"I'm Going to Dinner with Frank": Admissibility of Nontestimonial Statements of Intent to Prove the Actions of Someone other than the Speaker—and the Role of the Due Process Clause

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“I’M GOING TO DINNER WITH FRANK”: ADMISSIBILITY OF NONTESTIMONIAL STATEMENTS OF INTENT TO PROVE THE ACTIONS OF SOMEONE OTHER THAN THE SPEAKER—AND THE ROLE OF THE DUE PROCESS CLAUSE

Lynn McLain*

INTRODUCTION

A woman’s corpse, punctured with stab wounds, is found in the San Bernadino Valley. Her roommate tells the police that before leaving their apartment the night before, the woman had said, “I’m going to dinner with Frank.”¹

A teenage boy is missing, and his parents have received ransom notes. The boy’s friends tell the police that he had said he was “going to meet Angelo in the parking lot” because Angelo was going to give him a free pound of marijuana.²

An employee reports to his supervisor that another person in the company has refused to falsify documents so as to improperly obtain Medicaid payments. The supervisor says, “I’ll call Jim and have him take care of it.”³

In Frank’s trial for murder, in Angelo’s trial for kidnapping, and in Jim’s criminal trial for Medicaid fraud, respectively, are the woman’s, the boy’s, and the supervisor’s forward-looking statements admissible to inculpate Frank, Angelo, and Jim? Because none of the statements is “testimonial,”⁴ the Confrontation Clause erects no barrier to their

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¹ These facts are those of People v. Alcalde, 148 P.2d 627 (Cal. 1944) (in bank). See infra notes 182-86 and accompanying text.

² These facts are those of People v. Pheaster, 544 F.2d 353 (9th Cir. 1976). See infra notes 158-60 and accompanying text.

³ These facts are those of United States v. Best, 219 F.3d 192 (2d Cir. 2000). See infra note 227 and accompanying text.

⁴ See Crawford v. Washington, 541 U.S. 36 (2004) (holding, at least absent a defendant’s forfeiture of his or her confrontation right by wrongdoing, when a declarant’s statement is
admission against these criminal defendants in a post-*Crawford v. Washington* world.\(^5\) But there remains a significant hurdle in the rules of evidence: Do the statements fall within the hearsay exception for statements of the declarant's state of mind? This hearsay exception would be clearly applicable if the statements were relevant only to the declarants' own intent, and thus to their own actions after making the statements. Federal Rule of Evidence (Rule) 803(3) and its state corollaries\(^6\) provide that the hearsay rule does not exclude "[a]

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\(^5\) Davis v. Washington, 547 U.S. 813, 822 (2006) (holding that the Confrontation Clause applies to hearsay only when it is "testimonial"; statements made in response to police interrogation to establish "past events potentially relevant to later criminal prosecution" are testimonial, whereas statements made "to enable police assistance to meet an ongoing emergency" are nontestimonial).

In dictum, the *Crawford* Court mentioned that "casual remark[s] to an acquaintance" were not testimonial. *Crawford*, 541 U.S. at 51; *see also* Horton v. Allen, 370 F.3d 75, 83-84 (1st Cir. 2004) (finding that codefendant's statements to a friend that he needed money were nontestimonial); United States v. Johnson, 354 F. Supp. 2d 939, 959-60, 964 (N.D. Iowa 2005) (finding defense did not contend that murder victim's "of-the-cuff" statements to acquaintances and family members that he was "going to meet [the defendant]" were testimonial), *aff'd in part, vacated in part*, 495 F.3d 951 (8th Cir. 2007), *cert. denied*, 129 S. Ct. 32 (2008). The statements set forth in the text accompanying notes 1-3, *supra*, would seem to qualify as such "casual remarks" and are clearly nontestimonial. This Article focuses on clearly nontestimonial statements.

It bears mention, however, that other forward-looking statements of a declarant's state of mind, where the declarant seems worried that she may be in danger from a particular person, such as, "I'm meeting Frank tonight to pick up the kids, and if I'm not back in two hours, call the police," are arguably testimonial, even though they precede the commission of a crime. *See* *Crawford*, 541 U.S. at 52 (noting one possible definition of testimonial statements is "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" (internal citation omitted)); Stoll v. State, 762 So. 2d 870, 873 (Fla. 2000) (noting witness testified that murder victim had made her promise "that if anything ever happened to her [the witness] would go to the police and tell them that Michael did it"); cf. Manning v. Buchan, 357 F. Supp. 2d 1036, 1052-53 (N.D. Ill. 2004) (holding victim's statement to his wife "that if he turned up missing, she should 'tell the FBI the name of Steve Manning'" was inadmissible under the state of mind hearsay exception). *But see* Lilly v. Virginia, 527 U.S. 116, 140, 142 (1999) (Breyer, J., concurring) (expressing doubt as to whether the admission of statements made long before a crime occurred and without relation to the prospect of a future trial violates a defendant's confrontation right, rather than simply the hearsay rule of evidence); Evans v. Luebbers, 371 F.3d 438, 444-45 (8th Cir. 2004) (finding victim's statements as to her fear of defendant were nontestimonial); Demons v. State, 595 S.E.2d 76, 80 (Ga. 2004) (holding statement by the murder victim to a co-worker that the defendant was going to kill him was not testimonial: "[T]he victim's hearsay statements were not remotely similar to such prior testimony or police interrogation, as they were made in a conversation with a friend, before the commission of any crime, and without any reasonable expectation that they would be used at a later trial . . . ").

statement of the declarant’s then existing state of mind... (such as intent, plan, ... design ...), but not including a statement of memory or belief to prove the fact remembered or believed...”

In the above examples, however, the real meat of the declarants’ statements is their relevance to prove not what the declarant alone did, but what the accuseds—Frank, Angelo, and Jim—did: They acted in accord with the declarant’s plan. Both the federal and state courts are divided as to whether Rule 803(3)’s state of mind hearsay exception embraces such forward-looking statements of the declarant’s intent that implicate someone else when offered to prove that third person’s conduct after the statement was made. The fundamental problem is that the declarant cannot speak to another person’s present intent without basing the declarant’s statement on memory or belief as to something that occurred in the past to give the declarant that idea. For this reason, numerous jurisdictions flatly prohibit the use of the declarant’s statement of intent to prove the accused’s intent. Those jurisdictions will admit the evidence, if at all, with a limiting instruction that it is to be considered only as to the declarant’s conduct and not as to the nondeclarant’s. In stark contrast, many other jurisdictions see the evidence as both probative and irreplaceable and construe Rule 803(3) to freely allow use of the statement against the third person. A subgroup of these, most notably the United States Court of Appeals for the Second Circuit, permits use against the nondeclarant, but conditions this use upon the proof of corroborating evidence implicating that person.

This Article will provide background information concerning the common law state of mind hearsay exception, including the seminal 1892 United States Supreme Court decision in Mutual Life Insurance Company of New York v. Hillmon, and of the adoption in the mid-1970s of Rule 803(3). It then will discuss each of the current approaches to admissibility under Rule 803(3) of forward-looking statements to prove a nondeclarant’s intent, and thus his or her
subsequent actions. It will argue that the corroborating-evidence approach as presently framed (as a prerequisite to admissibility against a criminal defendant), and long followed (apparently unchallenged) by the United States Court of Appeals for the Second Circuit, among others, violated the Confrontation Clause pre-Crawford, as it contravened the Supreme Court's 1990 decision in Idaho v. Wright. Wright precluded consideration of corroborating evidence to establish the reliability of hearsay offered against a criminal defendant in the context of the then-applicable Confrontation Clause jurisprudence under Ohio v. Roberts. The status of Roberts, and thus of Wright, was thrown into doubt by Crawford.

Crawford overruled Roberts' approach to the confrontation right and established a new analytical framework. Under this framework, the Confrontation Clause applies only to testimonial hearsay and is satisfied only by the opportunity to cross-examine. Although the Court had hinted in Crawford that the Confrontation Clause did not apply at all to nontestimonial hearsay, it made that point explicit in its subsequent decision in Davis v. Washington. In Whorton v. Bockting, Justice Alito, writing for a unanimous Court, hammered this point home, saying:

[W]hatever improvement in reliability Crawford produced [as to testimonial statements] must be considered together with Crawford's elimination of Confrontation Clause protection against the admission of unreliable out-of-court nontestimonial statements. Under Roberts, an out-of-court nontestimonial statement not subject to prior cross-

17 See infra Part III.
19 See infra notes 243-50 and accompanying text.
20 See supra notes 4-5.

Members of this Court and academics have suggested that we revise our doctrine to reflect more accurately the original understanding of the Clause. They offer two proposals: First, that we apply the Confrontation Clause only to testimonial statements, leaving the remainder to regulation by hearsay law—that is, eliminating the overbreadth referred to above. Second, that we impose an absolute bar to statements that are testimonial, absent a prior opportunity to cross-examine—that is, eliminating the excessive narrowness referred to above. In White, we considered the first proposal and rejected it. Although our analysis in this case casts doubt on that holding, we need not definitively resolve whether it survives our decision today, because Sylvia Crawford's statement is testimonial under any definition.

Id. (citations omitted).

22 Davis v. Washington, 547 U.S. 813, 821 (2006) ("It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearing evidence, is not subject to the Confrontation Clause."). For pre-Crawford harbingers of this holding, see Lilly v. Virginia, 527 U.S. 116, 140-43 (1999) (Breyer, J., concurring); id. at 143 (Scalia, J., concurring in part and concurring in the judgment) (quoting White v. Illinois, 502 U.S. 346, 365 (1992) (Thomas, J., concurring in part and concurring in the judgment)); id. at 143-44 (Thomas, J., concurring in part and concurring in the judgment) (quoting White, 502 U.S. at 365 (Thomas, J., concurring in part and concurring in the judgment)).
examination could not be admitted without a judicial determination regarding reliability. Under Crawford, on the other hand, the Confrontation Clause has no application to such statements and therefore permits their admission even if they lack indicia of reliability.

It is thus unclear whether Crawford, on the whole, decreased or increased the number of unreliable out-of-court statements that may be admitted in criminal trials.23

These pronouncements, predictably, have caused great alarm and speculation about whether there remain any constitutional restraints regarding the admissibility of nontestimonial hearsay.24 This author believes that the Court will use the due process clauses of the Fifth and Fourteenth Amendments25 ("due process clause") to step into the gap that its rereading of the Confrontation Clause has created. Although the due process clause has been underutilized with regard to evidentiary matters in the past,26 Justices Thomas and Scalia have indicated interest in having it assume what they see as its rightful place in the constitutional galaxy, as arbiter of reliability and fairness.27 Recognizing that this argument expands the role of the due process clause from existing precedent, the Article will posit that both Roberts' standards for evaluating the reliability of hearsay and, more tenuously, Wright's holding, survive Crawford as to the admissibility of nontestimonial hearsay, but are now applicable by virtue of the due process clause, rather than the Confrontation Clause.28 Thus, using corroborating evidence to evaluate nontestimonial hearsay's reliability, as a condition to admissibility, remains constitutionally prohibited until the Court either overrules Wright or limits it to its facts. At present,

24 See, e.g., Laird C. Kirkpatrick, Nontestimonial Hearsay After Crawford, Davis and Bockting, 19 REGENT U. L. REV. 367, 370, 378 (2007) (lamenting that Bockting's comments as to nontestimonial hearsay were made without "briefing or argument on the question whether there should be at least a minimal level of Sixth Amendment scrutiny for some forms of nontestimonial hearsay," stating that "[i]t was premature for the Court to resolve the constitutional status of nontestimonial hearsay at a time when the definition of testimonial hearsay is still so unsettled," and worrying that "[i]f Roberts is dead, states would presumably be free to modify these statutes and eliminate the reliability and unavailability requirements from these hearsay exceptions or, for that matter, to repeal the hearsay rule entirely with respect to nontestimonial hearsay"); Alex Stein, Constitutional Evidence Law, 61 VAND. L. REV. 65, 74 (2008) ("[T]wo recent Supreme Court dicta [in Davis and Bockting] seem to remove completely the defendants' constitutional protection against non-testimonial inculpatory statements.").
25 See infra notes 270-70 and accompanying text.
26 See Stein, supra note 24, at 66, 68, 71, 89 (criticizing the Court as having "interpret[ed] the Due Process Clause, as related to evidence, very narrowly"; not applying it to protect against "informational risks"; and proposing that the Court should extend constitutional due process protection to "rules of evidential adequacy that determine which evidence is admissible and which evidence requires corroboration" by "expand[ing] the 'fundamental unfairness' category").
27 See supra note 22.
28 See infra Part IV.
then, \textit{Wright} circumscribes the choices available to the states and the lower federal courts with regard to the admission of forward-looking statements under Rule 803(3) and its state corollaries. This Article will therefore argue that the approach currently followed by the Second Circuit—requiring corroborating evidence to prove the reliability necessary for admissibility—remains unconstitutional, at least for now.

The Article will conclude with another novel argument that flows from this conclusion: Admission of a declarant’s forward-looking statements to inculpate an accused nondeclarant by proving the accused’s subsequent conduct may be constitutionally accomplished post-\textit{Crawford} within a due process paradigm under \textit{Wright} if the consideration of corroborating evidence is moved from a reliability inquiry preceding admissibility to a review of the \textit{sufficiency} of the evidence to meet the burden of production at the close of the proponent’s case.\textsuperscript{29} This approach is consistent with the due process standard as it has been applied outside the Confrontation Clause context in reviewing sentencing, probation revocation, and administrative law judges’ decisions, where the appellate court looks to be sure that the trier of fact’s verdict was not necessarily based on unreliable hearsay.\textsuperscript{30}

Thus, although recognizing that Professor Alex Stein has argued for a more vigorous constitutionalization of the law regarding the admissibility of evidence,\textsuperscript{31} this Article takes the position that, \textit{at the very least}, the due process clause must afford criminal defendants the same protections in their trials as to guilt or innocence as the pre-\textit{Crawford} due process case law affords them in sentencing proceedings and parole revocation hearings.\textsuperscript{32} This is merely the same level of protection provided to parties in administrative hearings, where neither life nor liberty is at stake.\textsuperscript{33}

On the second issue addressed by this Article, this author argues that it is both unnecessary and unwise to forfeit probative and irreplaceable evidence,\textsuperscript{34} as is done in the jurisdictions that totally bar the use of a declarant’s forward-looking statements to prove a non-declarant’s subsequent acts. Rather, jurisdictions ought to permit consideration of such evidence if it is corroborated. That requirement will serve the ultimate goal of fairness to the accused by not permitting a guilty verdict to be based on uncorroborated hearsay.\textsuperscript{35} As long as \textit{Wright} is good law, jurisdictions may codify, as an additional requirement to admissibility beyond that of reliability, the existence of

\textsuperscript{29} \textit{See infra} Part IV.C.
\textsuperscript{30} \textit{See infra} notes 281-86 and accompanying text.
\textsuperscript{31} Stein, \textit{supra} note 24.
\textsuperscript{32} \textit{See infra} notes 281-97 and accompanying text.
\textsuperscript{33} \textit{See infra} note 285 and accompanying text.
\textsuperscript{34} \textit{See infra} notes 57, 235.
\textsuperscript{35} \textit{See infra} notes 296-99, 319, 323-25 and accompanying text.
corroborating evidence. Or they may, through their case law, simply move their consideration of corroborating evidence to the sufficiency review outlined above. If and when Wright is overruled or limited to its facts, then the presence of corroborating evidence may be used in determining reliability for the purpose of admissibility.

II. THE HILLMON DOCTRINE

The “state of mind” hearsay exception, including “the Hillmon doctrine” regarding the admissibility of forward-looking statements, first developed at common law. The exception was codified, effective July 1, 1975, in Rule 803(3).

A. The Parameters of the Common Law Exception

The common law hearsay exception for statements by a declarant as to his or her then-existing state of mind is premised on the notion that the hearsay dangers of perception and memory are not present. When one asserts one’s own current state of mind, and that assertion is offered to prove that one had that state of mind when one spoke, by definition there can be no memory problem; nor can there be a first-hand knowledge problem, as no one could better perceive one’s then-existing state of mind than oneself. The statement is admissible under common

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36 See infra note 319 and accompanying text.
37 See infra notes 320-28 and accompanying text.
38 Justice Kennedy has strongly voiced his preference for this approach. Idaho v. Wright, 497 U.S. 805, 827, 828-31 (1990) (Kennedy, J., dissenting, joined by Rehnquist, C.J., White and Blackmun, JJ.); see infra text accompanying note 252.
39 See infra Part II.B.
40 See infra Part II.A.
41 See supra note 16.
42 See infra Part II.C.
43 E.g., 4 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 8:71 (3d ed. 2007).
44 In contrast, when a declarant does not directly assert his or her state of mind, but his or her statement is circumstantial evidence of his or her belief, which is relevant to the case, the evidence is nonhearsay. See Figgins v. Cochrane, 920 A.2d 572, 590-92 (Md. Ct. Spec. App. 2007), aff’d, 942 A.2d 736 (Md. 2008); 6A MARYLAND EVIDENCE, supra note 6, §§ 801:10, 801:13; see, e.g., State v. Magruder, 765 P.2d 716, 718-19 (Mont. 1988) (holding that, in response to a self-defense claim, a daughter’s testimony was properly admitted as showing the victim-declarant’s state of mind, where the daughter testified that her father, the victim, had told her that the defendant said he would be “packing a piece” following a telephone conversation with the defendant, i.e., the court admitted testimony that the victim believed the defendant would be armed and aggressive, rather than that the defendant was in fact armed).
law to prove the declarant’s state of mind, as long as the declarant’s state of mind is relevant to the case and circumstances do not indicate


45 5 WEINSTEIN’S FEDERAL EVIDENCE § 803.05[2][a], at 803-31 to -32 & nn.5-13 (Joseph M. McLaughlin ed., 2d ed. 2009) [hereinafter WEINSTEIN]; see, e.g., Rock v. Huffco Gas & Oil Co., 922 F.2d 272, 279 (5th Cir. 1991) (holding evidence inadmissible when defendant’s state of mind was irrelevant); People v. Madison, 638 P.2d 18, 27-31 (Colo. 1981) (en banc) (holding reversible error to admit murder victim’s statements that she feared defendant, when victim’s state of mind was not at issue); Graves v. Spedden, 46 Md. 527 (1877) (holding evidence of donor’s statements admissible to show whether he intended conveyance to be advancement or absolute gift); Sanborn v. Lang, 41 Md. 107, 114-15 (1874) (“To ascertain the intent and purpose with which the deed was made, we must refer to the facts and circumstances attending its execution, and the acts and conduct of the parties . . .”); Cross v. Black, 9 G. & J. 198, 210-11 (Md. 1837) (holding statements of a party that he intended to settle in Missouri, made while preparing to leave Maryland, were admissible in his favor on issue of his intent); Baptiste v. De Volunbrun, 5 H. McLaughlin ed., 2d ed. (holding third party reactions to libelous statement were admissible as relevant to the case); Ebert v. Ritchey, 458 A.2d 891, 896-97 (Md. Ct. Spec. App. 1983) (admitting decedent’s statements of testamentary intent); Santoni v. Moodie, 452 A.2d 1223, 1229-34 (Md. Ct. Spec. App. 1982) (holding exclusion of statement of decedent to wife that there was—or he believed there was—no risk in taking drug was reversible error; it was admissible to prove decedent’s state of mind, i.e., that he was unaware of risk and therefore not contributorily negligent). See also State v. Phillips, 461 S.E.2d 75, 88-92 (W. Va. 1995), in which the court held it was reversible error to admit testimony that murder victim said “she believed the defendant was having an affair and, when she returned to West Virginia, she would divorce him and seek half of the marital assets.” The court explained:

Although the declarant’s state of mind does not have to be directly in issue for the statement to be admissible under Rule 803(3), where a statement is introduced to show the declarant subsequently acted in compliance with this state of mind, the state of mind must be relevant. In this case, the declarant’s state of mind was not directly in issue and was only remotely related to the issues in this case. Id. at 90 (footnote omitted); see also infra notes 84, 123.

Responses to opinion polls and surveys have been admitted under this branch of the state of mind exception, when, for example, in a trademark or unfair competition case, the declarant says, “this product is made by [the plaintiff],” and the evidence is offered not to show the truth of the declarant’s assertion, but that the consuming public mistakenly believes that the defendant’s product is the plaintiff’s product. E.g., KOS Pharm., Inc. v. Andrx Corp., 369 F.3d 700, 719 (3d Cir. 2004); James Burrough Ltd. v. Sign of Beefeater, Inc., 540 F.2d 266 (7th Cir. 1976); Gibson Guitar Corp. v. Paul Reed Smith Guitars, L.P., 311 F. Supp. 2d 690, 709 n.6 (M.D. Tenn. 2004), (finding declarants’ perceptions as to manufacturer of guitar admissible under both Rules 803(1) and 803(3)), rev’d in part, vacated in part on other grounds, 423 F.3d 549 (6th Cir. 2005); Microwave Sys. Corp. v. Apple Computer, Inc., 126 F. Supp. 2d 1207, 1215-16 (S.D. Iowa 2000) (internet postings admissible to show consumers’ confusion in trademark infringement suit), aff’d, 238 F.3d 989 (8th Cir. 2001); Alston v. Va. High Sch. League, Inc., 144 F. Supp. 2d 526, 538-39 (W.D. Va. 1999) (holding, in Title IX case, survey of high school girls as to how they then felt about the scheduling of boys’ and girls’ sports admissible); Kraft Gen. Foods, Inc. v. BC-USA, Inc., 840 F. Supp. 344, 347-48 (E.D. Pa. 1993) (holding in trademark infringement case, customers’ statements that they thought the brands were the same, disclosing their confused state of mind, were admissible); Zippo Mfg. Co. v. Rogers Imp., Inc., 216 F. Supp. 670, 682-84 (S.D.N.Y. 1963). But cf. Baumholser v. Amox Coal Co., 630 F.2d 550, 552 (7th Cir. 1980) (holding survey offered to prove truth of interviewees’ statements as to number of cracks in their homes was inadmissible hearsay); Pitt. Press Club v. United States, 579 F.2d 751, 757-60 (3d Cir. 1978) (similar holding); United States v. S. Ind. Gas & Elec. Co., 258 F. Supp. 2d 884 (S.D. Ind. 2003) (finding survey/poll offered to prove truth of matters asserted by participants concerning projects over sixty years old was inadmissible hearsay).
that the declarant was insincere.\textsuperscript{46}

The common law exception does not permit such statements to be introduced to prove either an existing or a past fact that has created the declarant’s state of mind.\textsuperscript{47} In its landmark 1933 decision in \textit{Shepard v. United States}, the United States Supreme Court found that the trial court had committed reversible error in admitting, as proof of the truth of the matter asserted by the declarant, evidence of the deceased’s wife’s statement, “Dr. Shepard [the murder defendant] has poisoned me.”\textsuperscript{48}

The statement did not qualify under the hearsay exception for dying declarations.\textsuperscript{49} Nor did it qualify within the common law state of mind exception to prove that the declarant had no intent to commit suicide. “The testimony . . . faced backward and not forward . . . . What is even more important, it spoke to a past act, and, more than that, to an act by some one not the speaker.”\textsuperscript{50} These circumstances created hearsay

\textsuperscript{46} \textit{E.g.,} United States v. Layton, 549 F. Supp. 903, 909 (N.D. Cal. 1982), \textit{aff’d in part, rev’d in part on other grounds}, 720 F.2d 548 (9th Cir. 1983); Deane Buick Co. v. Kendall, 417 P.2d 11, 13-14 (Colo. 1966); Kirkland v. State, 540 A.2d 490, 492-93 (Md. Ct. Spec. App. 1988); Robinson v. State, 503 A.2d 725, 731-34 (Md. Ct. Spec. App. 1986) (finding no error in excluding proof offered to show that defendant accidentally shot her estranged lover, where defendant one month earlier said she was buying the gun to protect herself against robbers and burglars); Santoni v. Moodie, 452 A.2d 1223, 1232 (Md. Ct. Spec. App. 1982); Vergie M. Lapelosa, Inc. v. Cruze, 407 A.2d 786, 790-91 (Md. Ct. Spec. App. 1979) (holding proffered testimony of one plaintiff in medical malpractice action was properly excluded when circumstances did not indicate decedent’s sincerity as to alleged statements made to plaintiff regarding decedent’s feelings about his prospective surgery; additionally, trial court determined that statements were offered to prove defendant’s negligence rather than decedent’s state of mind); State v. Vestal, 180 S.E.2d 755, 768-73 (N.C. 1971); \textit{WEINSTEIN, supra} note 45, at 803-31 \& n.4; 6 \textit{JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW} § 1725, at 129 (James H. Chadbourne rev., 1976) (describing that statement of design or plan “must appear to have been made in a natural matter and not under circumstances of suspicion”).

The guarantee of sincerity was seemingly found to have been met through the spontaneity of the statement. 2 \textit{McCORMICK ON EVIDENCE} § 274 (John W. Strong ed., 5th ed. 1999) [hereinafter \textit{McCORMICK ON EVIDENCE}].

\textsuperscript{47} 6A \textit{MARYLAND EVIDENCE, supra} note 6, § 803(3):1.


\textsuperscript{49} \textit{Id.} at 99.

\textsuperscript{50} \textit{Id.} at 106; \textit{accord} Conyers v. State, 729 A.2d 910, 924-25 (Md. 1999); Aetna Cas. & Sur. Co. v. Kuhl, 463 A.2d 822, 826 (Md. 1983) (holding portion of statement given to police twelve hours after event, stating that declarant had “accidentally” run into boy, was not admissible under state of mind hearsay exception; it “was merely an attempt to explain [the declarant’s] former conduct rather than [a statement] which was evidence of his intent at the time in which the statement was made”); Braffman v. State, 349 A.2d 632, 632 (Md. 1976) (holding reversible error to admit evidence that defendant’s father broke down when police officer was explaining charges against his son and said, “I knew it, I knew it”, evidence was relevant not to prove father’s state of mind, but rather to show his son was guilty); Rosman v. Travelers’ Ins. Co. of Hartford, 96 A. 875, 877 (Md. 1916) (finding, in life insurance policy action defended on ground of suicide, statements of insured deceased, made several days after the occurrence, that he had taken aspirin tablets, were properly excluded when offered to show that he had mistakenly taken bichloride instead of aspirin); Miller v. State \textit{ex rel. Fiery}, 8 Gill 141 (Md. 1849) (holding declarations of party after signing a bond that he signed it with the understanding that another person was to sign it as surety, were not admissible as part of res gestae).
dangers of both perception and memory.51

On the other hand, the common law permitted the admission of a statement of the declarant’s present state of mind that included a statement looking forward into the future to show that the declarant subsequently acted in accordance with his or her stated intention.52 Here, where the declarant speaks only of his or her own present intent, there can be no perception or memory problems.53 There can be, of course, the risk of insincerity, and if the circumstances indicate insincerity, the trial court may exclude the statement.54 Such "forward-looking" statements also bear the risk of changes in plans or circumstances that interfere with the declarant’s accomplishment of the stated goal. But these frailties are well within a jury’s experience.55 A jury knows that even “the best-laid”56 plans are not always carried out; it therefore is unlikely to overvalue the statement and give it undue weight.57 This “forward-looking” use of a state of mind declaration was

51 MUELLER & KIRKPATRICK, supra note 43, § 8:73; WEINSTEIN, supra note 45, § 803.05(2)[b].

52 E.g., Md. Paper Prods. Co. v. Judson, 139 A.2d 219, 226 (Md. 1958) (holding reversible error to refuse to admit deceased wife’s testimony that, on morning of fatal accident, deceased had told her that he intended to stop on the way to work to pick up a gear wheel to be used in one of defendant-employer’s machines; evidence was admissible to show that deceased was acting in course of employment at time of accident); Tittlebaum v. Penn. R.R., 174 A. 89, 90-91 (Md. 1934) (holding proper to admit testimony of one boy that companion had picked up brick and said he was going to “bust a window” and that witness saw companion throw brick in direction of passing train, to show that brick broke window on train, even though witness did not see where brick struck); Balt. & O. R. Co. v. State ex rel. Chambers, 32 A. 201, 202 (Md. 1895) (finding decedent’s declaration of intention to travel to Washington was admissible to show that he had right to be on defendant’s property and to take particular route, on his way to defendant’s ticket office); Cooke v. Cooke, 43 Md. 522, 532-33 (1876) (finding statements of fraudulent intent were admissible); Kirkland v. State, 540 A.2d 490, 493 (Md. Ct. Spec. App. 1988); Sobus v. Kaisley, 273 A.2d 227, 231 (Md. Ct. Spec. App. 1971) (holding, in negligence action by plaintiff who, like defendant, could not remember collision or events of few moments preceding, testimony of policeman that plaintiff had told him of his intention to take certain route was admissible to show that plaintiff subsequently took that route); cf. Farah v. Stout, 684 A.2d 471, 477 (Md. Ct. Spec. App. 1996) (finding state of mind exception inapplicable as to forward-looking statements of intent not offered to show subsequent conduct). But see Walton v The Queen (1989) 166 CLR 283, 307 (Austl.) (Deane, J., dissenting) (arguing that evidence should not have been admitted even to prove deceased declarant’s intention or subsequent conduct).

53 6A MARYLAND EVIDENCE, supra note 6, § 803(3):1.

54 See supra note 46 and accompanying text.

55 6A MARYLAND EVIDENCE, supra note 6, § 803(3):1.

56 ROBERT BURNS, To a Mouse, On Turning Her Up in Her Nest with the Plough, November 1785, in THE COMPLETE WORKS OF ROBERT BURNS: CONTAINING HIS POEMS, SONGS, AND CORRESPONDENCE 106 (Allan Cunningham ed., Phillips, Sampson, & Co. 1859) (“But, Mousie, thou art no thy lane,/In proving foresight may be vain:/The best laid schemes o’ mice an men/Gang aft a-gley./An’ lea’e us nought but grief and pain,/For promis’d joy.”).

57 See Robert M. Hutchins & Donald Slesinger, Some Observations on the Law of Evidence—State of Mind to Prove an Act, 38 YALE L.J. 283, 285 (1929) (asserting that the rationale for the state of mind exception for statements of intention is that the utterance “will be more accurate than the memory of that state of mind years later,” and “[t]he jury knows that plans are frequently not carried out, and can give proper weight to expressions of them”).
the focus of the Supreme Court’s 1892 decision in Mutual Life Insurance Co. of New York v. Hillmon.58

B. Hillmon

The Hillmon case was one of several brought by Mrs. Hillmon on four life insurance policies bought on her husband’s life in the slightly more than three-month span between November 30, 1878 and March 4, 1879.59 Mrs. Hillmon alleged that Mr. Hillmon died on March 18, 1879 and that his body had been found at Crooked Creek, Colorado.60 The insurer argued that Mr. Hillmon was alive and that the body was instead that of F.A. Walters, who had not been heard from since early March 1879.61 The insurer offered into evidence proof of letters dated early March 1879 from Walters to his sister and fiancée stating that he intended to leave Wichita, Kansas, for Crooked Creek, Colorado, with Mr. Hillmon, who had promised him work.62 The trial court excluded the evidence, and the jury found for Mrs. Hillmon.63

The Supreme Court reversed on another ground, but because the evidentiary issue was likely to arise on retrial, it pointed out that the evidence of the letters was admissible.64 Justice Gray, writing for the Court, stated:

The letters in question were competent... as evidence that, shortly before the time when other evidence tended to show that the [declarant Walters] went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention.65


Recent exhumation of the remains at issue in Hillmon has been undertaken to attempt to ascertain their true identity with the assistance of DNA analysis. See Marianne Wesson, “Particular Intentions”: The Hillmon Case and the Supreme Court, 18 LAW & LIT. 343 (2006); Marianne Wesson, State of Mind: The Hillmon Case, the McGuffin, and the Supreme Court, in EVIDENCE STORIES (R. Lempter ed. 2006) (suggesting that insurance companies may have committed fraud).

59 Hillmon, 145 U.S. at 285-86.
60 Id. at 287.
61 Id.
62 Id. at 287-89.
63 Id.
64 Id. at 293.
65 Id. at 295-96 (emphasis added).
Thus, the *Hillmon* Court stated that the letters were admissible not only to prove that the declarant, Walters, subsequently went to Crooked Creek, but also to show that Hillmon went with him.66

Under the facts of the case, both parties wanted to show that Hillmon was at Crooked Creek—the insurance company to show that Hillmon had murdered Walters and substituted his body for Hillmon’s in an insurance fraud conspiracy, and Mrs. Hillmon to show that the body was Hillmon’s67—so the point was not one that Mrs. Hillmon would have contested. Justice Gray’s statement might be disregarded as dictum on an unbrieved and unargued issue.68 But his proffered support for his conclusion makes it difficult to so easily dismiss the matter.

To support the proposition of admissibility of Walters’ statement to prove not only his, but Hillmon’s, subsequent action, Justice Gray69 relied on *Hunter v. State*, a New Jersey decision that had declared admissible as part of the res gestae the declarant’s statement, on the night of his murder, that he was going away on business with the person later tried for his murder.70 In *Hillmon*, Justice Gray quoted with approval the following statement by the *Hunter* court:

> If it is legitimate to show by a man’s own declarations that he left his home to be gone a week, or for a certain destination, which seems uncontestable, why may it not be proved in the same way that a designated person was to bear him company? At the time the words were uttered or written, they imported no wrongdoing to anyone, and the reference to the companion who was to go with him was nothing more, as matters then stood, than an indication of an additional circumstance of his going.?l

This quotation made the *Hillmon* Court’s statement as to the admissibility of Walters’ stated intent to prove Hillmon’s subsequent conduct appear to be carefully considered.

It is interesting to note that the part of *Hunter* quoted by Justice Gray was not the holding of the case. The *Hunter* court held that, due to the presence of testimony that the defendant had also said he would

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66 Id.
67 See *supra* text accompanying notes 60-61.
68 This author has been unable to discover whether this sub-issue was briefed or argued. But the Court’s practice of reaching issues it need not reach to resolve the case before it continues to this day. See, e.g., Berghuis v. Thompkins, 130 S. Ct. 2250 (2010) (Sotomayor, J., dissenting, joined by Stevens, Ginsburg, and Breyer, J.J.) (criticizing the majority for revising the *Miranda* doctrine when the case could have been resolved under the Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)); Kirkpatrick, *supra* note 24, at 370 (criticizing the Court’s opinion in *Whorton v. Bockting*, 549 U.S. 406 (2007), for holding forth on an unbrieved and unargued question).
69 *Hillmon*, 145 U.S. at 299.
71 *Hillmon*, 145 U.S. at 299 (quoting *Hunter*, 40 N.J.L. at 534, 536-38). Thus, under *Crawford*, the statements would have been nontestimonial. See *supra* note 5.
meet the deceased, it need not decide whether the deceased’s statement would be admissible as relevant to the defendant’s subsequent conduct.\textsuperscript{72} Chief Judge Beasley’s words quoted above were dictum expressing that he would be inclined to find the evidence admissible as part of the \textit{res gestae}\textsuperscript{73} to prove the defendant’s conduct,\textsuperscript{74} even if the question were presented without that independent corroboration, as long as it comported with the general common law requirement that the declarant appears to have been sincere.\textsuperscript{75}

Unlike \textit{Hillmon}, which focused on the state of mind exception,\textsuperscript{76} other nineteenth century state cases found forward-looking statements admissible to prove both the declarant’s and nondeclarant’s subsequent actions only if either, as in \textit{Hunter}, the statements were found to be part of the \textit{res gestae}\textsuperscript{77} or if they were made in the third person’s (the opposing party’s) presence,\textsuperscript{78} presumably as a tacit admission by the opposing party.\textsuperscript{79}

The \textit{Shepard} Court carefully limited the state of mind exception. It referred to \textit{Hillmon} as “the high water” mark beyond which the Court

\textsuperscript{72} \textit{Hunter}, 40 N.J.L. at 540.
\textsuperscript{73} \textit{Id.} at 536-38.
\textsuperscript{74} \textit{Id.} at 540.
\textsuperscript{75} See \textit{supra} note 46 and accompanying text.
\textsuperscript{76} \textit{Hillmon}, 145 U.S. at 295.
\textsuperscript{77} E.g., Kilgore v. Stanley, 8 So. 130, 131 (Ala. 1890) (“What a person says on setting out on a journey, or to go to a particular place, explanatory of the object he has in view in so setting out, is \textit{res gestae} evidence, and may be proven; and the jury may give it such weight as they think it [is] entitled to.”). In \textit{West v. Price’s Heirs}, 25 Ky. 380, 383, 1829 WL 1399, at *3 (1829), the Kentucky Supreme Court asserted:

Conversations, or declarations, made by the actor or party concerned, at the time an act is done, and which explain the \textit{quo animo} and design of the performance, may, whenever the nature of the act is called in question, be given in evidence, as part of the \textit{res gestae}. Without tolerating this explanation of the acts of men, by receiving their accompanying declarations, we should be often misled as to their true nature and character; and consequently, liable to fall into errors, in respect to them. The rule requiring \textit{res gestae} declarations to be received as evidence, is a necessary, and very useful one . . . .

\textit{Id.}

\textsuperscript{78} E.g., Parker v. Commonwealth, 51 S.W. 573, 574 (Ky. 1899) (holding reversible error to admit murder victim’s statement, before fatal encounter, as “to his purpose in going down the road,” when statement was not made in accused’s presence); Kirby v. State, 17 Tenn. 383 (1836).

\textsuperscript{79} See generally 6A MARYLAND EVIDENCE, \textit{supra} note 6, § 801(4):3.
would not go, else it would "be an end" to the hearsay rule, "or nearly
that."80

C. Federal Rule of Evidence 803(3)

Almost a century after Hillman, Rule 803(3) codified the common law hearsay exception for statements of "then existing state of mind" as follows:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . A statement of the declarant's then existing state of mind [or] emotion . . . (such as intent, plan, motive, design, [and] mental feeling . . .), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.81

Rule 803(3) clearly codified both the common law inadmissibility of "backward-looking" (Shepard-type)82 statements under the state of mind hearsay exception,83 and the common law admissibility of statements of the declarant's then-existing state of mind when offered

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80 Shepard v. United States, 290 U.S. 96, 105-06 (1933).
81 Fed. R. Evid. 803(3). The Rule went into effect in 1975. See supra note 16.
82 See supra notes 48-50 and accompanying text.
83 See, e.g., United States v. Samaniego, 345 F.3d 1280 (11th Cir. 2003) (holding error to admit under Rule 803(3) proof of alleged thief's apology to original owner for stealing professional boxer championship belts, in effort to show that belts were stolen and current possessor had no right to them; however, because declarant was unavailable to testify, statement was admissible under Rule 804(b)(3)); United States v. Bishop, 264 F.3d 535, 548-49 (5th Cir. 2001) (finding that district court correctly excluded defendant's former bookkeeper's statements that it was her fault she had not recorded a $400,000 fee defendant received); United States v. Hernandez, 176 F.3d 719, 726-27 (3d Cir. 1999) (finding innocent explanation given to police for declarant's presence at scene was inadmissible); Firemen's Fund Ins. Co. v. Thien, 63 F.3d 754, 760 (8th Cir. 1995) (holding evidence properly excluded when offered to show facts remembered or believed); United States v. Joe, 8 F.3d 1488, 1491-93 (10th Cir. 1993) (finding proper to exclude the part of wife's statement that she was afraid of defendant husband because he had threatened her); United States v. Liu, 960 F.2d 449, 452 (5th Cir. 1992) (finding proper to exclude part of statement regarding cause for declarant's fear); United States v. Emmert, 829 F.2d 805, 809-10 (9th Cir. 1987) (finding proper to exclude proffered testimony that defendant had said he was scared because of threats made by government agents he believed to be members of a crime family); United States v. Day, 591 F.2d 861, 879-87 (D.C. Cir. 1978) (holding that, in prosecution of individuals named Beanny and Eric, it was error to preclude government witness from testifying that murder victim handed him slip of paper a few minutes before he was killed which read "Beanny, Eric 635-3135," because paper was nonhearsay; however, the trial court was correct in excluding testimony that victim said to call the police if he did not return home by three o'clock the next day and give them the number on the slip of paper, because there was "too great a potential for unfair prejudice" from a possible inference about defendants' past conduct (emphasis added)); Sanft v. Winnebago Indus., Inc., 216 F.R.D. 453, 456-59 (N.D. Iowa 2003) (granting motion to strike portions of affidavit that were statements of memory or belief); United States v. Lentz, 282 F. Supp. 2d 399, 410-27 (E.D. Va. 2002) (holding backward-looking statements inadmissible under Rule 803(3)), aff'd, 38 F. App'x 961 (4th Cir. 2003).
either (1) to show that the declarant had that state of mind, which state of mind is relevant to the case,\textsuperscript{84} or (2) as forward-looking (\textit{Hillmon-type}) statements to show that the declarant subsequently acted in accord with his or her stated intent, which action is relevant to the case.\textsuperscript{85}

\textsuperscript{84} \textit{E.g.}, Evans \textit{v.} Luebbers, 371 F.3d 438, 444 (8th Cir. 2004) (finding victim’s statements that she was scared of the defendant and that he verbally and physically abused her were properly admitted as evidence of her mental state, because defense implied that she had committed suicide); Horton \textit{v.} Allen, 370 F.3d 75, 83-85 & n.7 (1st Cir. 2004) (holding defendant’s compatriot’s statement showing that he had a motive for robbing felony murder victim was relevant); United States \textit{v.} Serafini, 233 F.3d 758, 769 (3d Cir. 2000) (finding that it was relevant that declarant intended his check to be a reimbursement to defendant); United States \textit{v.} Bartelhol, 129 F.3d 663, 668-69 & n.3 (1st Cir. 1997) (holding defendant’s evidence was inadmissible because defendant’s state of mind was irrelevant to the case); United States \textit{v.} Tokars, 95 F.3d 1520, 1535 (11th Cir. 1996) (holding evidence of victim’s state of mind was relevant to defendant’s motive to kill her); Phoenix Mut. Life Ins. Co. \textit{v.} Adams, 30 F.3d 554, 566 (4th Cir. 1994) (finding testator’s intent to change his beneficiary relevant to show testator’s state of mind); Turpin \textit{v.} Kassulke, 26 F.3d 1392, 1399-1401 (6th Cir. 1994) (holding defendant’s diary entry was admissible as both a party admission of accused and a statement of her then existing state of mind to show motive to kill her husband); Cincinnati Fluid Power, Inc. \textit{v.} Rexnord, Inc., 797 F.2d 1386, 1394-95 (6th Cir. 1986) (holding reversible error to admit landlord’s out-of-court statements concerning future rental agreements with plaintiff where intent was not at issue); United States \textit{v.} Adcock, 558 F.2d 397, 403-04 (8th Cir. 1977) (holding extortion victim’s statements admissible to show state of mind of fear of economic loss); United States \textit{v.} Taglione, 546 F.2d 194, 200-03 (5th Cir. 1977) (holding error to exclude testimony about accused’s conversation with attorney regarding his ability to negotiate a reward for the return of property, because evidence showed accused’s then existing state of mind); United States \textit{v.} Smallwood, 299 F. Supp. 2d 578, 582-83 (E.D. Va. 2004) (finding that, had victim’s roommate testified that victim said he was nervous, testimony would be admissible under Rule 803(3)), \textit{aff'd on other grounds sub nom.} United States \textit{v.} Smith, 452 F.3d 323 (4th Cir. 2006); Weststeyn Dairy 2 \textit{v.} Eades Commodities Co., 280 F. Supp. 2d 1044, 1076 (E.D. Cal. 2003) (holding, in action for conversion and unjust enrichment, statements by sales agents that they intended to establish trust accounts for prepayments were relevant to establish sales agents’ then existing state of mind); Lentz, 282 F. Supp. 2d at 414, 427 (admitting some evidence to prove declarant’s then existing fear) \textit{aff'd}, 38 F. App’x 961; \textit{see also} Wisconsin \textit{v.} Mitchell, 508 U.S. 476 (1993) (holding First Amendment does not prohibit the evidentiary use of defendant’s speech to show motive or intent); \textit{supra} note 45.

\textsuperscript{85} \textit{E.g.}, Southex Exhibitions, Inc. \textit{v.} R.I. Builders Ass’n, 279 F.3d 94, 103 n.8 (1st Cir. 2002) (finding district court did not abuse discretion in admitting declarant’s statement regarding his understanding of contract before he signed it); Firemen’s Fund Ins. Co. \textit{v.} Thien, 8 F.3d 1307, 1312-13 (8th Cir. 1993) (holding error to exclude statement regarding insured-declarant’s intent prior to his death); United States \textit{v.} Veltmann, 6 F.3d 1483, 1493-95 (11th Cir. 1993) (holding reversible error to exclude statements by alleged homicide victim proffered to show declarant’s suicidal state of mind); United States \textit{v.} Torres, 901 F.2d 205, 238-40 (2d Cir. 1990) (holding error to exclude defendant’s \textit{Hillmon-type} statement); United States \textit{v.} Donley, 878 F.2d 735, 737-38 (3d Cir. 1989) (finding evidence was properly admitted to show that deceased declarant acted in accordance with her plan to convince her husband that they were being evicted, giving defendant husband a motive to kill her); United States \textit{v.} Jenkins, 579 F.2d 840, 842-43 (4th Cir. 1978) ("Johnson’s closing remark [over the telephone], ‘I’m on my way’ nevertheless would be admissible under Rule 803(3) of the Federal Rules of Evidence, both to show her intent and to promote an inference that she actually effectuated her intent and set out for Lyles’ house.” (footnote omitted)); United States \textit{v.} Calvert, 523 F.2d 895, 910 & n.20 (8th Cir. 1975) (finding deceased’s statement that he intended to talk to defendant about cancelling insurance and leaving partnership was properly admitted to show that he had that conversation with defendant); United
Whether the Rule permits these last “forward-looking” statements to be admitted to prove a nondeclarant’s subsequent conduct, however, is where the waters become troubled. When used for this purpose, even if the declarant is sincere, perception and memory problems are introduced because the declarant is speaking implicitly about someone else’s intentions, and must be basing his or her statement on some previous communication from or with the nondeclarant. The Advisory Committee’s note to Rule 803 explicitly states: “The rule of Mutual Life Ins. Co. v. Hillmon, allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed.” But there is lack of clarity as to what is the Hillmon “rule.” True, the express language of Hillmon states that the declarant’s statement of intent was admissible to prove “both that [the declarant] did go and that he went with Hillmon . . . .” Yet under the facts of that case, the party opposing the introduction of that evidence was also trying to prove that Hillmon had gone to Crooked Creek (in order to

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87 FED. R. EVID. 803(3) advisory committee’s note.

show that the body was Hillmon's), so this point was not in controversy.

Under the facts of Hillmon, it was the declarant's conduct after he made the forward-looking statements that was the contested issue. The statements were offered by the insurance company to prove that it was the declarant's (Walters') corpse, and not the insured's (Hillmon's), that was found at Crooked Creek. One can argue, then, that Supreme Court precedent does not strongly support use of a declarant's forward-looking statement against a third person.

Accordingly, the report of the House Committee of the Judiciary made clear its reading that Rule 803(3) was not to be used to prove the act of anyone other than the declarant. The House Report states: "Rule 803(3) was approved in the form submitted by the Court to Congress. However, the Committee intends that the Rule be construed to limit the doctrine of Mutual Life Insurance Co. v. Hillmon, so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person."

As a result of the conflict between the language used in Hillmon and the restriction expressed in the House Report, and in the absence of a post-Federal Rules of Evidence Supreme Court decision on point, the lower federal courts are divided on the question of whether a declarant's forward-looking statement may be admitted under Rule 803(3) to prove a nondeclarant's subsequent conduct. At least three approaches have emerged.

III. THE COMPETING APPROACHES FOLLOWED IN THE LOWER COURTS’ CASE LAW

A number of lower federal and state courts have adhered to the restriction in the House Report. Some courts approve the admission of the part of the forward-looking statement referring to a third person, but with a limiting instruction that it be considered only as to the

89 See supra text accompanying note 67.
90 Hillmon, 145 U.S. at 296.
91 Id.
92 See 4 FEDERAL RULES OF EVIDENCE MANUAL, supra note 16, § 803.02[4][e], at 803-27 n.34 ("[T]he actual precedential import of [Hillmon's] extension of the state of mind exception is subject to doubt."); see also supra notes 67-79 and accompanying text.
94 Id.
96 See generally Wiseman, supra note 58.
97 See infra Part III.A.
declarant's intent or conduct.

Other courts have read Rule 803(3) broadly and freely admit one person's forward-looking statement, which refers to another person, to prove the nondeclarant's subsequent conduct. A third approach holds that the statement will be admissible against the nondeclarant, but only if there is independent evidence connecting the declarant's statement with the nondeclarant's activities. The first two approaches are constitutionally permissible, but have other practical or policy drawbacks; the third seems intuitively fair, but, in this author's opinion, contravenes the Supreme Court's decision in Idaho v. Wright.

A. Courts Following the Restrictive Approach Envisioned by the House Report

Numerous courts have followed the restriction set forth in the House Report to Rule 803(3) so as to admit a forward-looking statement only to prove the declarant's subsequent conduct and not the conduct of another. These include the United States Courts of Appeals for the First, Third, Fourth, and Tenth Circuits.

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98 See infra notes 105, 110, 113, 134-35.
99 See infra Part III.B.
100 See infra Part III.C.
101 See infra Part IV.C.
102 See infra Part IV.
103 See supra note 93.
104 See Gual Morales v. Hernandez Vega, 579 F.2d 677, 680 n.2 (1st Cir. 1978) (noting that declarant's statements of intent to see defendant would not be admissible against defendant).
105 See Baughman v. Cooper-Jarrett, Inc., 530 F.2d 529, 533 (3d Cir. 1976) ("The preferred course would have been to give a limiting instruction that [the declarant's] statement was not admissible to show the participation of [others] in the conspiracy."), overruled on other grounds, Croker v. Boeing Co. (Vertol Division), 662 F.2d 975 (3d Cir. 1981).
106 See United States v. Jenkins, 579 F.2d 840 (4th Cir. 1978), where the majority held that evidence was not used to prove other's acts:

[Defendant's girlfriend's] salutation to [third person over phone], "I'm on my way," (or even a statement that she would come over with [the defendant]) would be inadmissible under the Congress's limitation if offered solely to prove that [the defendant] did accompany [his girlfriend]. However, the purpose of the proffer here was not to show that [the defendant] drove to the [third party's] residence—nor substantial independent evidence was introduced on that point—but rather solely to show why [the defendant] left home in the middle of the night, drove across town, and let [his girlfriend] out in the 1200 block of North Ellwood Avenue. . . . The purpose was not to show [the defendant's] conduct on the night in question. Further, . . . we have concluded that [the girlfriend's] state of mind was material, given the circumstances of this case.

Id. at 843-44. Judge Widener dissented, asserting that the evidence constituted inadmissible hearsay:

The only thing the tapes were needed for, from the government's standpoint, was to support an inference that Johnson asked [the defendant] to drive her by Lyles' house, and that [the defendant] therefore lied to the grand jury when he denied knowledge of
At the state level, both Alaska and Maryland chose to incorporate the House position when codifying their rules of evidence by including the limitation that the evidence is admissible if “offered to prove [the declarant’s] present condition or future action.” Arizona, Delaware, Illinois, Michigan, Oregon, Pennsylvania, where Johnson was going. Given this central purpose, the taped conversations were [inadmissible] hearsay. … I think the majority’s application of Rule 803(3) of the Federal Rules of Evidence is erroneous. As the court correctly observes, the hearsay exception for statements of a declarant’s existing state of mind is applicable only to admit proof of the declarant’s future conduct, not that of third persons.

Id. at 844-45 (Widener, J., dissenting); see also Robin K. Vinson, Note, Evidence—The State of Mind Exception to the Hearsay Rule—United States v. Jenkins, 15 WAKE FOREST L. REV. 431 (1979) (criticizing Court of Appeals’ decision on facts in United States v. Vinson, where district court had admitted evidence with a limiting instruction, and jury might infer that declarant had told driver-defendant of her plans, which would show he committed perjury when he said he did not know of them).

107 See United States v. Joe, 8 F.3d 1488, 1493 n.4 (10th Cir. 1993) (“An out-of-court statement relating a third party’s state of mind falls outside the scope of the hearsay exception because such a statement necessarily is one of memory or belief.”).

108 ALASKA R. EVID. 803(3); accord MD. R. EVID. 5-803(b)(3) (“The following are not excluded by the hearsay rule, even though the declarant is available as a witness: … A statement of the declarant’s then existing state of mind [or] emotion … (such as intent, plan, motive, design, [and] mental feeling . . .), offered to prove the declarant’s then existing condition or the declarant’s future action . . .” (emphasis added)); see State v. McDonald, 872 P.2d 627, 634, 642-43 (Alaska Ct. App. 1994) (finding no error in admitting, under Alaska R. Evid. 803(3), with a limiting instruction, testimony that murder victim had said she planned to meet the defendant “near the King Crab Cannery at 9:00 p.m. that evening”; statements were properly admitted “to prove that she intended to meet [the defendant] at the King Crab Cannery that evening,” but were inadmissible to prove that defendant intended to be at the cannery); Figgins v. Cochran, 942 A.2d 736, 745 (Md. 2008) (“In all of the forward-looking uses of a present intent to prove a future act or to interpret a future act, there is the identity of person between the hearsay declarant and the future actor. Although some states permit a declarant’s statement of intent to prove not only the declarant’s future action pursuant to that intent but the future action of another person as well, Maryland does not.”); Johnson v. State, 381 A.2d 303, 305, 307-09 (Md. Ct. Spec. App. 1977) (holding harmless error to admit proof against defendant that his codefendant in felony murder and attempted robbery case had said, prior to the crime, that “he was going to pick up [defendant] and make some money”).

109 See State v. Via, 704 P.2d 238 (Ariz. 1985) (holding that, in an action alleging kidnapping and murder, the declarant’s note that he intended to meet a man at Denny’s about real estate was relevant to show that was the purpose, in the declarant’s mind, for the meeting: “The purpose of the exception is to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.”) (citing FED. R. EVID. 803 historical note)).

110 See State v. MacDonald, 598 A.2d 1134, 1135 (Del. Super. Ct. 1991), where the court required a hearing outside the jury’s presence on whether to admit testimony that the murder victim had told several people that she was going to meet the defendant to pick up a videotape and that the defendant “wanted to see her on Sunday evening … to give her a videotape.” The court explained:

Mindful of the possible prejudicial impact of the victim’s alleged statements, the Court nevertheless believes that [Del. R. Evid.] 803(3) encompasses such statements within its scope. … Such evidence would be admissible to show the victim’s present purpose or intention when the statements were made and to prove, by inference, her future conduct. Such evidence would not be admissible to show, inferentially, the intent or future conduct of the defendant, in my view.

Id. at 1140. The court noted:
Tennessee,\textsuperscript{115} and Texas,\textsuperscript{116} as well as Australia\textsuperscript{117} and the District of

A limiting instruction substantially in the following form would, in the Court's view, be appropriate, assuming the admissibility of the statements:

"Ladies and Gentlemen of the Jury: Statements of the deceased, Julie Spencer, have been allowed as evidence in this trial. You are instructed that this testimony is to be considered by you only in connection with evaluating the present purpose or intent of the deceased at the time when the statements were made, and its effect, if any, on her subsequent conduct. You are not to consider this testimony to evaluate the intent or conduct of the defendant, Glenn MacDonald."

\textit{Id.} at 1140 n.4; see also \textit{Derrickson v. State,} 321 A.2d 497, 503-04 (Del. 1974) (holding that murder victim's request to employer for time off so that he could go to Delaware with defendant was properly admitted "to show the present purpose or intention of the deceased when the statement was made").

\textsuperscript{111} \textit{See People v. Silvestri,} 500 N.E.2d 456, 459-60 (Ill. App. Ct. 1986) (holding that a murder victim's statement that she was "supposed to meet [her] husband on the 13th floor at 10:00 o'clock [sic]" was properly admitted under the state of mind exception: "A decedent's hearsay statement is admissible, for example, to show his intent to accompany defendant someplace or to prove that he did so, but is not admissible to show any intent on the part of defendant to go someplace."); \textit{People v. Jones,} 406 N.E.2d 112, 113-15 (Ill. App. Ct. 1980) (holding that statements by one murder victim to his wife and by the other victim to his brother that they were meeting the defendant to purchase a car were properly admitted "to show the decedents' intent to meet with the defendant"); \textit{People v. Reddock,} 300 N.E.2d 31, 38 (Ill. App. Ct. 1973) (holding that murder victim's statements to his sister were properly admitted "to show his intent to accompany the defendant in viewing the land and that he, in fact, left home on that ostensible mission. The testimony does not show, nor would it be competent to show any intent on the part of the defendant to look at the land or to set out upon such a trip."); \textit{see also Johnson v. Chrans,} 844 F.2d 482, 485 (7th Cir. 1988) (holding that application of Illinois law, which does not admit out-of-court statements regarding the declarant's state of mind as proof of subsequent conduct by a person other than the declarant, did not violate defendant's due process rights). The facts of \textit{Johnson v. Chrans,} however, involved a Shepard-type backward looking statement. See \textit{supra} notes 48-50 and accompanying text.

\textsuperscript{112} \textit{See People v. Atwood,} 154 N.W. 112, 115-17 (Mich. 1915) (finding that evidence was admissible to show declarant's intention to meet defendant and "her purpose in going away," but not that she met him).

\textsuperscript{113} \textit{See State v. Farnam,} 161 P. 417, 422 (Or. 1916) (Harris, J., concurring) (stating that victim's statement to her friend, that she would not go home with her that evening because she thought the defendant was "coming down," was admissible in trial for attempt to commit an unlawful abortion which resulted in victim's death; stating further that evidence was admissible to show victim's intent, not defendant's, and a limiting instruction could have been appropriate on request; concluding that even if admission had been error, it was harmless, as evidence was cumulative of evidence not objected to).

\textsuperscript{114} \textit{See Commonwealth v. Henderson,} 472 A.2d 211 (Pa. Super. Ct. 1984), where the court held it was proper to admit murder victim's statements that he intended to visit defendant on the day of his murder:

The objected to testimony merely established that it was the decedent's intent to meet with the appellant on June 3, 1981 in connection with the sale of the decedent's automobile to the appellant. The testimony does not establish that he went to the appellant's residence but that he merely intended to do so. Independent testimony established that the decedent was at the appellant's house on June 3, 1981. We are convinced that the testimony falls clearly within the "state of mind" exception to the hearsay rule.

\textit{Id.} at 214-16 (footnote omitted).

\textsuperscript{115} \textit{See Kirby v. State,} 17 Tenn. 383 (1836) (reversing murder conviction because trial court improperly admitted statement of victim that went beyond stating his intent to go on journey and included his intent to go with defendant).
Columbia,118 have followed this rule in their case law.

Those jurisdictions following the House Report's restriction reason that the circumstantial guarantees of reliability supporting the state of mind hearsay exception exist only when one speaks of one's own intent. Certainly, this hearsay exception bears no circumstantial guarantee of sincerity.119 Experience tells us, for example, that the declarant may be concocting a "cover story" for his or her true intentions, or falsely boasting of a relationship with the other person. But the state of mind hearsay exception is based, rather, on the fact that one has no problems of perception or memory when one speaks of one's own state of mind.120 Yet when one speaks of another's intent, even if one is sincere, there is perforce a perception problem (How is one to know what is someone else's intent or state of mind?) and a memory problem (whatever information one has must have been obtained before one made the statement).121

Due to the added hearsay dangers of perception and memory when one speaks of another's intent, these jurisdictions admit forward-looking

116 See Nguyen v. State, No. 14-97-01324-CR, 2000 WL 674894, at *1 (Tex. Ct. App. May 25, 2000) (not designated for publication) (finding no error in allowing murder victim's roommate to testify, under Tex. R. Evid. 803(3), that "he overheard a phone conversation between [victim] and [defendant] in which [victim] agreed to meet [defendant] at a specific gas station": "[Victim's] statements simply reflect his intention to meet [defendant] at the gas station"); Norton v. State, 771 S.W.2d 160, 166-68 (Tex. Ct. App. 1989) (holding that wife's testimony that murder victim, her husband, told her of his intention to go to defendant's shop was admissible to prove victim's intent, but wife's testimony that defendant had called and asked victim to come was inadmissible; reversible error to admit latter part of testimony, which was not cured by limiting instruction).

117 Walton v The Queen (1989) 166 CLR 283 (Aust.); see Tapper, supra note 86.

118 See Clark v. United States, 412 A.2d 21, 24, 26-30 (D.C. 1980) (finding reversible error to admit murder victim's statements that the defendant "had requested to see her the next morning at Federal City College"). The Clark court stated: "We accept the approach taken in the House Report not only because it admits statements of intention consistent with the standards applied to the admission of other state-of-mind evidence, but also because the declarant's statements, if reliable at all, are only reliable as to the declarant's own intention." Id. at 30.

119 See, e.g., Duvall v. Hambleton & Co., 55 A. 431, 433 (Md. 1903) (holding testimony that deceased had said she expected to loan another person $5000 and that he was to assign her certain stock was inadmissible hearsay—her self-serving declaration was offered in her own favor); see also supra note 46 and accompanying text.

120 See supra notes 43-44 and accompanying text.

121 See supra note 107; cf. Herman v. Oehrl, 82 A. 161, 162 (Md. 1911) (finding decedent's statement that she was leaving house where she boarded to go with plaintiffs because they were going to take care of her in exchange for her house was properly excluded when question was not decedent's intention in leaving, but whether she had entered into contract on which plaintiffs sought recovery). As philosopher Stuart Hampshire explained:

When we see a man acting, we normally see a whole performance in a standard social setting, not simply a set of physical movements. But the performance may be contrived to conceal feeling and intention, and we may not see through the performance to the feelings and intentions that in such a case will be said to lie "behind it."

STUART HAMPSHIRE, THOUGHT AND ACTION 78 (New ed. 1982).
statements of intention only to prove the declarant's subsequent acts, which requires that the declarant's acts be both relevant and in question.

In the typical homicide case, for example, the victim's state of mind and her own subsequent acts are usually irrelevant. What is in question, rather, is only the defendant's conduct: Did the defendant murder her? Her statement, "I'm afraid of Defendant," though it describes her state of mind, would ordinarily be relevant only to prove that the defendant had done something in the past to put the victim in fear, which in turn would make it more likely that he had hurt her this time as well. It thus would be offered for a "backward-looking" initial purpose and would be inadmissible under Shepard, as codified in Rule 803(3). But a particular defense may make relevant the victim's post-statement conduct in accord with her self-proclaimed state of mind.


123 See, e.g., Md. Paper Prods. Co. v. Judson, 139 A.2d 219, 226 (Md. 1958) (holding reversible error to refuse to admit deceased wife's testimony that, on morning of fatal accident, deceased had told her that he intended to stop on the way to work to pick up a gear wheel to be used in one of defendant-employer's machines; evidence was admissible to show that deceased was acting in course of employment at time of accident); Tittlebaum v. Penn. R.R., 174 A. 89, 90-91 (Md. 1934) (finding it proper to admit testimony of one boy that companion had picked up brick and said he was going to "bust a window," and that witness saw companion throw brick in direction of passing train, to show that brick broke window on train, even though witness did not see where brick struck); Balt. & O. R. Co. v. State ex rel. Chambers, 32 A. 201, 202 (Md. 1895) (holding decedent's declaration of intention of going to Washington was admissible to show that he had right to be on defendant's property and to take particular route, on his way to defendant's ticket office); Cooke v. Cooke, 43 Md. 522, 532-33 (1876) (finding that statements of declarant's fraudulent intent were admissible); Kirkland, 540 A.2d at 492-93 (holding proper to have admitted what was inferentially defendant's out-of-court statement that he "was going to kill this [victim] if he didn't have [his] money by a certain time"; "the statement was admissible under any of three theories: (1) as a state of mind exception to the hearsay rule; (2) as circumstantial evidence of declarant's subsequent conduct; and (3) as an admission [of a party opponent] under an exception to the hearsay rule"); Sobus v. Knisley, 273 A.2d 227, 231 (Md. Ct. Spec. App. 1971) (holding that, in negligence action by plaintiff who, like defendant, could not remember collision or events of few moments preceding, testimony of policeman that plaintiff had told him of his intention to take certain route was admissible to show that plaintiff subsequently took that route); see also supra notes 45, 83-84. See generally 2 MCCORMICK ON EVIDENCE, supra note 46, § 275; 1A JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 112 (Peter Tillers rev., 1983); Hutchins & Siesinger, supra note 57; John MacArthur Maguire, The Hillmon Case—Thirty-Three Years After, 38 HARV. L. REV. 709 (1925).


125 See Stoll, 762 So.2d at 878 (noting prosecution's closing argument as to import of victim's statements).

126 See, e.g., United States v. Brown, 490 F.2d 758, 771 (D.C. Cir. 1974); see also supra notes 48-50, 81-83 and accompanying text.
If the defendant pursues a claim of self-defense and offers testimony that the victim attacked him—or a defense of accident and offers testimony, for example, that the victim invited him into her home on the date of the charged homicide—the victim’s post-statement conduct becomes relevant, and the prosecution may prove that prior to that date, she had said, “I am afraid of Defendant.” Under these circumstances, the evidence is relevant to help to prove that she was in fear of the defendant, and thus she was unlikely either to seek him out to attack him or to invite him into her home.

A victim’s statement of intent may also sometimes be relevant to the defendant’s motive to commit a crime against her. If her following through with her stated intent would create a motive for the defendant to harm the victim, the victim-declarant’s forward-looking statement is relevant to prove her subsequent conduct, which is now material to the case. This situation often arises when the victim’s statement of intent involves future action intended to be taken toward the defendant, such as “I’m going to kick Defendant out of the house,” or “I’m going to break up with Defendant,” which is offered to show the victim’s likely subsequent conduct and its effect on the defendant.

The Hillmon doctrine is most pristinely applied in situations such as these, when the relevance of the declarant’s intended conduct is clear, and that conduct would have required no cooperation of the third person

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127 State v. Parr, 606 P.2d 263, 267 (Wash. 1980). The Washington Supreme Court explained: [If there is no defense [in homicide cases] which brings into issue the state of mind of the deceased [victim], evidence of fears or other emotions is ordinarily not relevant. But where a defense such as that of accident or self-defense is interposed . . . , courts have generally allowed the admission of evidence of the victim’s fears, as probative of the question whether that person would have been likely to do the acts claimed by the defendant . . . .]


128 See, e.g., Case v. State, 702 A.2d 777 (Md. Ct. Spec. App. 1997) (holding that, when murder defendant’s defense was that the victim had invited him into her home and that the gun went off by accident, trial judge properly admitted the victim’s out-of-court statements of her fear of the defendant as relevant to whether victim had invited him in and voluntarily positioned herself close enough to him that she could be accidentally shot; holding further that evidence of a domestic violence protective order that prohibited the defendant from entering the victim’s home was properly admitted for this purpose).

129 See, e.g., United States v. Natson, 469 F. Supp. 2d 1243, 1249-50 (M.D. Ga. 2006) (admitting murder victim’s statement under Rule 803(3) that she was going to talk to defendant about obtaining military benefits for herself and their unborn child); Gray v. State, 769 A.2d 170, 192, 209-15 (Md. Ct. Spec. App. 2001) (finding that out-of-court statements of murder victim that she intended to tell defendant, her husband, that she wanted a divorce, were properly admitted to prove that she did tell him, which was relevant to his motive; finding further that corroborating evidence of trustworthiness of out-of-court statement is not required by Md. Rule 5-803(b)(3)), rev’d on other grounds, 796 A.2d 697 (Md. 2002).

130 See supra note 129. But cf. State v. Weedon, 342 So.2d 642, 647 (La. 1977) (holding reversible error to permit testimony that the murder victim said she intended to leave her husband the following morning, after he left on a trip, when “she planned to leave secretly”).
(in these examples, the criminally accused). Where the other person's cooperation would be required, however—as where the declarant states an intention to meet the other person at a prearranged time and place—is where the jurisdictions diverge. If the declarant’s conduct is not in issue, those jurisdictions following the House Report exclude the evidence.

Where the declarant’s conduct is itself relevant to the case, the case law in these jurisdictions permits admitting the declarant's statement, but with a limiting instruction under Rule 105 that it must be considered only to prove the declarant's intent and not that of the other person. Here some bleed-over is natural in that the fact-finder will be hard-pressed to follow the limiting instruction. Nevertheless, as

131 Examples of such uses may be found in the facts of United States v. Jenkins, 579 F.2d 840, 842-43 (4th Cir. 1978). See also Boyer Chem. Lab. Co. v. Indus. Comm'n, 10 N.E.2d 389 (Ill. 1937) (finding employee’s statement that he intended to call on several druggists was admissible as part of the res gestae); Carter v. State, 501 N.E.2d 439, 441-42 (Ind. 1986) (“The statement ‘he would have to check with his brother, Charles Carter, to see if [cocaine] was available’ is also hearsay; however, it falls under the state of mind exception because it is introduced to show [the declarant’s] intention to do a future act, namely to telephone appellant.”); supra note 85.


133 See supra notes 104, 106-08, 115.

134 See generally 2 MCCORMICK ON EVIDENCE, supra note 46, § 275; 1 WEINSTEIN, supra note 45, §§ 105.01-105.04.


136 See State v. Via, 704 P.2d 238, 251 (Ariz. 1985) (finding hearsay statements admissible, under ARIZ. R. EVID. 803(3), when “they primarily relate to the declarant’s state of mind”: “Insofar as the statements in this case had some bearing on the issue of defendant’s conduct and whereabouts, however, they were nevertheless admissible.” (emphasis added)); see also supra note 110.

137 See Shepard v. United States, 290 U.S. 96, 103-04 (1933). The Court reasoned: "[T]he accusatory declaration ["Dr. Shepard has poisoned me"] must have been rejected as evidence of a state of mind, though the purpose thus to limit it had been brought to light upon the trial. The defendant had tried to show by Mrs. Shepard's declarations to her friends that she had exhibited a weariness of life and a readiness to end it, the testimony giving plausibility to the hypothesis of suicide. By the proof of these declarations evincing an unhappy state of mind, the defendant opened the door to the offer by the government of declarations evincing a different state of mind, declarations consistent with the persistence of a will to live. The defendant would have no grievance if the testimony in rebuttal had been narrowed to that point. What the government put in evidence, however, was something very different. It did not use the declarations by Mrs. Shepard to prove her present thoughts and feelings, or even her
long as the evidence is probative of the declarant’s conduct, which is important to the case, the evidence will not be excluded by the hearsay rule. If the declarant’s conduct is amply proved by other evidence, however, judges in the jurisdictions that follow the House Report’s restriction should exercise their discretion to exclude the evidence under Rule 403 because the risk of the jury’s using it to prove the defendant’s conduct substantially outweighs any probative value it will add as to the victim’s conduct.

thoughts and feelings in times past. It used the declarations as proof of an act committed by some one else, as evidence that she was dying of poison given by her husband. This fact, if fact it was, the government was free to prove, but not by hearsay declarations. It will not do to say that the jury might accept the declarations for any light that they cast upon the existence of a vital urge, and reject them to the extent that they charged the death to some one else. Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out.

*Id.* (emphasis added) (citations omitted); accord *United States v. Kaplan*, 510 F.2d 606, 609-11 & n.2 (2d Cir. 1974) (finding limiting instruction ineffective, and holding admission of evidence reversible error); *State v. Farnam*, 161 P. 417, 432 (Or. 1916) (Burnett, J., dissenting) (“The sole purpose of putting in evidence her unwarranted remark that she thought Roy was coming, and the only way the jury must have understood it, was to allow them to infer that he had written her he was coming, and . . . to presume that he did come . . .”).

138 See *People v. Atwood*, 154 N.W. 112 (Mich. 1915), where the Michigan Supreme Court held it was proper to admit, as part of the res gestae in an unlawful abortion trial, the testimony of a witness that the victim had said she was "going for a walk with [defendant]" and that defendant "was out waiting for her." *Id.* at 113. The court asserted, without mention of a limiting instruction having been given:

> We are of opinion that it was competent to prove her utterances made when she was leaving home, and the neighbor’s home, on Tuesday evening, not as evidence of the fact that she met respondent, but as evidence of her intention to meet him and explanatory of her purpose in going away. . . . Whether they truthfully explained her conduct and purpose was a question for the jury.

*Id.* at 117.

139 The advisory committee’s note to Rule 105 provides:

> A close relationship exists between this rule and Rule 403 which provides for exclusion when “probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.” The present rule recognizes the practice of admitting evidence for a limited purpose and instructing the jury accordingly. The availability and effectiveness of this practice must be taken into consideration in reaching a decision whether to exclude for unfair prejudice under Rule 403. In *Bruton v. United States*, the Court ruled that a limiting instruction did not effectively protect the accused against the prejudicial effect of admitting in evidence the confession of a codefendant which implicated him. The decision does not, however, bar the use of limited admissibility with an instruction where the risk of prejudice is less serious.

FED. R. EVID. 105 advisory committee’s note; see *United States v. Day*, 591 F.2d 861, 879-87 (D.C. Cir. 1978); *United States v. Layton*, 549 F. Supp. 903, 909-11 (N.D. Cal. 1982) (“While, strictly speaking, Jones’ statements are not sought to prove Layton’s conduct, the danger that the jury will make a highly prejudicial leap is certainly present.”), aff’d in part, rev’d in part, 720 F.2d 548; *State v. Magruder*, 765 P.2d 716, 720 (Mont. 1988) (Sheehy, J., dissenting) (discussing
In direct opposition to the approach followed by these jurisdictions, many other courts reject the House Report’s limitation and apply *Hillmon* to freely admit those statements to prove the nondeclarant-accused’s post-statement conduct.  

### B. The No Holds Barred Approach

Case law of the United States Court of Appeals for the Ninth Circuit; the United States District Courts for the Northern District of Iowa and the District of Massachusetts; arguably, the United States District Court for the Middle District of Georgia; and the states of Alabama, Arkansas, Connecticut, Georgia, Kansas, and others, are in favor of admitting such statements. The dangers because Rule 803(3) was approved to render statements of intent by the declarant, not the future conduct of another, admissible; Norton v. State, 771 S.W.2d 160, 166 (Tex. App. Ct. 1989). John MacArthur Maguire argues:

> It seems a proper conclusion that the *Hillman* doctrine as to the relevancy of mental state fails to cover the proof of any situation not at least partially attributable to the acts of the declarant, and that it will be applied hesitatingly and only after cautions to the jury in the proof of situations which must be the joint product of the acts of the declarant and others. If a line of cleavage comes here, it is reasonably sure to be jagged and irregular. No simple formula can solve all variations. It will be necessary to consider the amount of cooperation required from the other person involved by the declarations; the difficulty or ease of obtaining from him such cooperation; the emotional or other impulses tempting the triers of fact to swallow the declarations whole; and sundry additional matters peculiar to each case.

Maguire *supra* note 123, at 719; see also 5 WEINSTEIN, *supra* note 45, § 803.05[2][c], at 803-35 to -37 (discussing exclusion of such evidence under Rule 403); Tapper, *supra* note 86, at 462 (criticizing Walton v The Queen (1989) 166 CLR 283 (Austl.), which admitted state of mind evidence, ostensibly for the limited purpose of proving the declarant’s conduct, when the declarant’s state of mind was not really at issue); Wiseman, *supra* note 58, at 703-05.

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140 See infra Part III.B.

141 See United States v. Pheaster, 544 F.2d 353, 375-80 (9th Cir. 1976) (noting that trial court admitted proof of kidnapping victim’s statements of intent to meet defendant and instructed jury that the evidence was admitted only to show declarant’s state of mind; finding, on appeal, no error, even assuming that evidence was admitted to prove defendant’s actions); see also infra notes 158-75 and accompanying text.

142 See United States v. Johnson, 354 F. Supp. 2d 939, 959-60, 963-64 (N.D. Iowa 2005) (finding admissible evidence that murder victim had said he was “going to meet [defendant]”), aff’d in part, vacated in part, remanded, 495 F.3d 951 (8th Cir. 2007), cert. denied, 129 S. Ct. 32 (2008).

143 See United States v. Houlihan, 871 F. Supp. 1495 (D. Mass. 1994) (finding decedent’s statement that he was going out to meet “Billy Herd” admissible against codefendant Herd).

144 See United States v. Natson, 469 F. Supp. 2d 1243, 1249-50 (M.D. Ga. 2006) (admitting, pursuant to Rule 803(3), murder victim’s statements over telephone that she was with the defendant, that they were on their way to get her a car in Columbus, and that they would then return home). In this author’s opinion, however, because the statement in Natson as to the presence of the defendant would qualify as a present sense impression under Rule 803(1), the case does not clearly support admitting the statement under Rule 803(3) to prove the defendant’s whereabouts.

145 See Thornton v. State, 45 So.2d 298, 300-02 (Ala. 1950) (holding that statements of murder victim to wife that he was going to defendant’s home in order to retrieve the money he had loaned
defendant was properly admitted as part of the res gestae: "the act of beginning or contemplating the trip or journey"); Zumbado v. State, 615 So.2d 1223, 1226-27, 1235-37 (Ala. Crim. App. 1993) (finding that apparent murder victim's statements to his brother that he was selling all his property to defendant and going to Costa Rica to work for defendant were properly admitted and, in any event, evidence was cumulative of other evidence not objected to).

146 See State v. Abernathy, 577 S.W.2d 591 (Ark. 1979) (en banc), in which the Arkansas Supreme Court held it was reversible error to grant defense's motion in limine to preclude testimony that murder victim "had expressed her intention to see [the defendant] on the preceding night, before her death." Id. at 592. The court, making no mention of any proffer by the prosecution of corroborating evidence, asserted:

[T]he trial court should have sustained the admissibility of [the victim's] statement that she was going to meet [the defendant] that night. That statement falls within [Arkansas] Rule 803(3) and is in fact similar to the proof found admissible in Hillmon. That the statement may also show that [the defendant] was going to meet [the victim] does not, under the majority view, render it inadmissible. Id. at 593.

147 See State v. Santangelo, 534 A.2d 1175 (Conn. 1987). In Santangelo, the Connecticut Supreme Court held that the trial court did not err in admitting "testimony of the [murder] victim's husband and daughter relating to conversations they had with the victim concerning her intention to meet [the defendant] at the Chatham Pharmacy on September 10 and accompany him to a job interview." Id. at 1183-84. The court asserted:

[The defendant] contends . . . her statements that she was going to meet [the defendant] pertain, not only to her intention, but to those of another person, i.e., [the defendant]. He argues, therefore, that the victim's husband and daughter should not have been allowed to testify as to whom the victim said she was to meet, because for that purpose her statements were inadmissible hearsay. We are unpersuaded. The hearsay statements of an unavailable declarant, made in good faith and not for a self-serving purpose, that express his or her present intentions to meet with another person in the immediate future are admissible and allow the trier of fact reasonably to infer that the declarant's expressed intention was carried out.

Id. at 1184; see also State v. Journey, 161 A. 515 (Conn. 1932) (holding that murder victim's statement on morning of his death that he was going to work for defendant, and testimony that he walked off in direction of defendant's business, was properly admitted to show that victim "was in the company of the accused on the morning in question").

148 See Smith v. State, 96 S.E. 1042, 1042 (Ga. 1918) (affirming admission of murder victim's statement to his wife that he was "going over to the hollow to hide a still; him and [defendant and others]"); cf. Thomas v. State, 67 Ga. 460, 463-64, 1881 WL 3408, at *1 (1881). In Thomas, the Georgia Supreme Court held:

The sayings of the murdered woman on the night of the homicide when in the act of leaving the house to which she never returned, and a short time before the homicide, that "there are two persons down the alley; I think it is [the defendant] and his sweetheart; I will go down and see," were admissible as part of the res gestae, which is the transaction which began in her leaving the house in search of the prisoner and culminated in her assassination where she expected to find him. . . . The remark accompanied her act in leaving and her purpose to see the defendant on an errand of jealous anger; it was so near the fatal rencontre as to preclude the thought of plan or device to utter a falsehood.

Id. at *3. Although cited in People v. James, 717 N.E.2d 1052, 1058 & n.4 (N.Y. 1999), when discussing jurisdictions which have applied the Hillmon doctrine in a manner that allows "statements of a declarant's intention to perform acts entailing the participation jointly or cooperatively of the nondeclarant accused," in the author's opinion, this statement is better analyzed as a combination of her present sense impression under Rule 803(1)—that it was defendant—and then under Rule 803(3) of her own intent to go down the alley, which required no other person's cooperation.

149 See State v. McKinney, 33 P.3d 234, 243 (Kan. 2001) (holding that the victim's "statement to his uncle, Jimmy Spencer, that Les wanted to talk to [the victim] and he was going to see what
Maine,\textsuperscript{150} Mississippi,\textsuperscript{151} Nevada,\textsuperscript{152} New Jersey,\textsuperscript{153} North Carolina,\textsuperscript{154} South Carolina,\textsuperscript{155} Virginia,\textsuperscript{156} and Washington\textsuperscript{157} has freely admitted, \textquotedblleft Les wanted	extquotedblright was properly admitted under the state of mind hearsay exception: \textquotedblleft The statement is important because it connects the defendant to Spencer's testimony that indicated the Les to whom the statement referred to in the plan to lure [the victim] out of the house was the defendant.	extquotedblright, \textit{overruled on other grounds}, State v. Davis, 158 P.3d 317 (Kan. 2006).

\textsuperscript{150} See State v. Cugliata, 372 A.2d 1019, 1026-29 (Me. 1977) (holding that the state of mind exception is broad enough to admit information involving the future actions of nondeclarants; finding that statements by the victim that he and the defendant were going to take a trip to buy hashish and that the defendant was armed were admissible under the state of mind exception; rejecting the argument that the trial judge's limiting instruction would have been ineffective; and reasoning that: \textquoteleft The \textit{Hillman} Court conceived the scope of the 'present state of mind' hearsay exception as broad enough to encompass the admissibility of so much of the declarant's plan to take future action as included the involvement of other persons in the plan.'\textquoteright, \textit{overruled on other grounds}, State v. Brewer, 505 A.2d 774 (Me. 1985).

\textsuperscript{151} See Bogan v. State, 754 So.2d 1289, 1290, 1293-94 (Miss. Ct. App. 2000) (affirming that murder victim's statement to his girlfriend that he intended to pick up \textquoteleft Jerry\textquoteright (defendant's first name), on his way to work was properly admitted pursuant to MISS. R. EVID. 803(3): \textquoteleft By its terms, the rule does not limit the class of person's [sic] statements of intent may be admitted against.\textquoteright).

\textsuperscript{152} See Lisle v. State, 941 P.2d 459, 467 (Nev. 1997) ("Pursuant to \textit{Hillmon} and [NEV. REV. STAT.] 51.105(1) [the state of mind exception], the district court did not err by allowing [victim's] statement" that he was going with \textquoteleft Vatos\textquoteright to get drugs, "to be admissible as direct evidence that he did, indeed, carry out that intent and go with Vatos.").

\textsuperscript{153} See State v. Thornton, 185 A.2d 9 (N.J. 1962), in which the New Jersey Supreme Court held:

\[\text{[W]hen [the murder victim], in effect, told her cousin, a few hours before she was shot at the apartment where the husband was living, of her intention to visit [the defendant], her husband, [because she thought he was ill], the statement was a perfectly natural incident of the conversation. It related to the then existing state of her mind; it was made in the ordinary course of a conversation as the usual type of information she might communicate to her cousin; and the circumstances were such as to exclude suspicion of an intention to make evidence to be used at a trial.}\textit{Id. at 14-17; Hunter v. State, 40 N.J.L. 495, 540 (1878) (dictum).}
\textsuperscript{154} See State v. Coffey, 389 S.E.2d 48, 58-59 (N.C. 1990) (holding murder victim's statements that she was going to "go fishing with a nice gray-haired man" were admissible under N.C. R. EVID. 803(3)); State v. McElrath, 366 S.E.2d 442, 450-52 (N.C. 1988) (holding victim's statement of intention to go to North Carolina with defendant was admissible); State v. Vestal, 180 S.E.2d 755, 768-73 (N.C. 1971) (finding no error in permitting widow to testify as to her husband's (the victim's) plans that he was going on a business trip with the defendant: "It is competent evidence indicating that for such purpose [the victim] reached and entered into the company of [the defendant] on the night the State's evidence tends to show he was killed in [defendant's] warehouse.").

\textsuperscript{155} See State v. Griffin, 528 S.E.2d 668, 669-70 (S.C. 2000) (holding that testimony that murder victim had hung up the phone and said "he 'had to meet [the defendant] and someone else' who wanted to buy two or three pounds of marijuana" was properly admissible under Rule 803(3); holding in addition that it was merely cumulative).

\textsuperscript{156} See Hodges v. Commonwealth, 634 S.E.2d 680, 683, 693-94 & n.14 (Va. 2006) (holding that murder victim's statement to her babysitter that she was going to meet defendant "'down the dirt road past his house'" on the day of her disappearance was properly admitted, as it made it "more probable that she indeed met him there").

\textsuperscript{157} See State v. Terrovona, 716 P.2d 295, 299-300 (Wash. 1986). The Washington Supreme Court, asserting that "[m]ost courts have expanded the 'Hillmon doctrine' to admit hearsay statements of intent that implicate a third party's conduct," held:
under the state of mind hearsay exception, statements of the declarant’s intent, such as “I’m going to dinner with Frank tonight,” to prove the nondeclarant’s (here, Frank’s) subsequent conduct, and has done so without mentioning any requirement of corroboration of the nondeclarant’s intent or conduct. The decision by the United States Court of Appeals for the Ninth Circuit in United States v. Pheaster exemplifies this approach.

Hugh Pheaster and Angelo Inciso were tried for and convicted of conspiracy to kidnap and hold for ransom sixteen-year-old Larry Adell, whose whereabouts were unknown at the time of trial. The district court admitted, over Inciso’s objection, testimony by two of Larry’s friends that on the evening of his disappearance, Larry had said that “he was going to meet Angelo at Sambo’s North at 9:30 [p.m.] to ‘pick up a pound of marijuana which Angelo had promised him for free,’” and that when he left the table at Sambo’s at 9:15 p.m., he said “he was going to meet Angelo and he’d be right back.” One of the friends further “testified that she had been with Larry on another occasion when he met a man named Angelo, and she identified the defendant as that man.”

In response to the hearsay objection regarding Larry’s statements, the prosecutor offered the testimony “for the limited purpose of showing the ‘state of mind of Larry.’” The judge overruled the objection and instructed the jury that it could consider the testimony only “for that limited purpose and not for ‘the truth or falsity of what (Larry) said.’”

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158 United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976).
159 Id. at 358.
160 Id. at 375.
161 Id.
162 Id. at 374.
163 Id. at 374-75.
On appeal, the panel majority of two, in an opinion by District Judge Renfrew, affirmed the convictions.\textsuperscript{164}

The majority chose not to rely on the limiting instruction, but went out of its way to instead hold that, under the then-applicable common law (the trial took place before the effective date of the Federal Rules of Evidence), the statements were "relevant and admissible to show that, as intended, Larry did meet Inciso in the parking lot at Sambo's North on the evening of June 1, 1974."\textsuperscript{165} Judge Renfrew acknowledged that "[s]everal objections can be raised against a doctrine"\textsuperscript{166} that "requires that the trier of fact infer from the state of mind of the declarant the probability of a particular act not only by the declarant but also by the other person."\textsuperscript{167} As he explained:

One such objection is based on the unreliability of the inference but is not, in our view, compelling. A much more significant and troubling objection is based on the inconsistency of such an inference with the state of mind exception. This problem is more easily perceived when one divides what is really a compound statement into its component parts. In the instant case, the statement by Larry Adell, "I am going to meet Angelo in the parking lot to get a pound of grass," is really two statements. The first is the obvious statement of Larry's intention. The second is an implicit statement of Angelo's intention. Surely, if the meeting is to take place in a location which Angelo does not habitually frequent, one must assume that Angelo intended to meet Larry there if one is to make the inference that Angelo was in the parking lot and the meeting occurred. The important point is that the second, implicit statement has nothing to do with Larry's state of mind. For example, if Larry's friends had testified that Larry had said, "Angelo is going to be in the parking lot of Sambo's North tonight with a pound of grass," no state of mind exception or any other exception to the hearsay rule would be available. Yet, this is in effect at least half of what the testimony did attribute to Larry.\textsuperscript{168}

Although voicing these reservations, both the majority\textsuperscript{169} and Judge Ely, who concurred in part and dissented in part,\textsuperscript{170} felt that precedent compelled the application of the Hillmon doctrine to the Pheaster facts.

\textsuperscript{164} Id. at 358.
\textsuperscript{165} Id. at 375. The majority asserted: "Although we recognize the force of the objection to the application of the Hillman doctrine in the instant case, we cannot conclude that the district court erred in allowing the testimony concerning Larry Adell's statements to be introduced." Id. at 380 (footnote omitted).
\textsuperscript{166} Id. at 376.
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 376-77 (footnotes omitted).
\textsuperscript{169} See id. at 377-79. The majority stated: "Despite the theoretical awkwardness associated with the application of the Hillmon doctrine to facts such as those now before us, the authority in favor of such an application is impressive, beginning with the seminal Hillmon decision itself." Id. at 377.
The majority argued that the possible "unreliability of the inference" went merely to the weight of the evidence, rather than to its admissibility:

The inference from a statement of present intention that the act intended was in fact performed is nothing more than an inference. Even where no actions by other parties are necessary in order for the intended act to be performed, a myriad of contingencies could intervene to frustrate the fulfillment of the intention. The fact that the cooperation of another party is necessary if the intended act is to be performed adds another important contingency, but the difference is one of degree rather than kind. The possible unreliability of the inference to be drawn from the present intention is a matter going to the weight of the evidence which might be argued to the trier of fact, but it should not be a ground for completely excluding the admittedly relevant evidence.\(^{171}\)

The majority thus indicated that it felt the jury could properly evaluate the evidence and not overvalue it.

Yet, the case against Angelo Inciso—as opposed to his co-defendant, Pheaster—was thin.\(^{172}\) As ably explained by Judge Ely, the key evidence against Inciso was the "Hillmon" evidence:

In respect to Inciso’s participation in the kidnapping conspiracy, there is no doubt that [Larry] Adell’s hearsay statement that the latter was going to meet "Angelo" [Inciso] was the strongest evidence linking Inciso to the conspiracy. The statement was obviously relevant to Adell’s state of mind and his future intent. But it was also highly prejudicial to Inciso. Adell’s statement could not be admitted without the attendant and substantial risk that, despite the judge’s limiting instruction, the jury would rely on the statement to prove not only the act of Adell, but also those of Inciso.\(^{173}\)

Had the hearsay statements been the only evidence against Inciso, without any other evidence connecting him to Pheaster, this author believes that Inciso’s conviction would have been reversed, even by the

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170 Id. at 384 (Ely, J., concurring in part and dissenting in part). Judge Ely explained:
I am obligated by the almost century-old precedent of Mutual Life Insurance Co. v. Hillmon to concur in the majority’s decision that the trial court did not commit reversible error in admitting Adell’s alleged statement. Nevertheless, while my Brother Renfrew is doubtless correct that a majority of courts have adhered to the so-called Hillmon doctrine, it is also true that the holding has been subjected to severe criticism by some of our Nation’s most distinguished judicial scholars. I am impelled, therefore, strongly to emphasize my own agreement with [those critics].

Id. at 385 (footnote and citation omitted).

171 Id. at 376 n.14 (majority opinion). The majority also noted, "Our review of the record reveals nothing about the circumstances of the statements made by Larry to suggest any reason to doubt their reliability." Id. at 378 n.17.

172 See id. at 383 ("The evidence against Pheaster can properly be characterized as overwhelming. . . . [In contrast, a]lthough circumstantial, the evidence against Inciso is sufficient to support the jury verdict.").

173 Id. at 385 (Ely, J., concurring in part and dissenting in part).
majority, on the ground that it was not supported by sufficient evidence. Judge Ely strenuously argued that Inciso's conviction was in any event unjust, quoting California Supreme Court Justice Traynor: "A declaration as to what one person intended to do . . . cannot safely be accepted as evidence of what another probably did." That view, though rejected by the Pheaster majority, was of course the one later adopted in the House Report on Rule 803(3).

Some jurisdictions take a compromise position between that of the House Report and that of the Pheaster majority. They condition the admissibility of such statements as Larry's in Pheaster against the accused on the admission of corroborating evidence that the nondeclarant (there, "Angelo") named in the declarant's forward-looking statement took the action that the declarant prognosticated.

C. Jurisdictions that Condition Admissibility on Corroborating Evidence

State courts in New York and Ohio and the United States Court of Appeals for the Second Circuit, have explicitly stated that they will not approve the admission of statements like "I'm going to meet Angelo" to prove that the declarant met up with "Angelo," unless there is corroborating evidence of "Angelo's" actions. Indeed, although in adopting the broad admissibility approach in Pheaster the Court of Appeals for the Ninth Circuit relied on the leading California case, People v. Alcalde, the Alcalde court may be seen as following (albeit not explicitly) this less radical approach of requiring corroborating evidence before admitting a forward-looking statement to help to prove a nondeclarant's subsequent conduct.

174 See id. at 383 (majority opinion) (summarizing evidence connecting Inciso to Pheaster during time of charged kidnapping); id. at 379 (pointing out that the Alcalde "court also noted that there was other evidence from which the defendant's guilt could be inferred").

175 Id. at 385 (Ely, J., concurring in part and dissenting in part) (quoting People v. Alcalde, 148 P.2d 627, 633 (Cal. 1944) (Traynor, J., dissenting)).

176 See supra notes 93-94 and accompanying text.

177 See infra Part III.C.

178 See People v. James, 717 N.E.2d 1052, 1055-61 (N.Y. 1999). In upholding the conviction of a police officer for perjury in connection with an investigation into cheating on a police department exam, the New York Court of Appeals affirmed admission under the state of mind hearsay exception of a recorded conversation between two of the defendant's friends. The conversation concerned a meeting during which the defendant and his friends were to obtain the answers to the exam. The court held that the statement in question met the following necessary foundational requirements:

1. the declarant is unavailable;
2. the statement of the declarant's intent unambiguously contemplates some future action by the declarant, either jointly with the nondeclarant defendant or which requires the defendant's cooperation for its accomplishment;
3. to the extent that the declaration expressly or impliedly refers to a
1. Alcalde

In Alcalde, a murder victim’s roommate and brother-in-law each testified that the victim had told them on the day of her murder that she intended to have dinner with “Frank” that evening. The next morning, her beaten body was found in a field alongside a country road. Unlike in Hillman, where the declarant’s whereabouts were the key question, in Alcalde, there was no question at trial as to the declarant’s whereabouts. The only possible relevance of the victim’s statements was to place Florencio “Frank” Alcalde with her on the night of her murder.

prior understanding or arrangement with the nondeclarant defendant, it must be inferable under the circumstances that the understanding or arrangement occurred in the recent past and that the declarant was a party to it or had competent knowledge of it; and (4) there is independent evidence of reliability, i.e., a showing of circumstances which all but rule out a motive to falsify, and evidence that the intended future acts were at least likely to have actually taken place.

Id. (citations omitted), habeas corpus denied, No. 99 Civ. 8796 (RMB), 2002 WL 31426266 (S.D.N.Y. Oct. 25, 2002). Note that in People v. James, the statements also should have been admissible under Rule 801(d)(2)(E) as statements by coconspirators during and in furtherance of the conspiracy. In People v. Malizia, 460 N.Y.S.2d 23, 27 (App. Div. 1983), the New York appellate court asserted:

We are persuaded that a statement by a deceased that he intends to meet another is admissible where the statement is made under circumstances that make it probable that the expressed intent was a serious one, and that it was realistically likely that such a meeting would in fact take place.


The court held:

[The defendant’s girlfriend’s statements that she and defendant] intended to procure three pounds of marijuana to sell later that night are admissible against [the defendant] as proof that later that evening he obtained and sold three pounds of marijuana. The Hillman state of mind exception has been expanded to include statements of a declarant’s intention to do a subsequent act with a third person to prove that the third person participated in the subsequent act when there is independent evidence that corroborates the declarant’s statements.

Id. at *4.

See infra Part III.C.2.

181 United States v. Pheaster, 544 F.2d 353, 378-89 (9th Cir. 1976); see supra Part III.B.


183 Id. at 628.

184 Id. at 627.

185 See supra notes 60-61, 70-89 and accompanying text; see also infra note 210 and accompanying text.

186 Alcalde, 148 P.2d at 633 (Traynor, J., dissenting). Justice Traynor reasoned:

Since the evidence is overwhelming as to who the deceased was and where she was when she met her death, no legitimate purpose could be served by admitting her declarations of what she intended to do on the evening of November 22[n]d. The only purpose that could be served by admitting such declarations would be to induce the belief that the defendant went out with the deceased, took her to the scene of the crime and there murdered her.
The trial court had admitted the victim's statements, but advised the jury that they were "admitted for the limited purpose of showing the decedent's intention." Justice Shenk, writing for the California Supreme Court majority of five that affirmed Alcalde's conviction and death sentence, characterized the victim's statements as follows:

Her utterance was hearsay. It was made extrajudicially and offered as proof of the truth of its content. It was a declaration of intent to do an act in the future, offered as evidence that the deceased had the intent she declared and that the intent was probably carried out, namely, that she intended to and did go out that night with a man named "Frank." The California precedent cited by the majority was not directly on point, as those cases involved facts where the declarant's subsequent act, not a third person's, was at issue. Therefore, in extending the hearsay exception so as to prove acts of the third person, Justice Shenk relied instead on Hillmon and on the New Jersey decision in Hunter, which had been cited with approval in Hillmon, as well as in Minnesota and Utah cases. He stated: "In other jurisdictions cases are found which recognize the admissibility of declarations of intent to go to a certain place or with a certain person in the future."

Interestingly, neither any of the cited cases nor the facts of Alcalde (where there was a great deal of corroborating evidence of the defendant's guilt) support reading it as setting forth the no-holds barred approach to admissibility for which it was relied on by the Ninth Circuit when it adopted that approach in so many words in Pheaster.

The Utah case cited by the Alcalde majority provides no support for extending the hearsay exception to prove a third person's intent and subsequent conduct. The Utah court approved the admission of a murder victim's statement of intent to go to the defendant's house; the statement did not purport to predict or describe the defendant's

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187 Id. at 630 (majority opinion).
188 Id. at 627, 633.
189 Id. at 631.
190 Id.
191 Id.
192 Id. (citing Hunter v. State, 40 N.J.L. 495 (1878); State v. Hayward, 65 N.W. 63 (1895); State v. Mortensen, 73 P. 562, 568-70 (1903)).
193 See infra text accompanying notes 221-22.
194 See supra notes 165-68 and accompanying text. But see United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976), in which the Ninth Circuit asserted:

Despite the theoretical awkwardness associated with the application of the Hillmon doctrine to facts such as those now before us, the authority in favor of such an application is impressive, beginning with the seminal Hillmon decision itself. . . . The Hillmon doctrine has been applied by the California Supreme Court in People v. Alcalde, a criminal case with facts which closely parallel those in Hunter.

Id. at 377-78 (citation omitted).
Accomplishment of the victim’s intended conduct would not have required the defendant’s cooperation. Moreover, the defendant had admitted that the deceased had come to his house, so the victim’s statement was not needed to place the victim and the defendant together.

*Hayward,* the Minnesota case cited in *Alcalde*, approved the admission of the murder victim’s statement that she had a business engagement with the defendant, but again, the defendant’s conduct was also proved by independent evidence: An accomplice testified that he and the defendant subsequently met the victim at an appointed place. The Minnesota court in *Hayward* in turn had relied on a Wisconsin case, which held that evidence that the deceased (alleged to have died as a result of an illegal abortion at the hands of the defendant) had said she was going to the defendant’s house had been properly admitted to show she did go there—the same purpose as in the Utah case: to prove the declarant’s subsequent actions, independent of the defendant’s.

The *Alcalde* majority also cited with approval *People v. Fong Sing*, a decision of the intermediate California appellate court, as holding admissible “a declaration of intent to go to a certain place.” Yet that case supports a conclusion directly contrary to that reached in *Alcalde*, as the intermediate court in *Fong Sing* affirmed the trial court’s exclusion of a third person’s statement, which had been offered by the defendant. The appellate court reasoned:

> [S]ince the rule constitutes an exception to the general rule excluding the admission of hearsay testimony, it must, of course, be confined in its application strictly to the circumstances or conditions giving rise to the reason for the recognition of that class of testimony as a legal method of proving a fact, and hence we do not believe that the scope of the rule can reasonably be so far extended as to justify the admission in evidence of the declaration of a third party to the defendant in either a criminal or civil action involving a request by the former that the latter go to some particular place, *unless such declaration is accompanied or followed by a declaration by the party himself that he intends to go to such place*. Therefore, referring to the present case, the fact that Gong Sue might have requested Charlie Suey to go to the lumber yard and get some lumber, of itself, or in

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195 State v. Mortensen, 73 P. 562, 568-70 (Utah 1903).
196 See *supra* text accompanying notes 131-32.
197 Mortensen, 73 P. at 568-70.
198 State v. Hayward, 65 N.W. 63, 65 (Minn. 1895).
199 Id.
200 State v. Dickinson, 41 Wis. 299, 306-07, 1877 WL 3579, at *3 (1877).
201 Id.
202 See *supra* notes 195-96 and accompanying text.
the absence of some statement by the defendant in response to such request indicating his intention to accompany Suey to the lumber yard, would not be admissible. The rule contemplates some utterance by the party to the action himself, and not that of a third party, for the very obvious reason that the declaration is admissible only because it is supposed to be expressive of what is in the declarant's own mind with respect to the intention as to his destination, which, manifestly, could not be determined from what some other person might have said, unconnected with any declaration in that particular by the party himself.205

Hunter, the New Jersey case cited in both Alcalde206 and Hillmon,207 provides the strongest support for the Alcalde holding, but like Alcalde, it was a case in which there was substantial independent evidence of the nondeclarant's intent or conduct. Hunter approved the admission of the victim's statements to his wife and son that he was going to Camden (a New Jersey city) with the defendant.208 Chief Justice Beasley, writing for the New Jersey court, analyzed these statements as "part of the res gestae," as they "can reasonably be said to be component parts, or the natural incidents of the act of the deceased in going to Camden..."209 Yet again, the defendant's acts were proven by independent evidence, as well: Another witness testified that he heard the defendant offer to go with the deceased that evening.210 The New Jersey appellate court also held that, even if admitting the deceased's statements had been error, it was harmless.211

Hillmon's language, literally, was of the same import as that of Alcalde, Hayward, and Hunter. But both parties in Hillmon agreed that the nondeclarant—Hillmon—had gone to Crooked Creek, so that part of the questioned evidence did not harm the opposing party—Mrs. Hillmon—whose concern would have been with keeping out any evidence tying Walters to Crooked Creek.212 Alcalde's defense, on the other hand, was an alibi: He testified not to have met the victim and to have been elsewhere on the night of her murder.213 Given his alibi defense, the victim's statements inculpated him by placing them together on the night of his murder, which fact was critical to the

205 Fang Sing, 175 P. at 913-14 (emphasis added).
206 See supra text accompanying note 192.
207 See supra text accompanying notes 69-71.
208 Hunter v. State, 40 N.J.L. 495, 538 (1878).
209 Id. at 537. It should be noted that the appellate record is unclear as to whether the victim's body was found in Camden. See id. at 496-97 (describing how the defense attacked the indictment on the ground that it implicitly averred that the victim had died both in Pennsylvania and in New Jersey).
210 Id. at 540-41.
211 Id. at 542-43.
212 See supra text accompanying notes 60-61.
prosecution. But there was substantial independent evidence of Alcalde's guilt: (1) physical evidence that he had been at the crime scene; (2) evidence that his car had been seen there; and (3) testimony (a) to his own inculpatory statements before the murder, (b) to his father's offering to bribe two witnesses to give false alibi testimony, and (c) to facts contradicting his exculpatory statements after the murder.214

In affirming the admission of the victim's out-of-court statements, the Alcalde majority referred to a general proposition that "the existence of a person's design or plan to do a certain thing is relevant circumstantially to show that he did it, and may be evidenced by his assertion of present intent when made in a natural way and not under circumstances of suspicion . . . ."215 The requirement that the evidence not be shown to have indicia of insincerity is consistent with the case law regarding the narrower, traditional common law state of mind hearsay exception216 (stemming from the early res gestae exception)217 that is unambiguously codified in Rule 803(3).218 Within the paradigm of the Federal Rules of Evidence, a court may accomplish this same result by exercising its discretion to exclude an apparently insincere state of mind statement under Rule 403 on the ground that the probative value of an apparently insincere statement is substantially outweighed by the risk that its admission will result in unfair prejudice.219 The

214 Id. at 627-30.
215 Id. at 632.
216 See supra notes 46, 119, 153.
218 See supra notes 84-85 and accompanying text.
219 See Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needlessly presentation of cumulative evidence."). For cases decided under the Federal Rules of Evidence, see, for example, United States v. Cianci, 378 F.3d 71, 105-07 (1st Cir. 2004) (finding no abuse of discretion to exclude defendant's statement, made at some time during alleged corruption conspiracy, to person he apparently believed was F.B.I. agent, that defendant would not tolerate corruption); United States v. Reyes, 239 F.3d 722, 743 (5th Cir. 2001) (finding no abuse of discretion to exclude exculpatory statements made by defendant to person he suspected was cooperating with legal authorities); United States v. Faust, 850 F.2d 575, 585-86 (9th Cir. 1988) (finding no abuse of discretion to exclude defendant's letter offered by him to show his state of mind, when, inter alia, circumstances indicated that he had had time to "think long and hard before drafting the letter"); United States v. Ponticelli, 622 F.2d 985, 992 (9th Cir. 1980) (finding no abuse of discretion to exclude proof of accused's post-arrest statements made to his attorney because accused "had a chance for reflection and misrepresentation in making the proffered statements"). Cf. United States v. Mandel, 437 F. Supp. 262, 264 (D. Md. 1977) (dictum) (noting that out-of-court statements that "at least impliedly refer to past, present, and future events" may be admissible; testimony by defendant's wife that her husband and his co-defendant informed her that a transaction was "none of the governor's business," that governor would be "shocked" if he were to learn of it, and that it was to be kept a secret, was excluded pursuant to Rule 403 because the evidence lacked the circumstantial guarantees of reliability found in United States v. Annunziato, 293 F.2d 373, 376-78 (2d Cir. 1961), and the need for it was not overwhelming; the court noted that it would be admissible under Rule 803(3) to show that they subsequently kept it a secret from the governor (emphasis added), aff'd in part, vacated in part, 591 F.2d 1347,
Alcalde majority, however, not only found the victim’s statements of intent to have been “made in a natural way and not under circumstances of suspicion,” but also—importantly—found reliability in the existence of corroborating evidence. Justice Shenk explained:

No attempt need be made here to define or summarize all the limitations or restrictions upon the admissibility of declarations of intent to do an act in the future or to indicate what degree of unavailability of the declarant or corroboration should exist in every case. Elements essential to admissibility are that the declaration must tend to prove the declarant’s intention at the time it was made; it must have been made under circumstances which naturally give verity to the utterance; it must be relevant to an issue in the case. Those qualifications are here present. The declaration of the decedent made on November 22 that she was going out with Frank that evening stated a present intention to do an act in the future. Certainly it was a natural utterance made under circumstances which could create no suspicion of untruth in the statement of her intent. It did not necessarily refer to the defendant as the person named. But the defendant was called “Frank” as a nickname and he registered as Frank at the hotel where he lived. The defendant admittedly had been entertaining the decedent. Manifestly that fact, together with other corroborating circumstances, bore directly on the question of the relevancy of the declaration. Unquestionably the deceased’s statement of her intent and the logical inference to be drawn therefrom, namely, that she was with the defendant that night, were relevant to the issue of the guilt of the defendant. But the declaration was not the only fact from which an inference could be drawn that the deceased was with the defendant that night. Other facts were in evidence from which the inference could reasonably be drawn. The cumulation of facts corroborative of the guilt of the defendant was sufficient to indicate that the trial court did not err in admitting the declaration.

Justice Traynor, joined by Justice Edmonds, would have reversed Alcalde’s conviction on the ground that the trial court erred in admitting the victim’s statements, as they did not fall into the state of mind exception. He agreed that corroboration was required for admissibility, but even then he would admit such evidence only to prove the declarant’s own subsequent acts:

A declaration of intention is admissible to show that the declarant did the intended act, if there are corroborating circumstances and if
the declarant is dead or unavailable and hence cannot be put on the witness stand. A declaration as to what one person intended to do, however, cannot safely be accepted as evidence of what another probably did. The declaration of the deceased in this case that she was going out with Frank is also a declaration that he was going out with her, and it could not be admitted for the limited purpose of showing that she went out with him at the time in question without necessarily showing that he went with her.... Such a declaration could not be admitted without the risk that the jury would conclude that it tended to prove the acts of the defendant as well as of the declarant, and it is clear that the prosecution used the declaration to that end. There is no dispute as to the identity of the deceased or as to where she was at the time of her death. Since the evidence is overwhelming as to who the deceased was and where she was when she met her death, no legitimate purpose could be served by admitting her declarations of what she intended to do on the evening of November 22[n]d. The only purpose that could be served by admitting such declarations would be to induce the belief that the defendant went out with the deceased, took her to the scene of the crime and there murdered her. Her declarations cannot be admitted for that purpose without setting aside the rule against hearsay. 224

The House Report to Rule 803(3) adopts Justice Traynor’s approach,225 but the Second Circuit has followed the Alcalde majority instead.226

2. The Second Circuit

In United States v. Best, the United States Court of Appeals for the Second Circuit affirmed the admission against Best, under Rule 803(3), of “a codefendant’s out-of-court statement that the codefendant intended to ask Best to create a fraudulent document.”227 In an opinion by Judge Kearse, the panel explained:

In several cases, this Court has discussed whether a declarant’s out-of-court statement of intent was admissible in evidence against a person other than the declarant. In each of these cases, we concluded that admissibility turned on whether there was independent evidence

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224 Id. (citations omitted).
225 See supra notes 93-94 and accompanying text.
226 See infra Part III.C.2.
227 United States v. Best, 219 F.3d 192, 195-96 (2d Cir. 2000). The court described: Over Best’s objection, [an employee] further testified that when he reported to [Best’s co-defendant the vice-president of finance’s] refusal to implement the Medicare reallocation without written instructions, “[the co-defendant] told [the witness] that he would call Albany and talk to Jim [Best] and take care of it with the Albany division.”

Id.
that connected the declarant’s statement with the non-declarant’s activities.\textsuperscript{228}

The panel continued:

In United States v. Cicale, for example, the declarant on several occasions told an undercover agent that he was about to meet with his drug “source,” to whom he never referred by name, at specific locations such as “the guy’s house” or “at the restaurant where he’s at” “right now.” Soon after each such statement, the declarant was either seen with Cicale or seen arriving at Cicale’s home. We concluded that the observations of Cicale meeting with the declarant promptly after the declarant stated he was about to meet with his “source” were independent evidence that Cicale was the “source” referred to by the declarant and that Cicale had engaged in narcotics trafficking.

Following the reasoning of Cicale, we held in United States v. Sperling that a declarant’s statement that she was going to meet with her drug source at noon that day was admissible to prove Sperling’s participation in a drug conspiracy where law enforcement agents observed Sperling meeting with the declarant at the appointed time, and no one else met with the declarant from 11:30 a.m. to 2 p.m. In United States v. Delvecchio, an informant stated that he was going to meet with defendants Delvecchio and Amen to set up a drug transaction. A meeting ensued, and law enforcement agents observed Amen drive to the meeting site and get out of the car and approach the informant. However, the passenger in the car never got out and the agents could not see his face. \textit{We held that the informant’s statement was not admissible to prove that Delvecchio attended the meeting because there was no independent evidence that he had done so.}

\textit{Corroboration of the nature of the transaction need not be eyewitness observations and may be provided by circumstantial evidence.} Thus, in United States v. Badalamenti, the declarant stated that he would meet the defendant at a particular time and place to obtain a heroin sample; we held that there was sufficient corroboration to admit that statement against the defendant in light of the government’s evidence that the defendant met the declarant at the location specified in the declarant’s statement and that after the meeting, the declarant had samples of heroin.

\textit{In the present case, there was ample circumstantial evidence to corroborate the proposition that Best was the person Maciejewski said he would ask to prepare a Medicare reallocation memorandum for the Company’s Albany division.} Best’s name is James, and

\textsuperscript{228} \textit{Id.} at 198 (emphasis added) (citations omitted) (citing United States v. Delvecchio, 816 F.2d 859, 863 (2d Cir. 1987); United States v. Nersesian, 824 F.2d 1294, 1325 (2d Cir. 1987); United States v. Badalamenti, 794 F.2d 821, 825-26 (2d Cir. 1986); United States v. Sperling, 726 F.2d 69, 73-74 (2d Cir. 1984); United States v. Cicale, 691 F.2d 95, 103 (2d Cir. 1982)).
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Maciejewski said he would call "Jim"; Best and Maciejewski were friends, permitting the inference that it was not improbable that Maciejewski would refer to Best by nickname; and Maciejewski said he would have "Jim" take care of the matter with respect to the Albany division, and Best was in charge of the Albany division.

There was also ample independent proof that Maciejewski thereafter made such a request of Best. The record included evidence that Maciejewski made his statement to Gastle in early May; that Maciejewski thereafter wrote a memorandum on May 6 instructing Voss to make the fraudulent reallocations with respect to the Buffalo division; that on May 13, Maciejewski met with Best; and that Best, within a day or two of meeting with Maciejewski, wrote a memorandum to Voss with respect to the Albany division that was in substance identical to the memorandum written by Maciejewski. Best's conduct was proven not by Maciejewski's statement of what he would ask Best to do, but rather by the direct evidence of what Best did. We see no error in the district court's admission of Maciejewski's statement against Best.229

Judge Kearse's opinion thus adopts and strongly asserts a rule in the Second Circuit conditioning admissibility of Hillman-type statements against a nondeclarant on the admission of corroborating evidence.230

229 Id. at 198-99 (emphasis added) (citations omitted).
230 Best itself stands for this proposition, although its support in prior Second Circuit cases is considerably thinner than it might appear from Judge Kearse's opinion. Indeed, the Cicale case cited by Judge Kearse in the passage quoted in the text does not support Best's holding, as the Cicale court did not reach the question of admissibility against the nondeclarant. Cicale involved the admissibility of a coconspirator's (Messina's) statements under Rule 801(d)(2)(E) to an undercover agent. United States v. Cicale, 691 F.2d 95, 97 (2d Cir. 1982). Cicale argued that there was insufficient evidence of his participation in the conspiracy to admit, against Cicale, Messina's many inculpatory statements regarding Messina's ability to provide heroin. Id. at 97-102; see United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969) (establishing the Second Circuit's Geaney standard for admission of an alleged coconspirator's statements against another as a conspirator).

Judge Winter, writing for a majority of two on this point, held that Messina's statements to the agent regarding Messina's going to see his "source" for the heroin were admissible only against Messina under Rule 803(3), and their use was not necessary to satisfy the burden needed to show that Cicale was a participant in the conspiracy:

Under Fed. R. Evid. 803(3), hearsay statements reflecting a declarant's intentions or future plans are admissible to prove subsequent acts. Were Cicale's participation in these acts proven only by such hearsay statements, a difficult issue would arise since the legislative history of Rule 803(3) in the House indicates an intent to prevent use of a declarant's statements as to future intentions to prove the acts of a third person. This would force us to join the debate about the merit and present vitality of Mutual Life Insurance v. Hillman. We need not enter that debate, however, which is fully explored in 4 J. Weinstein & M. Berger, Weinstein's Evidence P 803(3)(04)-(05) (1981), for, while Messina's statements prove the nature of the transaction he was planning, Cicale's participation in that transaction is proven by independent evidence.

... Here, while Messina's statement indicates that he is about to engage in an illicit drug transaction involving another, Cicale's involvement is proven by independent non-hearsay evidence. That the nature of the transaction necessarily entailed the involvement of third parties surely does not limit use of Messina's
The United States District Court for the Southern District of New York, applying the rule as stated in Best, denied the government’s in limine motion to admit testimony to the statement of a homicide victim, Masella, that “he was travelling to or was then located in, Brooklyn,” for a meeting with “Steve,” when offered to prove what Steve did.\textsuperscript{231} As explained by District Judge McKenna:

\begin{quote}
statements to prove Messina’s own acts. \textit{Statements by the declarant that he intends to carry out a plan are clearly admissible under 803(3), and, if a third party’s participation is proven by independent evidence, the Hillmon issue does not arise.}
\textit{Cicale, 691 F.2d at 103-04 (emphasis added) (footnote and citations omitted).}
\end{quote}

District Judge Ward, dissenting from this part of the opinion, would have squarely addressed the Hillmon issue and would have held that Messina’s statements regarding meeting his “source” were inadmissible against Cicale under Rule 803(3); he thus would have remanded for the trial judge to consider whether the evidence—absent those statements—was sufficient to prove Cicale’s participation in the conspiracy. \textit{Id. at 107, 110 (Ward, J., concurring in part and dissenting in part). Judge Ward wrote:}

\begin{quote}
Rule 803(3) makes declarations of intention admissible to prove only the declarant’s future conduct, and not (as had been allowed, prior to the adoption of the Federal Rules of Evidence, under the doctrine set forth in \textit{Mutual Life Insurance Co. v. Hillmon}) to prove the future conduct of another person. Under Rule 803(3), then, while Messina’s six statements to Garcia were arguably admissible, with a limiting instruction, against Messina \ldots they remained inadmissible hearsay as to Cicale.
\textit{Id. at 109 (footnote and citations omitted).}
\end{quote}

Judges Winter and Ward agreed that the Second Circuit had previously “declined to rule whether Rule 803(3) limits” the Hillmon doctrine on this point. \textit{Id. at 104 (majority opinion); id. at 109 n.2 (Ward, J., dissenting) (citing United States v. Mangan, 575 F.2d 32, 42 n.12 (2d Cir. 1978); United States v. Moore, 571 F.2d 76, 82 n.3 (2d Cir. 1978); United States v. Stanchich, 550 F.2d 1294, 1297-98 n.1 (2d Cir. 1977)).}

The other cases cited in Best—United States v. Nersesian, 824 F.2d 1294, 1325 (2d Cir. 1987); United States v. Delvecchio, 816 F.2d 859, 862-63 (2d Cir. 1987); United States v. Badalamenti, 794 F.2d 821, 825-26 (2d Cir. 1986); and United States v. Sperling, 726 F.2d 69, 73-74 (2d Cir. 1984)—were also conspiracy cases.

\textit{Badalamenti} provides little support for Best, as the \textit{Badalamenti} court explicitly pointed out that the trial judge there had stated that he was admitting an informant’s statement that he was going to meet a codefendant (who pled guilty during the trial) to obtain heroin only to show the informant’s “own future intent”; there was independent evidence that the appellant-codefendant met the informant, which then, the government argued, “linked” the statement to that defendant’s conduct. \textit{Badalamenti, 794 F.2d at 825-86. The court of appeals upheld the district court’s ruling and the resulting conviction.}

\textit{Nersesian, Delvecchio, and Sperling provide stronger support for Best. They involve the question of whether there was adequate substantive proof “by a fair preponderance of the evidence independent of hearsay utterances” of a nondeclarant defendant’s participation in the charged conspiracy. Sperling, 726 F.2d at 73-74. In Sperling, the evidence that a declarant had said she was going to meet her heroin “source” was held properly considered on this fact because there was independent corroborating evidence. Id. Nersesian and Delvecchio both stated that “declarations of intention or future plans are admissible against a nondeclarant when they are linked with independent evidence that corroborates the declaration.” Nersesian, 824 F.2d at 1325; Delvecchio, 816 F.2d at 862-63 (holding evidence inadmissible in absence of independent evidence that Delvecchio participated in the meeting declarant had said he attended). But, in the end, these cases seem to conflate Rule 803(3) and Rule 801(d)(2)(E) analyses. But see infra note 233.}

The government's position [was] that Masella's "statements can be utilized to prove not only that Masella acted in conformity with his own intentions—that he in fact went to Brooklyn to meet 'Steve' to pick up money—but also as proof that the person believed by Masella to be 'Steve' in fact met Masella in Brooklyn."232

Judge McKenna found insufficient admissible, independent evidence that "Steve" or someone posing as "Steve" had met Masella.233 For that reason, he held that "the Masella statements are admissible under Rule 803(3) to prove [only] that Masella intended to, and did, go to Brooklyn, but not that he intended to, or did, meet "Steve.""234

This compromise approach to resolution of the Hillman third-person debate—admitting the evidence to help to prove the nondeclarant-accused’s subsequent conduct only if there is corroborating evidence of that conduct—has much to recommend it in terms of fairness to both parties. The prosecution does not suffer the loss of often invaluable and irreplaceable evidence, which the restrictive House approach would deny it.235 And the requirement of significant,

232 Id. at *2.
233 Id. at *2-3. Judge McKenna asserted:

[T]he government argues that the Court can consider [inadmissible hearsay] in connection with the issue of the admissibility pursuant to Fed. R. Evid. 803(3) of the Masella statements at issue, because "in considering whether proffered evidence is admissible, the Court is not bound by the Rules of Evidence and may consider hearsay evidence in making preliminary determinations as to admissibility."

The government's argument, however, misconceives the requirement of Best. Best, and the cases which it follows, do not require a preliminary determination of some fact (e.g., the existence of a conspiracy as a condition to the admission of coconspirator statements) as a condition to the admissibility of a statement under Rule 803(3). The case law, rather, requires corroboration by "independent evidence." That evidence may be "circumstantial," but there is no indication in the cases that the corroboration required by Best can be supplied by inadmissible evidence known to the Court but not the jury.

Id. (citations and footnotes omitted).
234 Id. at *3.
235 See Mut. Life Ins. Co. of N.Y. v. Hillmon, 145 U.S. 285, 296 (1892) ("Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent, explanatory, or corroborative evidence, it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury." (quoting Travellers' Ins. Co. of Chicago v. Mosley, 75 U.S. 397, 404-405 (1869))); see also Zumbado v. State, 615 So.2d 1223, 1235 (Ala. Crim. App. 1993) (prosecutor referred to "Fatal Journey Doctrine"); State v. Vestal, 180 S.E.2d 755, 769 (N.C. 1971) (necessity established by death of declarant); 2 MCCORMICK ON EVIDENCE, supra note 46, § 275 ("[I]n virtually all the cases admitting the statements of intent as proof of the doing of the intended act, the declarant has been unavailable, and it may well be that the resulting need for the evidence influenced the courts . . . ."); McFarland, supra note 86, at 56 (arguing that declarant's unavailability should be required for admissibility of Hillmon-type statements); supra note 57.
corroborating evidence ensures against the possible conviction of an accused on too slim a record. But before embracing the Second Circuit’s compromise, one must consider whether it will survive constitutional scrutiny.

IV. CONSTITUTIONALITY OF THE SECOND CIRCUIT’S APPROACH TO ADMITTING THE EVIDENCE AGAINST A NONDECLARANT ACCUSED, AND A PROPOSED REVAMPING OF THAT APPROACH UNDER A NEWLY INVIGORATED DUE PROCESS REVIEW

The first issue that must be explored—one that appears not to have been raised in the case law thus far—is the Second Circuit’s consideration of corroborating evidence in determining the reliability, for the purpose of admissibility, of a statement under Rule 803(3). This was unconstitutional, pre-Crawford, under the Supreme Court’s 1990 holding in Idaho v. Wright. Wright was decided under the Confrontation Clause framework that had been established in 1980 in Ohio v. Roberts.

If hearsay is offered against a criminal accused today, Crawford and its progeny govern the Confrontation Clause analysis. They subject only “testimonial” hearsay to Confrontation Clause scrutiny. Post-Crawford, the Confrontation Clause poses no bar to the admission against a criminal defendant of nontestimonial hearsay. The remaining constitutional parameters as to all evidence, including nontestimonial hearsay, are those of the due process clause. In this author’s opinion, Wright’s constraints as to how to determine reliability for admissibility remain until and unless Wright is overruled, but as part of the due process guarantee, which now assumes a much more prominent position than it enjoyed pre-Crawford. This author believes that the Second Circuit’s current approach is vulnerable under Wright, but that the desirable aspects of the Second Circuit’s approach may be achieved in a clearly constitutional manner either by codifying a requirement of corroboration in addition to reliability, or by shifting the corroboration requirement from the determination of admissibility to the determination of sufficiency of evidence at the close of the case.

236 497 U.S. 805 (1990); see also infra Part IV.A.
237 See infra text accompanying notes 243-50.
238 See supra notes 4-5 and accompanying text.
239 See supra notes 4-5 and accompanying text.
240 See supra notes 4-5 and accompanying text.
241 See infra Part IV.B.
242 See infra notes 319-28 and accompanying text.
A. Idaho v. Wright and Its Pre-Crawford Implications for the Second Circuit’s Application of Rule 803(3)

In *Wright*, Justice O’Connor, writing for a majority of five well before *Crawford*, held that corroborating evidence could not be constitutionally considered in determining whether hearsay statements by a two-and-a-half-year-old child to a pediatrician were sufficiently reliable so that their admission complied with the Confrontation Clause analysis required by then-applicable *Roberts*. Under *Roberts*, hearsay could be admitted against a criminal accused if (1) it were necessary and (2) it either fell within a “firmly rooted” hearsay exception or it bore “particularized guarantees of trustworthiness.”

Because the child’s statement in *Wright* had been admitted under the non-“firmly rooted” residual hearsay exception of Idaho Rule of Evidence 803(24), its proponent had to show “particularized guarantees of trustworthiness.” The Court held that these could not be shown by corroborating evidence.

Moreover, Justice O’Connor stated that the rule precluding the consideration of corroborating evidence as to the admissibility of the hearsay was identical for both the non-firmly rooted residual exception and for specific, “firmly rooted” hearsay exceptions. She reasoned:

> The circumstantial guarantees of trustworthiness on which the various specific exceptions to the hearsay rule are based are those that existed at the time the statement was made and do not include those that may be added by using hindsight. We think the “particularized guarantees of trustworthiness” required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief. . . .

> [W]e are unpersuaded by the State’s contention that evidence corroborating the truth of a hearsay statement may properly support a finding that the statement bears “particularized guarantees of trustworthiness.” *To be admissible under the Confrontation Clause,*

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244 Ohio v. Roberts, 448 U.S. 56 (1980).
245 *Id.* at 65-66 (holding that in order for hearsay to be properly admitted over a Confrontation Clause objection, necessity for the hearsay must be shown by the unavailability of the witness, and reliability must be shown either by the fact that “the evidence falls within a firmly rooted hearsay exception” or by “a showing of particularized guarantees of trustworthiness”).
246 *Wright*, 497 U.S. at 820.
247 *Id.* at 820, 822-23.
248 *Id.*
hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. A statement made under duress, for example, may happen to be a true statement, but the circumstances under which it is made may provide no basis for supposing that the declarant is particularly likely to be telling the truth—indeed, the circumstances may even be such that the declarant is particularly unlikely to be telling the truth. In such a case, cross-examination at trial would be highly useful to probe the declarant’s state of mind when he made the statements; the presence of evidence tending to corroborate the truth of the statement would be no substitute for cross-examination of the declarant at trial.

In short, the use of corroborating evidence to support a hearsay statement’s “particularized guarantees of trustworthiness” would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial, a result we think at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility. Indeed, although a plurality of the Court in Dutton v. Evans looked to corroborating evidence as one of four factors in determining whether a particular hearsay statement possessed sufficient indicia of reliability, we think the presence of corroborating evidence more appropriately indicates that any error in admitting the statement might be harmless, rather than that any basis exists for presuming the declarant to be trustworthy.249

Because Idaho had not argued that, if the admission of the child’s statement were error, it was harmless, the majority reversed the appealed conviction without inquiring into whether the error was harmless.250 But Justice O’Connor also argued that jurors might be unskilled in assessing the independent reliability, or lack thereof, of partially corroborated hearsay. She stated:

Corroboration of a child’s allegations of sexual abuse by medical evidence of abuse, for example, sheds no light on the reliability of the child’s allegations regarding the identity of the abuser. There is a

249 Id. (emphasis added) (footnote omitted) (citations omitted) (internal quotation marks omitted). On the issue of harmless error, compare, for example, United States v. Wright, 540 F.3d 833, 843 (8th Cir. 2008) (holding that admission of child’s statements to others, identifying defendant as her molester, was harmless even if error, where it was cumulative evidence and consistent with her trial testimony), with Gregory v. North Carolina, 900 F.2d 705, 707-10 (4th Cir. 1990) (holding reversible error for state court to have admitted inadequately corroborated hearsay statement by three-year-old girl made in June 1984, when defendant was charged with having sexually abused the girl in September 1984). But see id. at 710-11 (Wilkinson, J., dissenting) (arguing that correcting holding would have been that corroborating circumstances need not all be “contemporaneous” with the statements).

250 Wright, 497 U.S. at 827.
very real danger that a jury will rely on partial corroboration to mistakenly infer the trustworthiness of the entire statement. 251

Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Blackmun, strenuously dissented from the majority’s holding precluding the consideration of corroborating evidence in evaluating the reliability of proffered hearsay:

The majority errs, in my view, by adopting a rule that corroboration of the statement by other evidence is an impermissible part of the trustworthiness inquiry. The Court’s apparent ruling is that corroborating evidence may not be considered in whole or in part for this purpose. This limitation, at least on a facial interpretation of the Court’s analytic categories, is a new creation by the Court; it likely will prove unworkable and does not even square with the examples of reliability indicators the Court itself invokes; and it is contrary to our own precedents.

I see no constitutional justification for this decision to prescind corroborating evidence from consideration of the question whether a child’s statements are reliable. It is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence. In the context of child abuse, for example, if part of the child’s hearsay statement is that the assailant tied her wrists or had a scar on his lower abdomen, and there is physical evidence or testimony to corroborate the child’s statement, evidence which the child could not have fabricated, we are more likely to believe that what the child says is true. Conversely, one can imagine a situation in which a child makes a statement which is spontaneous or is otherwise made under circumstances indicating that it is reliable, but which also contains undisputed factual inaccuracies so great that the credibility of the child’s statements is substantially undermined. Under the Court’s analysis, the statement would satisfy the requirements of the Confrontation Clause despite substantial doubt about its reliability. Nothing in the law of evidence or the law of the Confrontation Clause countenances such a result; on the contrary, most federal courts have looked to the existence of corroborating evidence or the lack thereof to determine the reliability of hearsay statements not coming within one of the traditional hearsay exceptions. . . . In sum, whatever doubt the Court has with the weight to be given the corroborating evidence found in this case is no justification for rejecting the considered wisdom of virtually the entire legal community that corroborating evidence is relevant to reliability and trustworthiness. 252

251 Id. at 824.
252 Id. at 827, 828-31 (Kennedy, J., dissenting, joined by Rehnquist, C.J., White and Blackmun, JJ.) (footnote omitted).
Despite this strong dissent by four members of the Court, and considerable criticism by commentators, Wright has not been overruled.

Where does this leave the Second Circuit's approach as articulated in Best? Is it constitutionally permissible for a court to condition its finding of reliability, and thus admissibility under Rule 803(3), on the existence of independent evidence corroborating the third person's subsequent conduct consonant with the declarant's forward-looking statement of intention?

In this author's opinion, pre-Crawford, the Wright majority's rationale clearly precluded, as a constitutional matter, the consideration of corroborating evidence with regard to the reliability of Rule 803(3)

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Although the use of corroborating evidence is at odds with the holding in Idaho v. Wright, the long term viability of that decision is questionable. First, Wright was a 5-4 decision, and two Justices from the majority have since retired. Second, "often corroborating evidence is strong proof of important points in a statement, and Wright's approach to the difficulties in this area is not promising." Third, as the dissenters in Wright argued, there is "no difference between the factors that the Court believes indicate 'inherent trustworthiness' and those, like corroborating evidence, that apparently do not." Fourth, earlier Supreme Court decisions had used corroborating facts in testing reliability. Finally, some scholars have suggested that Wright's "bar against considering independent corroborative evidence should be dropped."

Id. (footnotes omitted). Barbara Horan asserts:

Hearsay offered to prove a state of mind should be consistent with external facts and events that are presupposed or implied by that state of mind. For example, evidence of a businessman's intent to interfere with a competitor's contract with his own supplier of cheap materials, offered in the form of out-of-court declarations of his desire to best his competitors, could can [sic] be tested against other testimony showing he was unfamiliar with the competitor in question.

Barbara L. Horan, Using Hearsay to Establish State of Mind: Rule 803(3) in Action, PROOF, Winter 2009, at 8, 11; see also Timothy W. Murphy, Corroboration Resurrected: The Military Response to Idaho v. Wright, 145 MIL. L. REV. 166, 167 (1994) ("Military courts, in particular, have aggressively sought to limit Wright's application and resurrect the use of corroborative evidence in assessing the admissibility of residual hearsay.")]. Gordon Van Kessel opines:

[C]orroboration should not be limited by the Idaho v. Wright standard of "indicia of reliability by virtue of [the statement's] inherent trustworthiness." In terms of hearsay reliability, it is not productive to distinguish between intrinsic and extrinsic corroborating factors. In fact, evidence extrinsic to the circumstances surrounding the making of the statement may be stronger proof of statement reliability, and, ultimately, verdict integrity, than the context in which the statement was made. The statement of a kidnap victim describing the interior of defendant's home or of a sexual assault victim describing unique private physical characteristics of the accused would be highly reliable if the statement were proven to conform to the actual facts and the declarant was shown to be incapable of knowing these facts by other means. Such probative hearsay should not be excluded merely because corroboration was not based entirely on the context in which the statement was made.


forward-looking statements of intent like those under discussion here, offered against a nondeclarant accused; bootstrapping their admission in such a way would violate the Confrontation Clause under Ohio v. Roberts, as applied in Idaho v. Wright. In 2004, however, Crawford overruled Roberts’ Confrontation Clause analysis and instituted a new paradigm under which the Confrontation Clause applies only to “testimonial” statements.

B. Post-Crawford Implications: The Ascending Importance of the Due Process Clause

How, if at all, does it matter that Wright was decided under the Confrontation Clause, during the reign of Ohio v. Roberts and before Crawford? This author concludes that it matters only as to testimonial statements, as these are the only ones to which the confrontation right now applies. In the author’s opinion, the lower courts properly continue to apply the reliability analysis of Roberts as to the admissibility of nontestimonial statements. Thus, until and unless either Roberts or Wright is overruled as to nontestimonial statements, Wright also continues to be good law as to how to assess the reliability of nontestimonial hearsay.

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255 The Wright majority’s rationale is not limited to residual hearsay, but applies also to specific, firmly rooted hearsay exceptions. See supra notes 248-48 and accompanying text.

256 See supra notes 4-5 and accompanying text.

257 See supra notes 85-97 and accompanying text.


259 See Capowski, supra note 253.

260 See Albrecht, 485 F.3d at 132-35 (finding Wright survives Crawford as to nontestimonial hearsay); Capano, 547 F. Supp. 2d at 391 n.6, 395-96 (applying Wright factors in evaluating
important 1992 pre-Crawford concurring opinion by Justice Thomas, joined by Justice Scalia in *White v. Illinois*, this must now be accomplished under a due process lens rather than under the Confrontation Clause.

In 1970, in his concurrence in *Dutton v. Evans*, Justice Harlan had said:

> The task [of examining the constitutionality of evidence rules] is far more appropriately performed under the aegis of the Fifth and Fourteenth Amendments’ commands that federal and state trials, respectively, must be conducted in accordance with due process of law [than under the Confrontation Clause of the Sixth Amendment]. It is by this [due process] standard that I would test federal and state rules of evidence.

[FN4.] Reliance on the Due Process Clauses would also have the virtue of subjecting rules of evidence to constitutional scrutiny in civil and criminal trials alike...[T]he Confrontation Clause, which applies only to criminal prosecutions, was never intended as a constitutional standard for testing rules of evidence.

Building on Justice Harlan’s thoughts, Justices Thomas and Scalia, who were in the vanguard of the current Court’s ultimate move away from Roberts’ approach to the Confrontation Clause, straightforwardly asserted in *White* in 1992: “Reliability is more properly a due process concern. There is no reason to strain the text of the Confrontation Clause to provide criminal defendants with a protection that due process already provides them.”

In 2004, *Crawford* finally tolled the death knell for Roberts with regard to its application of the Confrontation Clause. *Davis* and *Bockting* made clear that, under the new regime, the Confrontation Clause applies only to “testimonial statements,” i.e., those made by “witnesses against” the accused, within the meaning of the Sixth
Amendment. Justice Scalia, who authored the Court’s opinions in Crawford and Davis, stressed that this was a corrective measure, taking us off the wrong path we had travelled under Roberts as to the confrontation right, and returning us to the framers’ intended meaning in 1789, when the Sixth Amendment was ratified.

Having taken away the protective embrace of the Confrontation Clause as to nontestimonial hearsay offered against an accused, the Crawford line of opinions has not yet addressed what constitutional safeguards, if any, remain as to the admissibility and sufficiency of such hearsay. We are so used to having the Confrontation Clause do the heavy lifting in protecting a criminal accused from the admission of unreliable hearsay against her that our initial reaction was one of almost panicked dismay: Could the Court be saying that there is no constitutional safeguard against the conviction of a person when based on unreliable nontestimonial hearsay?

To ask the question would seem to answer it. Could a conviction based on unreliable hearsay have been constitutionally obtained? Here is where Justice Thomas’s concurrence in White comes to the fore: “Reliability is ... a due process concern”; due process provides such “protection” by definition.

He and Justice Scalia summon us to pull the due process clause out into the daylight and dust it off. The Fifth Amendment provides: “No person shall ... be deprived of life, liberty, or property, without due process of law ....” The Fourteenth Amendment provides in pertinent part: “No State shall ... deprive any person of life, liberty, or property, without due process of law ....” As Justice Harlan argued, these clauses are well suited for examining the constitutionality of evidence matters, as, unlike the Confrontation Clause, they apply to both civil and criminal proceedings.

Under Crawford and its progeny, the Confrontation Clause applies only to “testimonial” hearsay offered against a criminal accused. The
states are free to devise evidence rules as they like, but if they improperly admit testimonial hearsay against an accused without complying with Crawford's requirements, they will violate the confrontation right. Before Crawford, Roberts and its progeny, including Wright, applied equally to testimonial and nontestimonial hearsay. The Crawford line has pulled testimonial hearsay out from under the Roberts tent. Is the tent still standing as to nontestimonial hearsay?

The lower courts think so. They continue to apply Roberts to the admissibility of nontestimonial hearsay. Although the cases so far have been criminal, they (perforce of Crawford) were not decided under the Confrontation Clause. From where, then, comes the constitutional authority to support Roberts in this new iteration? The White concurrence tells us it is from the due process clause.

Just as before Crawford, the remedy of reversal for a new trial in this context is generally available only if the trial court's evidentiary error causes "substantial prejudice" to the accused. In effect, the appellate court looks at whether the improperly admitted evidence was likely to have affected the fact-finder's decision.

There have been exceptions to this rule. Where the government's actions were egregious, the convictions have been reversed, regardless of other, even overwhelming, evidence of the defendants' guilt. The Supreme Court has held that the admission of a coerced (and thus unreliable) confession violates the accused's due process right, as does the admission of an identification of the accused obtained through overly suggestive methods (making it unreliable). The Court has also held that the prosecution's deliberate, knowing use of perjured testimony violates due process.

Pre-Crawford, in the criminal context, the Confrontation Clause was the defense against unreliable hearsay being used against an accused. The due process clause was invoked only when the

274 Crawford v. Washington, 541 U.S. 36, 68 (2004) ("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 does Roberts, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.").

275 See supra note 258.

276 See supra text accompanying note 263.

277 See supra note 268.


279 E.g., Manson v. Brathwaite, 432 U.S. 98, 105-06, 114 (1977) ("The standard, after all, is that of fairness required by the Due Process Clause of the Fourteenth Amendment. . . . [R]eliability is the linch pin in determining the admissibility of identification testimony . . . ."); Foster v. California, 394 U.S. 440, 442-43 (1969) (unduly suggestive lineup).

Confrontation Clause could not be used, as in the examples given in the preceding paragraph.

The appellate courts also relied on due process principles to review decisions in which the Confrontation Clause was altogether inapplicable: sentencing hearings,281 probation revocation hearings,282 and administrative law proceedings.283 In each of these arenas pre-Crawford case law establishes that, although hearsay may be admitted because the formal rules of evidence do not apply,284 the due process clause requires that the decisions be reversed if the fact-finder necessarily based its decision on unreliable hearsay.285

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281 E.g., United States v. Roche, 415 F.3d 614, 618 (7th Cir. 2005) (“[T]he relevant provision at sentencing is the due process clause, not the confrontation clause . . . .”).
282 E.g., United States v. Aspinall, 389 F.3d 332, 342-43 (2d Cir. 2004) (holding due process requirement applies to probation revocation proceedings, but Crawford does not). In United States v. Frazier, 26 F.3d 110, 114 (11th Cir. 1994), a pre-Crawford opinion, the court stated:

Defendants involved in revocation proceedings are entitled to certain minimal due process requirements. Among these minimal requirements is the right to confront and cross-examine adverse witnesses. . . . Thus, in deciding whether or not to admit [reliable] hearsay testimony, the court must balance the defendant’s right to confront adverse witnesses against the grounds asserted by the government for denying confrontation.

Id. at 114 (citations omitted).
283 See infra note 285.
284 See, e.g., In re Billy W., 875 A.2d 734, 749-51 (Md. 2005) (holding that, although the rules of evidence do not “strictly apply” in certain kinds of proceedings, including juvenile disposition and permanency planning hearings, sentencing hearings, probation revocation hearings, and administrative hearings, proponent must demonstrate that “evidence proffered for admission is sufficiently reliable and probative prior to its admission”; holding further no error in admitting reliable hearsay during permanency planning proceeding regarding child custody); Bethlehem Steel Co. v. Ziegenfuss, 49 A.2d 793, 798 (Md. 1946) (finding that reliable hearsay admissible before Workers’ Compensation Commission, even if it does not fit within a recognized exception to the hearsay rule); see also Richardson v. Perales, 402 U.S. 389 (1971) (holding that procedural due process requirements in a social security disability claim hearing were not violated by reliance upon written reports of nontestifying physicians, when claimant had not availed himself of his right to subpoena and cross-examine physicians).
285 See, for example, Basco v. Machin, 514 F.3d 1177, 1882-83 (11th Cir. 2008), in which the Court of Appeals for the Eleventh Circuit applied the “substantial evidence” standard in reviewing an administrative hearing decision, and found that it was not met under the facts of the case. The court held:

Although the rules of evidence are not strictly applied in administrative hearings, there are due process limits on the extent to which an adverse administrative determination may be based on hearsay evidence. As was held in U.S. Pipe and Foundry Company v. Webb, “hearsay may constitute substantial evidence in administrative proceedings as long as factors that assure the ‘underlying reliability and probative value’ of the evidence are present.” The reliability and probative force of such evidence depend on “whether (1) the out-of-court declarant was not biased and had no interest in the result of the case; (2) the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant; (3) the information was not inconsistent on its face; and (4) the information has been recognized by courts as inherently reliable.”

Id. (citations omitted). See also United States v. Robinson, 482 F.3d 244 (3d Cir. 2007), where the Court of Appeals for the Third Circuit asserted:
The fact that the hearsay would not have been admissible under the rules of evidence applicable to trials on the merits is not sufficient to find it unreliable.\footnote{See supra note 284.} In these contexts, courts have looked not only at the circumstances under which the hearsay statements were made, but also at corroborating or contradicting evidence to help evaluate both (1) whether the admitted hearsay was reliable, and (2) whether (a) the hearsay was a necessary part of the fulcrum that supported the fact-finder's decision, or (b) even if not a necessary part, the fact-finder clearly relied on it, rather than on other evidence which did not suffer from the same unreliability.\footnote{See, for example, Chambers v. Mississippi, 410 U.S. 284, 294, 300-02 (1973), where the Supreme Court held it was reversible error under due process clause to preclude defendant from}

Prosecutors, of course, may not introduce any and all hearsay testimony at a sentencing proceeding. The admission of hearsay statements in the sentencing context is subject to the requirements of the Due Process Clause. Under the precedent of this Court, hearsay statements must have some "minimal indicum of reliability beyond mere allegation." \footnote{Id. at 246-47 (emphasis added); see Cotto v. Herbert, 331 F.3d 217 (2d Cir. 2003) (basing verdict on unreliable evidence violates the losing party's due process right). In United States v. Kikumura, 918 F.2d 1084 (3d Cir. 1990), the Court of Appeals for the Third Circuit explained:} In Baylin, we held [generally] that "as a matter of due process, factual matters may be considered as a basis for sentence only if they have some minimal indicum of reliability beyond mere allegation." \footnote{In Baylin, we held [generally] that "as a matter of due process, factual matters may be considered as a basis for sentence only if they have some minimal indicum of reliability beyond mere allegation." [United States v. Baylin,] 696 F.2d [1030,] [1040 (3d Cir. 1982) . . . . Nonetheless, we believe that the Baylin standard is not sufficiently exacting to be applied in cases, such as this one, where the sentencing hearing can fairly be characterized as a "tail which wags the dog of the substantive offense," McMillan [v. Pennsylvania], 477 U.S. [79], [1886].] In such a situation, we think that due process requires more than a "minimal indicum of reliability," Baylin, 696 F.2d at 1040 (emphasis added). Instead, the court should examine the totality of the circumstances, including other corroborating evidence, and determine whether the hearsay declarations are reasonably trustworthy. Id. at 1102-04 (emphasis added) (footnotes omitted), overruled on other grounds, United States v. Grier, 449 F.3d 558 (3d Cir. 2006); see also Thompson v. State, 846 A.2d 477 (Md. Ct. Spec. App. 2004) (reversing trial court's revocation of probation based on transcripts of witnesses' testimony at defendant's murder trial when State made inadequate showing of good cause to forego live testimony and trial court had not found the hearsay to be reasonably reliable); Travers v. Balt. Police Dep't, 693 A.2d 378, 386 (Md. Ct. Spec. App. 1997) (noting that although the rules of evidence are relaxed in administrative proceedings, the evidence adduced "must demonstrate sufficient reliability and probative value to satisfy the requirements of procedural due process"); Kade v. Charles H. Hickey Sch., 566 A.2d 148 (Md. Ct. Spec. App. 1989) (reversing agency's decision that was based on unreliable hearsay); Kurschner v. City of Camden Planning Comm'n, 656 S.E.2d 346, 349-52 (S.C. 2008) (upholding as not violative of due process planning commission's decision on a matter as to which it had discretion; asserting that due process does not require that the hearsay rule have been applied; and upholding the standard of review of affirming the decision as long as there was "any evidence" to support it).}
At the very least, this same level of due process protection must be provided in the criminal context. It is inconceivable that the Court would provide less protection to a criminal accused under the due process clause than to a party in a civil or administrative proceeding. The Court’s precedent points clearly in the direction of extra protections, rather than fewer, for an accused. Hence the Court held in In re Winship that the Constitution requires that the criminal prosecution bear the heaviest burden of persuasion—that of “beyond a reasonable doubt”—in order to win a conviction. This burden reflects our judgment that we would rather err on the side of erroneous

proving through his witnesses exculpatory hearsay statements by one witness, McDonald, against his own penal interest. The Court explained:

The hearsay statements involved in this case were originally made and subsequently offered at trial under circumstances that provided considerable assurance of their reliability. First, each of McDonald’s confessions was made spontaneously to a close acquaintance shortly after the murder had occurred. Second, each one was corroborated by some other evidence in the case—McDonald’s sworn confession, the testimony of an eyewitness to the shooting, the testimony that McDonald was seen with a gun immediately after the shooting, and proof of his prior ownership of a .22-caliber revolver and subsequent purchase of a new weapon. The sheer number of independent confessions provided additional corroboration for each.

Id. at 300 (emphasis added). See also Robinson, 482 F.3d at 246-47, in which the Court of Appeals for the Third Circuit, affirming the lower’s court decision, stated:

The District Court noted that [witness’s] [hearsay] testimony was supported by audiotapes of Robinson talking with his buyers and taped sworn statements of those buyers admitting they purchased cocaine from Robinson on multiple occasions. Considering the footprint left by this evidence, the District Court’s decision to allow the hearsay testimony was warranted. Accordingly, we affirm the sentence imposed by the District Court.

Id. Previously, in Kikumura, 918 F.2d at 1103-04 & n.21, the same court, in a due process review of sentencing, “conclude[d] that there [was] sufficient corroboration to establish that the informant’s hearsay statements [were] reasonably trustworthy, and, therefore, the district court’s consideration of the Hartman affidavit was proper.” The court also noted:

[In assessing reliability of a hearsay statement, the sentencing court’s inquiry is not limited to “circumstances that surround the making of the statement,” Idaho v. Wright, 497 U.S. 805 [] (1990). The Supreme Court’s decision in Wright involved an interpretation of the confrontation clause and is thus applicable only at trial. In contrast to Wright, at a “tail-which-wags-the-dog” sentencing hearing, the court is free, and indeed is required, to consider other evidence that substantiates the proffered hearsay statement.

Id. at 1103 n.21; see also Bailey v. State, 612 A.2d 288, 293-94 (Md. 1992) (stating that trial court should consider “the presence of any additional evidence which corroborates the proffered hearsay,” in determining whether evidence is “reasonably reliable hearsay” so that it may be admitted at probation revocation hearing).


Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeitures of life, liberty and property.

Id. at 174.
acquittals than erroneous convictions. In accordance with this philosophy, the Court held in 1973 in *Chambers v. Mississippi* that a state’s evidentiary rules precluding the accused from impeaching his own witness and from introducing evidence of that witness’s pretrial statements in which he asserted his guilt of the charged crime, deprived the accused of his due process right.289

Again, in a 2006 capital case, *Holmes v. South Carolina*,290 the Court held that a state evidentiary ruling was unconstitutional. The South Carolina decision had precluded an accused from offering “proof of third-party guilt if the prosecution ha[d] introduced forensic evidence that, if believed, strongly support[ed] a guilty verdict.”291 Justice Alito, writing for a unanimous Court, quoted the Court’s 1986 (Roberts era) decision in *Crane v. Kentucky* that, “[w]hether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense.””292 Justice Alito did not specify on which provision of the Constitution the *Holmes* Court relied.293 But his reasoning points not only to the defendant’s right to compulsory process to call witnesses in his own behalf, but also to due process. This conclusion is supported by the fact that he points out that the South Carolina Supreme Court found the prosecution’s forensic evidence to be so “strong”294 that the defense’s exculpatory evidence of a third-party’s guilt had little probative value, even though the defense had extensively challenged the credibility of the forensic evidence. Thus, the state appellate court had arrogated to itself a determination of the credibility of the evidence, which rightfully fell to the fact-finder.295 That error is one implicating principles of due process.

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289 *Chambers*, 410 U.S. at 294-303.
291 *Id.* at 321.
292 *Id.* at 324 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (reversing conviction of a sixteen-year-old who had been precluded from presenting evidence before the jury as to the circumstances under which his confession had been obtained, so as to impact the weight, if any, it should be given)).
293 See *Holmes*, 547 U.S. at 321 (“This case presents the question whether a criminal defendant’s federal constitutional rights are violated by an evidence rule under which the defendant may not introduce proof of third-party guilt if the prosecution has introduced forensic evidence that, if believed, strongly supports a guilty verdict.”).
294 *Id.* at 329.
295 *Id.* at 330. The Court explained:

[W]here the credibility of the prosecution’s witnesses or the reliability of its evidence is not conceded, the strength of the prosecution’s case cannot be assessed without making the sort of factual findings that have traditionally been reserved for the trier of fact and that the South Carolina courts did not purport to make in this case.

*Id.*
Pre-Crawford, the Supreme Court also relied on the due process clause to reverse convictions when, on the evidence presented at trial, no rational fact-finder could have found guilt.\textsuperscript{296} The cases did not involve hearsay because, at that time, \textit{Roberts} ruled that ocean. But now that Crawford has removed non-testimonial hearsay from the reach of the Confrontation Clause, this due process standard must take up the slack.

Indeed, this test of “no rational fact-finder” being able to find guilt is perfectly consonant with the existing due process standard in other contexts, which requires the reversal of decisions necessarily based on unreliable hearsay.\textsuperscript{297} It would not be “rational” to base a decision on “unreliable” hearsay.\textsuperscript{298}

One easy and familiar way for the courts to determine whether hearsay is “reliable” for due process purposes is to follow the approach they have hewn for decades: that of \textit{Roberts}. Not surprisingly, then, this is what the lower courts are doing,\textsuperscript{299} without explicitly relying on the due process clause.

This approach is consistent with early articulations of due process values by the Supreme Court.\textsuperscript{300} The concept is sufficiently malleable\textsuperscript{301} to achieve this goal. Certainly, if an administrative decision based on unreliable hearsay violates the losing party’s due process rights, so does a criminal conviction based on unreliable hearsay. All that we await is for the Supreme Court to explicitly hold that \textit{Roberts} continues to apply as to what is reliable hearsay from a due process perspective.

The next question will be whether \textit{Wright} has legs. It was a close decision to begin with,\textsuperscript{302} when decided under the Confrontation Clause, and corroborating evidence has generally been considered when

\begin{footnotesize}
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\item \textsuperscript{296} Jackson v. Virginia, 443 U.S. 307, 319, 323 (1979) (“[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.... [The question of sufficiency of the evidence is] central to the basic question of guilt or innocence.”); see Herrera v. Collins, 506 U.S. 390, 401 (1993) (applying, again, Jackson standard to review of a habeas corpus petition).
\item \textsuperscript{297} See supra notes 281-86 and accompanying text.
\item \textsuperscript{298} Cf Dowling v. United States, 493 U.S. 342, 352-53 (1990) (holding that due process clause did not bar prosecution’s use of evidence of act as to which defendant had previously been acquitted, when the evidence was “at least circumstantially valuable in proving petitioner’s guilt” of the charged crime; disagreeing with petitioner’s contention that the evidence was “inherently unreliable”).
\item \textsuperscript{299} See supra note 258.
\item \textsuperscript{300} See Stein, supra note 24, at 86-87 & nn.115-31 (“Early on, the Supreme Court.... interpreted the scope of due process broadly.... Contemporary constitutional jurisprudence reaffirms this understanding of due process [as guaranteeing ‘fundamental’ fairness].”).
\item \textsuperscript{301} See id. at 89-90, 105 (describing the due process guarantee as “a floating constitutional threat”).
\item \textsuperscript{302} See supra notes 252-52 and accompanying text.
\end{itemize}
\end{footnotesize}
determining whether a litigant has been deprived of due process. Will the change from the application of the confrontation right to the application of the due process clause alter the outcome? It could. First, that change gives the Court a premise on which to jettison Wright altogether, in which case courts could condition a finding of reliability, for admissibility purposes, on the existence of corroborating evidence.

Second, even if Wright is not overruled outright, but reincarnated in a due process context, that context changes the analysis. In a criminal trial, a violation of the Confrontation Clause is reversible error, unless the government adequately defends the verdict by persuading the appellate court "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." The pre-Crawford due process cases arise outside the Confrontation Clause context, and the burden has apparently been on the party attacking the verdict to show that principles of fundamental fairness have been violated. Under this approach, there is no error of constitutional dimension until the party complaining of a due process violation meets that standard. Applying the traditional burden allocation in due process challenges to the erroneous admission of unreliable, but nontestimonial, hearsay against a criminal accused shifts the burden to the accused. Although the accused retains some constitutional protection, this burden-shifting is a—perhaps unintended—consequence of Crawford that, unless altered, could result in a significant lowering of protection against unreliable convictions when based on nontestimonial hearsay.

C. Available Choices as to the Application of Rule 803(3), Their Drawbacks and Advantages, and a Proposal

Wright's continuing viability at present means that we cannot properly condition a finding of admissibility of Rule 803(3) forward-looking, nontestimonial statements as to the subsequent conduct of a nondeclarant on corroborating evidence, as the Second Circuit did in Best. What alternatives as to admissibility remain?

First, a jurisdiction could choose to follow the House Report and (1) exclude Hillmon-type statements, unless the declarant's conduct is in question; and (2) then, if it is, admit the statements only for that

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303 See supra notes 252-52, 287 and accompanying text.
305 See Stein, supra note 24 (arguing for a significant strengthening of the available constitutional protection as to admissibility and adequacy of evidence).
306 See supra note 23 and accompanying text.
307 See supra Part III.C.2; notes 259-59 and accompanying text.
limited purpose. The exclusionary rule of those jurisdictions following the House Report’s caveat has doctrinal purity, as the evidence bears increased risks of misperception and faulty memory. But it comes at too great a cost. It often excludes irreplaceable evidence of either dead or otherwise unavailable declarants, like the victim’s statements regarding her plans with Frank in Alcalde, or of coconspirator-declarants like those in Best (who will not repeat at trial incriminatory statements made during and in furtherance of the conspiracy) that could reasonably be found to be highly reliable. A variation of the first approach is possible, but morally unacceptable: paying only lip service to the House approach, and letting in the evidence that implicates the nondeclarant when the declarant’s conduct is not at issue, but giving a limiting instruction under Rule 105 that the jury may consider the evidence only as to the declarant’s intent. The limiting instruction would perform both intellectually dishonest and ineffective, and the result would be the same as in wide-open jurisdictions like the Ninth Circuit.

Second, a jurisdiction might choose to explicitly apply the Ninth Circuit’s approach in Pheaster and freely admit Hillman-type statements as to the nondeclarant’s conduct. Under this approach, the perception and memory hearsay dangers will go only to the fact-finder’s consideration in weighing the evidence, rather than to admissibility.

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308 See United States v. Pheaster, 544 F.2d 353, 376 n.13 (9th Cir. 1976). The Court of Appeals for the Ninth Circuit explained:

[O]ne treatise states that, “Use of declarations of state of mind to prove subsequent conduct might, then, be limited to proof of conduct that would not have required the substantial cooperation of persons other than the declarant.” McCormick’s Handbook of the Law of Evidence 698 (E. Cleary ed. 1972). However, that same authority also recognizes that “courts have not imposed the limitation.” Id. at 698-99.

Id. The court continued:

In his opinion for the Court in Shepard v. United States, Justice Cardozo indicated in dicta an apparent hostility to the Hillmon doctrine. In his survey of the state of mind exception, Justice Cardozo appeared to suggest that the Hillmon doctrine is limited to “suits upon insurance policies,” although the cases cited by the Court in Hillmon refute that suggestion.

Id. at 380 n.18 (citations omitted).

309 See supra note 86.

310 See supra notes 57, 235.


312 For examples of such uses of a limiting instruction, see supra note 150 and text accompanying note 162.

313 See supra note 137.

314 See supra Part III.B.

315 See supra Part III.B.

316 See Mut. Life Ins. Co. of N.Y. v. Hillmon, 145 U.S. 285, 296 (1892) (“Their truth or falsity is an inquiry for the jury.”); United States v. Pheaster, 544 F.2d 353, 376 n.14 (9th Cir. 1976) (“The possible unreliability of the inference ... is a matter going to the weight of the evidence which might be argued to the trier of fact: ...”); JACK B. WEINSTEIN & MARGARET A. BERGER, 4 WEINSTEIN’S EVIDENCE ¶ 803(3)(04) (1981) (expressing a preference for Maguire’s rule,
This approach also goes too far, as it could result in such statements, standing alone, being considered sufficient evidence of the nondeclarant’s conduct.

A third option, the compromise approach currently followed by the Second Circuit—which conditions a finding of admissibility on the existence of corroborating evidence—has the desirable effects of retaining probative, often irreplaceable, evidence without sacrificing fairness to the accused. Technically, however, it does not survive constitutional scrutiny under Idaho v. Wright\(^\text{317}\) (although a particular error might be found to be harmless).\(^\text{318}\)

But the Second Circuit’s approach can be modified in one of either two ways so as to pass constitutional muster. First, a jurisdiction could choose to codify a requirement for corroborating evidence in its version of Rule 803(3). Justice Kennedy’s dissenting opinion in Wright suggested that, despite the Court’s ruling on the constitutional issue, a requirement of corroborating evidence might be added, as a matter of state law, to hearsay categories where a state so desired.\(^\text{319}\)

The other possibility is to resequence the corroboration requirement, through the case law, by re-working the Second Circuit’s approach into two steps. This has the practical advantage of not requiring approval through the rulemaking or legislative process. Under this alternative, the trial court’s first step would be to admit a Hillmon-type statement under Rule 803(3), regardless of whether there was corroborating evidence, and permit it to be used as proof of both the declarant’s and nondeclarant’s subsequent conduct, as long as it was made absent circumstances supporting a finding of insincerity.\(^\text{320}\) If the trial court finds that nontestimonial hearsay evidence facially fits under a firmly rooted hearsay exception—and it finds Rule 803(3) to be such

which allows a statement of intent to function as part of a “larger matrix of circumstantial evidence” (citing Maguire, supra note 123, at 717)); see also 6A MARYLAND EVIDENCE, supra note 6, § 801:1 (Supp. 2009) (“[O]ne legitimately may question whether modern, well-educated jurors are likely to overvalue hearsay . . . .” (citing Roger C. Park, Visions of Applying the Scientific Method to the Hearsay Rule, 2003 MICH. ST. L. REV. 1149)); supra notes 56, 138; text accompanying note 171.

\(^{317}\) See supra notes 236-50, 257-59, and accompanying text.

\(^{318}\) See supra text accompanying note 249.

\(^{319}\) Idaho v. Wright, 497 U.S. 805, 830-31 (Kennedy, J., dissenting, joined by Rehnquist, C.J., White and Blackmun, JJ.) (“States are of course free, as a matter of state law, to demand corroboration of an unavailable child declarant’s statements . . . before allowing the statements to be admitted into evidence.”); cf. FED. R. EVID. 804(b)(3) (conditioning the admissibility of a statement that is against an unavailable declarant’s penal interest and that exculpates an accused on the presence of “corroborating circumstances clearly indicat[ing] the trustworthiness of the statement”).

\(^{320}\) This requirement is consistent both with the common law rule, see supra note 46; text accompanying note 71, the res gestae cases, see supra notes 77, 138, 145, 148, and with Wright, which requires looking at the circumstances, including spontaneity, surrounding the making of the hearsay statement, Wright, 497 U.S. at 820-22. See, e.g., Capano v. Carroll, 547 F. Supp. 2d 378, 395-96 (D. Del. 2008) (applying Wright).
an exception—under Roberts, it constitutionally may admit the evidence, even if the declarant is not available for cross-examination.

But, under this proposed approach, such statements standing alone would be insufficient evidence of the nondeclarant's conduct. Thus, at the close of the case, when the court reviews the sufficiency of the evidence to get to the trier of fact, the court would take the second step and consider the presence or absence of substantial corroborating evidence. If there is none, the party bearing the burden of persuasion

321 The Rule 803(3) exception goes well back to the res gestae exception of the common law and is generally considered "firmly rooted." Horton v. Allen, 370 F.3d 75, 85 (1st Cir. 2004); see supra Part II.A. Even the "forward looking," Hillmon-type use is apt to be considered firmly rooted. See Pheaster, 544 F.2d at 379-80 (reading the Advisory Committee note and the House Report to Rule 803(3) as concerning what was "perceived to be the prevailing common law view, namely that the Hillmon doctrine could be applied to facts such as those now before us"). If perchance it is found not to be "firmly rooted," an admissible statement would have to be found to have "particularized guarantees of trustworthiness" under the circumstances under which it was made. Ohio v. Roberts, 448 U.S. 56, 6 (1980).

322 See supra note 245 and accompanying text.

323 See United States v. Moore, 571 F.2d 76, 81-82 (2d Cir. 1978) (holding that even if forward-looking statements were properly admitted, they "are not sufficient by themselves to prove" the apparently intended act; statement by kidnapper of intent to take victim out of state was insufficient to prove interstate transportation); see also 2 MCCORMICK ON EVIDENCE, § 276 at 227, supra note 46 ("in the typical case, it is reasonable to hold that the declarations [of state of mind to prove subsequent conduct] are themselves insufficient to support the finding [that the conduct recurred] and therefore that statements of intention must be admitted in corroboration of other evidence to show the acts." (footnotes omitted)); Capowski, supra note 253, at 512 ("A corroboration requirement [for statements against interest offered by the prosecutor under Rule 804(b)(3)] would accomplish much in assuring that only hearsay or a constitutionally-reliable nature is admitted against a criminal defendant."). See also Charles R. Nesson & Yochai Benkler, Constitutional Hearsay: Requiring Foundational Testing and Corroboration Under the Confrontation Clause, 81 VA. L. REV. 149 (1995), opining:

The trouble with hearsay is that it denies the defendant the opportunity to test the evidence and denies society the condition forged by that testing. To remedy this gap of testing and conviction, we propose an interpretation of the Confrontation Clause that will limit the use of hearsay evidence to situations in which (1) the judge has made an independent foundational finding that the hearsay is competent and (2) the hearsay is independently corroborated.

Id. at 173. Similarly, Van Kessel, supra note 253, argues:

[Co]rroboration and sufficiency standards should be increased to insure verdict integrity in light of the absence of checks on the independent and unaccountable factfinder. With respect to all hearsay, whether admitted under specific or residual exceptions, the judge should require a showing of reliability by reference to its nature, the circumstances of its creation, or other evidence in the case. Moreover, a sufficiency rule should bar convictions which are based primarily on hearsay statements unless they are clearly corroborated and the judge also is convinced of defendant's guilt. With these protections, nonadversary-created hearsay generally should be admitted on behalf of both the prosecution and the defense despite the presence of traditional declarant-oriented concerns.


324 Admitting this evidence, to contribute its probative value to the total to be considered by the fact-finder, is worthwhile. See Bourjaily v. United States, 483 U.S. 171, 179-80 (1987) ("[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation
of proving the nondeclarant's conduct would have judgment entered against it. Because the due process clause forbids *basing a verdict on unreliable hearsay*, the trial court would be obligated to enter a judgment of acquittal in a prosecution's case, or an appellate court would be obligated to reverse a guilty verdict that it found was clearly based on unreliable hearsay. Corroborating evidence *may* be considered when evaluating the reliability of admitted hearsay in a *due process* context.

Under this proposed approach, a seemingly just conviction under facts such as those in *Alcalde* should be upheld. In contrast, a prosecution under facts such as those in *Pheaster* ought to result in a judgment of acquittal due to insufficiency of the evidence at the close of the case. This approach would lead to the same result as has been reached in many cases approving the admissibility of *Hillmon*-type evidence: There was abundant independent evidence of the nondeclarant's conduct in them, although most of the courts did not cite that fact as a consideration in their review. A jurisdiction would be well advised either to codify this corroboration requirement, or explicitly adopt it through case law.

prove it. The sum of an evidentiary presentation may well be greater than its constituent parts. 

... [A] piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.); cf. Wynn v. State, 718 A.2d 588, 606-07 (Md. 1998) (Raker, J., dissenting) (discussing the "doctrine of chances," which takes into account the unlikelihood of coincidence); *supra* note 287.

325 *See supra* note 285.

326 *See supra* note 287.

327 *See supra* Part III.C.1.

328 *See supra* Part III.B.

CONCLUSION

_Crawford_ and its progeny have restricted the application of the Confrontation Clause to “testimonial” hearsay. Until overruled as to nontestimonial hearsay, however, _Ohio v. Roberts_, and thus _Idaho v. Wright_, continue to apply, but now reincarnated as part of the due process guarantee, which, like an understudy taking the role of an indisposed Broadway star, is virtually untested in this context. The fairest approach regarding the admissibility of _Hillmon_-type forward-looking statements of a declarant’s intention offered to prove a nondeclarant-accused’s subsequent conduct, and one that is constitutional under _Roberts_ and _Wright_, is either to codify a requirement of corroborating evidence or to follow a new, two-step procedure under the case law.

If the case law path is taken, first the statements should be admitted (absent circumstances supporting a finding of the declarant’s insincerity) under the state of mind hearsay exception, Rule 803(3) or its state equivalent, as relevant to both the declarant’s and nondeclarant’s subsequent conduct. At the close of the trial, however, the court should decline to send the case to the jury absent the admission of some substantial evidence corroborating that the nondeclarant-accused’s subsequent conduct was as reported in the _Hillmon_-type forward-looking statement of the declarant’s intended acts.

The due process clause, previously relegated to the rear of the column, has been thrust forward to frontline action. The approaches proposed here will satisfy the requirements of the due process clause, which, post-_Crawford_, must fill the vacuum left by the removal of Confrontation Clause protection as to nontestimonial hearsay offered against an accused. Taking either of these paths will achieve two important goals. First, it will protect the prosecution from being unable to prove its case-in-chief with often invaluable, irreplaceable evidence. It will also protect the accused from the possibility of an unjust conviction on too slim a record.