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**Party Admissions in Criminal Cases:  
Should the Government Have to Eat Its Words?**

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## Party Admissions in Criminal Cases: Should the Government Have to Eat Its Words?

Anne Bowen Poulin<sup>†</sup>

### INTRODUCTION

Confidence in the justice system cannot be affirmed if any party is free, wholly without explanation, to make a fundamental change in its version of the facts between trials, and then conceal this change from the final trier of the facts.<sup>1</sup>

When the government applied for a search warrant, the agent swearing to the affidavit averred that a reliable informant reported that “Timmy” was selling drugs out of the specified house.<sup>2</sup> Now William is charged with possession of the drugs found in the basement of a house.<sup>3</sup> He claims that the drugs belong to the homeowner’s son, Timmy.<sup>4</sup> Not surprisingly, William would like to tell the jury what was in the affidavit for the search warrant.<sup>5</sup> The trial court excludes the evidence.<sup>6</sup>

Rolando is charged with murder and the State seeks the death penalty. In the first trial, the prosecution argues that the victim, a 10-year-old girl, was murdered where her body was found on the Prairie Path.<sup>7</sup> Rolando is convicted and sentenced to death on this set of facts.<sup>8</sup> After that trial, Dugan—another suspect who has no connection to Rolando—claims that he alone committed the crime and that he murdered the girl on the Prairie Path.<sup>9</sup>

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1. United States v. GAF Corp., 928 F.2d 1253, 1260 (2d Cir. 1991).
2. See United States v. Morgan, 581, F.2d 933, 934 (D.C. Cir. 1978).
3. *Id.*
4. *Id.* at 935-36.
5. *Id.*
6. *Id.* at 935-36 (holding that the statements should have been admitted).
7. See People v. Cruz, 643 N.E.2d 636, 664-65 (Ill. 1994).
8. See *id.* at 639.
9. See *id.* at 664. Dugan was not prosecuted. See *id.* at 652. See

Meanwhile, Rolando wins a new trial.<sup>10</sup> At his second trial, he calls a witness to testify to Dugan's statements, and he argues that Dugan committed the murder.<sup>11</sup> Adjusting to Rolando's defense, the prosecution alters its theory and argues that the murder occurred elsewhere.<sup>12</sup> Rolando wants to introduce the prosecutor's prior statements, letting the new jury hear that in the first trial the prosecution argued that the murder occurred exactly where Dugan claims he committed it. The trial court refuses to admit the prosecutor's statements from the first trial.<sup>13</sup> Unaware of this change in the prosecution's theory, the jury convicts Rolando again and sentences him to death.<sup>14</sup>

Should the jury sitting in a criminal case learn that a prosecutor or a law enforcement agent made statements inconsistent with the prosecution's case against the defendant? In a civil case, a party's contrary statement is generally admissible as the admission of a party opponent.<sup>15</sup> When the government is a party, however, courts often resist admitting statements of those who speak on its behalf.<sup>16</sup> Most general sources on the law of party admissions state that the statements of government agents are not admissible as party admissions in criminal cases.<sup>17</sup> Even though these sources sometimes acknowledge questions about the fairness of or justification for this application of the rule governing vicarious admissions,<sup>18</sup> courts cite these sources for the proposition that

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*generally* JIM DWYER ET AL., ACTUAL INNOCENCE 175-80 (2000) (detailing this case).

10. See *Cruz*, 643 N.E.2d at 639.

11. See *id.* at 645.

12. See *id.* at 664 (noting that the State argued Dugan was not credible).

13. See *id.* at 664-65 (holding that the trial court did not abuse its discretion by not admitting evidence due to lack of binding authority).

14. See *id.* at 639 (noting that on initial review the Illinois Supreme Court affirmed).

15. See *generally* 2 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 254, at 135-37 (5th ed. 1999) [hereinafter MCCORMICK] (noting that party opponent admissions are generally excluded from the hearsay rule).

16. See *infra* Part II.

17. See, e.g., 3 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 801.23, at 178 (5th ed. 2001) ("However in a criminal prosecution, government employees are apparently not considered agents or servants of a party-opponent for the purpose of the admissions rules."); 2 MCCORMICK, *supra* note 15, § 259, at 160 (commenting that "statements by agents of the government are often held inadmissible against the government," particularly those made at the investigative stage); 29 AM. JUR. 2D *Evidence* § 819, at 204-05 (1994) ("Statements by government agents and employees are not admissible, substantively, against the government in criminal prosecutions.")

18. See 29A AM. JUR. 2D, *supra* note 17, § 819, at 204-05 (noting doubt about this application of the Federal Rules of Evidence); 3 GRAHAM, *supra*

the rule does not admit the statements of government agents.<sup>19</sup> Thus they perpetuate the narrow rule.

*People v. Cruz*<sup>20</sup> on which the second introductory hypothetical is based, should prompt reconsideration of the restriction on the admissibility of prior inconsistent statements of the government.<sup>21</sup> The Supreme Court of Illinois affirmed Cruz's capital conviction, holding that the trial court acted within its discretion in excluding the statements in this case.<sup>22</sup> Much later, after Rolando Cruz had spent years in prison, his innocence was conclusively established.<sup>23</sup> As it turned out, the case against him was built on inventive testimony and outright lies.<sup>24</sup> The prosecutor's shift in position could have raised a warning flag if the court had admitted the prosecution's earlier statements, allowing the jury to consider whether that shift signaled an effort to make up for a deficient case. Perhaps that evidentiary decision would have exposed the injustice sooner—or prevented it entirely.

The justice system is currently evaluating how to respond to documented instances of innocent defendants wrongfully convicted and guilty defendants treated unfairly. If the government is free to change its position without repercussions, either as a case moves from investigation to trial or from trial

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note 17, § 801.23, at 178 n.11 (questioning this application).

19. See *People v. McDaniel*, 647 N.E.2d 266, 272 (Ill. 1995) (citing 29A AM. JUR. 2D *Evidence* § 819, 204-05 (1994)); *State v. Asbridge*, 555 N.W.2d 571, 576 (N.D. 1996) (citing 2 MCCORMICK, *supra* note 15, § 259, at 168-69).

20. 643 N.E.2d 636 (Ill. 1994).

21. See Barry Tarlow, *Limitations on the Prosecution's Ability to Make Inconsistent Arguments in Successive Cases*, CHAMPION, Dec. 1997, at 40, 42-44 ("The infamous prosecution of Rolando Cruz, an Illinois man who spent 11 years on death row for a rape and murder that he did not commit, illustrates the potential importance of the principles established in cases like *Salerno II*.").

22. See *Cruz*, 643 N.E.2d at 665 (concluding that prosecutors' statements are sometimes admissible but finding that the court did not abuse its discretion because of lack of binding authority).

23. See DWYER ET AL., *supra* note 9, at 179 (discussing the case); Tarlow, *supra* note 21, at 42 (detailing the State's evidence, including a DNA sample, which did not implicate defendant).

24. Rather than recognizing a possible problem with the case against Cruz, the Supreme Court of Illinois expressed regret and noted the unfortunate impact of reversal on the victim's family. See *Cruz*, 643 N.E.2d at 667. When the corruption in the prosecution of the case was later uncovered, Cruz was released from death row. See DWYER ET AL., *supra* note 9, at 180. The case ultimately led to a civil suit against several law enforcement officers and prosecutors on the basis of their deceit and manipulation of evidence. *Id.*

to trial, unfair trials and improper convictions may result.<sup>25</sup> Exposing the jury to the statements of government agents favorable to the defendant represents one step toward preventing such results.<sup>26</sup>

Party admissions can offer a uniquely valuable insight into a case.<sup>27</sup> Like a corporation, the government speaks and acts only through its agents. In criminal cases, those agents are responsible for investigating the case, developing evidence for trial, exercising prosecutorial discretion, formulating the government's theory, and representing the government in dealings with the defendant and the court.<sup>28</sup> If a government agent at one of these stages articulates a position that is favorable to the defendant at trial, the defendant should be allowed to inform the jury of that statement. If an innocent explanation exists, the prosecution may advance that explanation, inviting the jury to accord little weight to the agent's statement. In some cases, however, as in *Cruz*, the inconsistency reflects governmental impropriety or weakness in the government's case.

Party admissions do not bind the government, but they are powerful evidence. Proof that the government previously advanced a position inconsistent with its current posture is likely to capture the jury's attention. If the statement is not admissible as a party admission, its impact is severely curtailed. Although the defense attorney may still be able to use it as a basis for questions on cross-examination or employ it as a prior inconsistent statement to impeach the witness, the evidence may not be admissible at all and, even if admitted, will have a limited role.<sup>29</sup> Of course, the opportunity to cross-

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25. See Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 CAL. L. REV. 1423, 1477 (2001).

26. I have argued elsewhere that this step does not provide sufficient protection and that the courts should implement stronger measures. See *id.* at 1443, 1477-78. Nevertheless, informing the jury of the government's change in position may protect against unfair results in some cases.

27. See *In re A.H. Robins Co.*, 575 F. Supp. 718, 724 (D. Kan. 1983) (commenting that in a large company with fragmented responsibility for decision making, essential information may be found only in communications within the corporation at the critical time).

28. See WAYNE R. LAFAVE ET AL., *CRIMINAL PROCEDURE* § 1.3, at 7-25 (3d ed. 2000).

29. If limited to impeachment use, the statement will not be admissible at all unless the person who made the statement testifies; even in that case, the jury will normally only be permitted to consider the evidence to assess the

examine or impeach with the statement will arise only if the prosecution calls as a witness the person who made the statement; if the prosecution knows the statement exists, it may choose not to call the witness at all. Furthermore, the jury will not be allowed to consider the truth of the statements if the defendant can only cross-examine the government witness on the basis of the prior statement or impeach the witness with the statement.<sup>30</sup> Neither approach allows or invites the jury to believe the statement itself and use it as evidence favorable to the defendant.<sup>31</sup> Only admitting the statement as a party admission permits such favorable use.

The rule governing party admissions is a well accepted principle of evidence law. The rule allows a party's adversary to introduce into evidence over a hearsay objection both the party's own words and statements attributable to the party.<sup>32</sup> In the Federal Rules of Evidence, this doctrine is embodied in Rule 801(d)(2); the states have adopted similar rules.<sup>33</sup> Rather than a single umbrella rule, the party admission rule consists of five distinct subsections: individual admissions, statements

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credibility of the witness. See 1 MCCORMICK, *supra* note 15, § 34, at 126-27 (noting that prior inconsistent statements admitted only to impeach a witness will often be inadmissible as substantive evidence of the facts stated and can only be used to evaluate the credibility of in-court testimony).

30. See *United States v. McKeon*, 738 F.2d 26, 32 (2d Cir. 1984) (referring to party admissions as "the trial equivalent of a deadly weapon"). *But see United States v. Ramirez*, 894 F.2d 565, 571 (2d Cir. 1990) (suggesting that the defendant was adequately protected by cross-examining government witnesses on the basis of their statements); *United States v. Santos*, 372 F.2d 177, 180 (2d Cir. 1967) (suggesting that statements be limited to impeachment).

31. When the statement is admitted for such limited purposes the defense is not permitted to argue that the jury should believe the statement, so the defendant cannot build a narrative around the government's shift in position. The defense can only use the statement to attack the credibility of the witness who made the statement. See *supra* note 29.

32. See FED. R. EVID. 801(d)(2); 2 MCCORMICK, *supra* note 15, § 254, at 135-39. It is important to note that Rule 801(d)(2) only overcomes a hearsay objection. The government is free to argue that the statements offered by the defendant are inadmissible on other grounds, such as irrelevance or lack of authentication, or that, while admissible, the statements should not be given much weight. See *United States v. Woo*, 917 F.2d 96, 98 (2d Cir. 1990) (*per curiam*) (noting that party admissions were properly excluded as unfairly prejudicial and confusing); *United States v. AT&T Co.*, 498 F. Supp. 353, 358 n.14 (D.D.C. 1980).

33. See, e.g., ALA. R. EVID. 801(d)(2); MONT. R. EVID. 801(d)(2); N.J. R. EVID. 803(b); VT. R. EVID. 801(d)(2); Olin Guy Wellborn III, *Texas Rules of Evidence Handbook: Article VIII: Hearsay*, 30 HOUS. L. REV. 897, 936-50 (1993) (discussing the adoption of Rule 801(d)(2) in Texas).

adopted by the party, statements made by an agent with authority and offered against the principal, statements made by an agent concerning matters within the scope of the agent's duties, and co-conspirators' statements.<sup>34</sup> In a criminal case, the prosecution can employ each of these five sub-rules to introduce out-of-court statements against the defendant.<sup>35</sup> Indeed, the expansive prosecutorial use of the exception for co-conspirators' statements, a form of party admission, has been well documented and critiqued.<sup>36</sup>

In contrast, the bases for admitting statements against the government are more circumscribed. In theory, the criminal defendant should have three available party admission justifications. First, in appropriate cases, the defendant should be able to argue that the government adopted statements, making them admissible as adoptive admissions.<sup>37</sup> Second, when the defendant can demonstrate that the declarant was authorized to speak for the government, the statements should fall within the traditional definition of vicarious admissions.<sup>38</sup> Finally, even when the defendant cannot demonstrate the declarant's authority to speak, if the defendant can demonstrate that the declarant was an agent of the government and spoke about matters within the scope of the declarant's responsibilities, then the statements should be

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34. See FED. R. EVID. 801(d)(2); see also 3 GRAHAM, *supra* note 17, § 801.15, at 132-40.

35. See *United States v. Gil*, 58 F.3d 1414, 1419-21 (9th Cir. 1995) (admitting drug ledgers against the defendant on the grounds that defendant made or adopted them); *United States v. Saccoccia*, 58 F.3d 754, 778-79 (1st Cir. 1995) (admitting statements as co-conspirator statements under Rule 801(d)(2)(E)); *United States v. Paxson*, 861 F.2d 730, 734-35 (D.C. Cir. 1988) (rejecting defendant's argument to limit Rule 801(d)(2)(D) because it would require "a hyper-technical construction of the rule" and admitting vicarious admission against defendant); *United States v. Hutchins*, 818 F.2d 322, 327-28 (5th Cir. 1987) (admitting defendant's statement as an admission under Rule 801(d)(2)(A)); *United States v. Ojala*, 544 F.2d 940, 945-46 (8th Cir. 1976) (holding defendant's attorney's statements admissible as authorized party admissions under Rule 801(d)(2)(C)).

36. See, e.g., Edward J. Imwinkelried, *Of Evidence and Equal Protection: The Unconstitutionality of Excluding Government Agents' Statements Offered as Vicarious Admissions Against the Prosecution*, 71 MINN. L. REV. 269, 271 (1986) ("Vicarious admissions are admitted against the party-opponent on the theory that, given the party's close relationship with the third party, it is fair to impute the statement to the party-opponent.")

37. See FED. R. EVID. 801(d)(2)(B).

38. See *id.* 801(d)(2)(C).

admitted as an unauthorized vicarious admission.<sup>39</sup> Often, however, courts exclude governmental statements offered by the defendant even though they fall within one of these three categories of party admissions.

The application of the party admissions doctrine to statements offered against the government deserves closer consideration than it has received. The rules are not applied to statements by government agents in a consistent or coherent manner, and the law governing the use of party admissions against the prosecution is neither uniform nor well developed.<sup>40</sup> Courts usually refuse to allow defendants to inform the jury of the favorable statement of a government agent by excluding the evidence as inadmissible hearsay.<sup>41</sup> Some courts have rebuffed defendants' efforts to admit inconsistent governmental statements by invoking "the common law principle that no individual should be able to bind the sovereign."<sup>42</sup> Even when courts admit statements as governmental party admissions, they often do so with muddled or unclear reasoning and

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39. See *id.* 801(d)(2)(D).

40. See 5 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 801.33[3], at 801-72 to 801-73 (Joseph M. McLaughlin ed., 2d ed. 2002). Even when courts recognize that prosecutors' statements may fall within Federal Rule of Evidence 801(d)(2), they do not appear to agree about which particular provision of the rule applies. See *id.* § 801.33[3], at 801-73 n.23. Courts variously rely upon subsections (A), (B), (C), and (D). See, e.g., *United States v. Salerno*, 937 F.2d 797, 811-12 (2d Cir. 1991) (relying on *McKeon* admittance of defense counsel's prior statements as party admissions under Federal Rules of Evidence 801(d)(2)(B) and (C) to rule that the prosecution's opening statement from the prior trial is admissible), *rev'd on other grounds*, 505 U.S. 317 (1992); *United States v. Kattar*, 840 F.2d 118, 130 (1st Cir. 1988) (holding that at least the Justice Department, if not every federal agency, is a party-opponent in criminal cases under Federal Rule of Evidence 801(d)(2)(A)); *Hoptowit v. Ray*, 682 F.2d 1237, 1262 (9th Cir. 1982) (holding that an investigative report prepared by the prosecutor's office was admissible under Federal Rule of Evidence 801(d)(2)(D)); *United States v. Morgan*, 581 F.2d 933, 937-38 (D.C. Cir. 1978) (finding that the government manifested its belief in an informant's statements under Federal Rule of Evidence 801(d)(2)(B) when it indicated in a sworn affidavit for a search warrant that it believed the informant's statements were trustworthy).

41. See *supra* notes 2-19 and accompanying text.

42. See, e.g., *United States v. Zizzo*, 120 F.3d 1338, 1351 n.4 (7th Cir. 1997) (rejecting the argument that the prosecutor's statements fall within Federal Rule of Evidence 801(d)(2)); *State v. Brown*, 784 A.2d 1244, 1255 (N.J. 2001) (holding that a law enforcement officer's statement in a sworn affidavit was inadmissible as a party admission); see also *United States v. Santos*, 372 F.2d 177, 180 (2d Cir. 1967) (refusing to admit statements as party admissions).

thereby generate confusion for future decisions.<sup>43</sup>

This Article seeks to eliminate that confusion. The Article examines the appropriate role of party admissions in criminal cases and proposes a comprehensive analytical approach to the admission of statements attributable to the government as party admissions. Part I summarizes the law governing party admissions before the adoption of the Federal Rules of Evidence in 1975. Part II notes the adoption of the Federal Rules of Evidence, which expanded the categories of admissible party admissions and recognized no special rule for government admissions. This Part of the Article also documents the continued resistance to admitting party admissions against the prosecution under the modern rules of evidence. Part III examines in detail the way in which the rules governing party admissions should apply to governmental admissions, advocating a reading of the rule that is receptive to informing the jury of the government's change in position on matters relevant to a criminal case. The subsections of Part III discuss the manner in which the requirements of the subsections of the rule governing adoptive admissions and vicarious admissions should apply to statements made or adopted by government agents. The Article concludes that a fair application of the rule on party admissions does not allow the government in a criminal case to conceal from the jury a change in position that is favorable to the defendant. Instead, it would permit the criminal defendant to introduce a wide range of government statements to demonstrate to the jury that the government espoused inconsistent positions, possibly casting doubt on the defendant's guilt.

#### I. THE LAW OF PARTY ADMISSIONS BEFORE THE FEDERAL RULES

The admissibility of party admissions against parties other than the government is well established. The origin of the rule admitting party admissions lies in the doctrine estopping a party from asserting in court a position inconsistent with a position previously advanced in a formal setting, as in the pleadings or in a stipulation.<sup>44</sup> The rules governing party

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43. See *supra* note 40; *infra* Part III.A.3.

44. See Edmund M. Morgan, *Admissions*, 12 WASH. L. REV. 181, 181 (1937) [hereinafter Morgan, *Admissions*]. That doctrine is now embodied in the law of judicial admissions, which bar the party altogether from asserting the inconsistent position. Judicial admissions are "formal concessions in the

admissions, however, are merely rules of evidence, and they extend to all statements of a party, whether formal or informal.<sup>45</sup> So although party admissions are not binding on the party, they are admissible as evidence over a hearsay objection, and the jury may consider them for the truth of what they assert.

Party admissions have long been admissible in evidence and exempt from the usual requirements imposed on admissible hearsay. Historically, party admissions were admissible even when the guarantees of trustworthiness that underlie the other hearsay exceptions were lacking.<sup>46</sup> A party admission did not need to be shown to be reliable and could actually have been self-serving when made.<sup>47</sup> Moreover, a

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pleadings in the case or stipulations by a party or counsel that have the effect of withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." 2 MCCORMICK, *supra* note 15, § 254, at 137-38. A judicial admission is conclusive in a case unless a court allows it to be withdrawn. *See id.*; *see also* Keller v. United States, 58 F.3d 1194, 1198 n.8 (7th Cir. 1995) (contrasting the conclusiveness of judicial admissions with the ability of a party to controvert or explain evidentiary admissions).

45. *See* United States v. D.K.G. Appaloosas, Inc., 630 F. Supp. 1540, 1564 (E.D. Tex. 1986) (distinguishing between evidentiary and binding use of statements), *aff'd*, 829 F.2d 532 (5th Cir. 1987); *see also* United States v. Blood, 806 F.2d 1218, 1221 n.2 (4th Cir. 1986) (illustrating the confusion between evidentiary admissions and judicial admissions). In *Blood*, the defendant claimed that certain plans were not ERISA plans, as charged, but were insurance plans. *See id.* at 1220-21. During the government's opening argument and in proposed voir dire questions, the prosecutor referred to the plans as insurance plans. *See id.* at 1219, 1221. The defendant argued that the court should treat the matter as established, by treating the statements as judicial admissions. *See id.* at 1220. Since the statement was made to the jury in the case, Rule 801(d)(2) had no possible role; there was no need to introduce evidence that the prosecutor had made the statements. *Id.* at 1221. Nevertheless, in rejecting the defendant's argument because the statements were not sufficiently factual, the court discussed party admissions and cited authority dealing only with party admissions. *Id.* In addition, the court noted that it was not going to address the distinction between judicial and evidentiary admissions. *See id.* at 1221 n.2. *See generally* Ediberto Roman, "Your Honor What I Meant to State Was . . .": A Comparative Analysis of the Judicial and Evidentiary Admission Doctrines as Applied to Counsel Statements in Pleadings, Open Court, and Memoranda of Law, 22 PEPP. L. REV. 981, 993-1004 (1995) (analyzing the law of party admissions as applied to statements in pleadings, open court, and memoranda of law).

46. *See* John S. Strahorn, Jr., *A Reconsideration of the Hearsay Rule and Admissions*, 85 U. PA. L. REV. 564, 573 (1937); *see also* Morgan, *Admissions*, *supra* note 44, at 183 ("Every danger that cross-examination tends to guard against is positively shown to be present in full force.")

47. *See* Morgan, *Admissions*, *supra* note 44, at 182; Strahorn, *supra* note 46, at 575 ("[T]he admission need not be against interest when made . . .").

party admission was competent evidence even when the declarant lacked personal knowledge of the facts asserted.<sup>48</sup>

As the law of evidence developed, the rationale for admitting party admissions was debated at length.<sup>49</sup> Some advocated viewing party admissions not as hearsay but as conduct of the party inconsistent with their contention in the litigation.<sup>50</sup> Eventually, however, it became accepted that the party admission rule is based on fairness in an adversarial setting. On this theory, it is simply considered fair to permit a party to introduce, against its adversary, words attributable to that adversary. Professor Morgan, an early spokesperson for this position, articulated the rationale that continues to support the admissibility of party admissions over a hearsay objection:

A litigant can scarcely complain if the court refuses to take seriously his allegation that his extra-judicial statements are so little worthy of credence that the trier of fact should not even consider them. He can hardly be heard to object that he was not under oath or that he had no opportunity to cross-examine himself.<sup>51</sup>

In 1937, Professor Morgan stated,

[O]ften [an admission] hasn't even an attenuated guaranty of trustworthiness. It stands in a class by itself; the theory of its admissibility has not the remotest connection with the jury system and can be explained only as a corollary of our adversary system of litigation.<sup>52</sup>

The view that a party is responsible for its words as well as actions supports admitting party admissions.<sup>53</sup>

The common law allowed statements to be admitted against corporations and other non-human entity parties as party admissions if the statement was either authorized or adopted by the entity against which it was offered.<sup>54</sup> Vicarious

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48. See Morgan, *Admissions*, *supra* note 44, at 183.

49. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1239 (E.D. Pa. 1980) (noting departures from common law), *aff'd in part, rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986); Strahorn, *supra* note 46, 569-79 (discussing various theories advanced to support admitting party admissions); Richard D. Geiger, Note, *Vicarious Admissions by Agents of the Government: Defining the Scope of Admissibility in Criminal Cases*, 59 B.U. L. REV. 400, 402 (1979).

50. Strahorn, *supra* note 46, at 572-73.

51. Edmund M. Morgan, *The Rationale of Vicarious Admissions*, 42 HARV. L. REV. 461, 461 (1929) [hereinafter Morgan, *Vicarious Admissions*]; see also Geiger, *supra* note 49, at 402-04.

52. Morgan, *Admissions*, *supra* note 44, at 182.

53. See Geiger, *supra* note 49, at 403.

54. See Morgan, *Vicarious Admissions*, *supra* note 51, at 462-63.

admissions, which are the statements of an agent that are admissible against the agent's principal, posed a particular challenge to courts; many government admissions could fall within this category. Normal hearsay protections, including indicia of reliability and the requirement that the declarant have personal knowledge, are required if out-of-court-statements of third parties are to be admitted unless "some doctrine of vicarious liability intervenes."<sup>55</sup> Working on the premise that the party's own words constituted party admissions, the law treated either authorization or adoption as sufficient to put the third party's words in the same status as the party's own words.<sup>56</sup> As to authorized statements, Professor Morgan remarked, "[i]f *B* authorizes *A* to speak for him, he can take no valid exception to the reception of *A*'s statements against him which he could not take to the reception of his own."<sup>57</sup>

The law was equally clear, however, that if the agent's statement was neither authorized nor adopted, it would not be admitted as a vicarious admission.<sup>58</sup> *State v. Smith*<sup>59</sup> illustrates how the pre-rules requirement of authorization worked in criminal cases. In *Smith*, the defendant tried to introduce the statement of an officer who arrested him shortly

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55. *Id.* at 461-62. Professor Strahorn argued that vicarious admissions warranted admissibility as relevant conduct if vicarious responsibility existed. Strahorn, *supra* note 46, at 582-83.

56. See Strahorn, *supra* note 46, at 582.

57. Morgan, *Vicarious Admissions*, *supra* note 51, at 463.

58. See, e.g., *N. Oil Co. v. Socony Mobil Oil Co.*, 347 F.2d 81, 85 (2d Cir. 1965) (identifying as the prevailing position the requirement of authorization to speak for the principal); *United States v. Foster*, 131 F.2d 3, 7 (8th Cir. 1942) (declining to admit the statement of the Secretary of War because it was not authorized); *Lorber v. Vista Irrigation Dist.*, 127 F.2d 628, 636 (9th Cir. 1942) (holding a letter to be properly excluded because it was not shown to be authorized by the board); see also 2 EDMUND M. MORGAN, BASIC PROBLEMS OF EVIDENCE 236 (Honorable Charles E. Clark ed., 1957) ("It is necessary to distinguish sharply between authority to do an act or to deal with a specified matter and authority to talk about it. The latter is usually a requisite of admissibility of statements made by the agent."); Morgan, *Admissions*, *supra* note 44, at 191-204 (summarizing the relationship between the laws of vicarious liability and the rules governing the admissibility of an agent's declarations against the principal and stressing that only authorized statements were admissible as the principal's party admissions); Morgan, *Vicarious Admissions*, *supra* note 51, at 464 (expressing the prevailing common law view and emphasizing the importance of distinguishing between "authority to do an act and authority to talk about it").

59. 153 N.W.2d 538 (Wis. 1967).

after a burglary.<sup>60</sup> The officer stated that "the person who broke into the place must have got cut."<sup>61</sup> The court concluded that even if the officer was an agent of the state, he was not authorized to speak for the state and that therefore the statement was not admissible as a vicarious admission.<sup>62</sup> The *Smith* court applied the classic distinction between the agent authorized to act and the agent authorized to speak for the principal.<sup>63</sup> Of course, the agent authorized to act will talk in the course of carrying out various duties, but those statements are not viewed as authorized by the principal. Therefore, at common law, they could not be introduced against the principal as party admissions.

The rationale for admitting adopted statements and authorized statements against other entities could extend to party admissions offered against the prosecution. Nevertheless, party admissions were almost never admitted against the government in criminal cases.<sup>64</sup> The rules governing party admissions were construed narrowly even when a criminal defendant offered a statement against the prosecution that appeared to fall within the rule.<sup>65</sup> Even if a statement appeared to be authorized or adopted by the government, the courts would usually exclude it.<sup>66</sup> The most influential pre-Rules decision considering the admissibility of party admissions against the government is *United States v. Santos*.<sup>67</sup> In *Santos*, a criminal defendant charged with assaulting a federal officer argued that the trial court should have admitted the prior statement of a narcotics agent as the government's admission. The agent's statement was contained in a sworn affidavit supporting a complaint and identified someone other than the defendant as the assailant.<sup>68</sup> The court

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60. *Id.* at 540-41.

61. *Id.* at 543.

62. *See id.*

63. *See id.* (concluding that a municipal police officer is not an agent of the state in its adversary capacity as a party in a criminal prosecution).

64. *See, e.g.,* *United States v. Santos*, 372 F.2d 177, 180-81 (2d Cir. 1967).

65. *See generally* Irving Younger, *Sovereign Admissions: A Comment on United States v. Santos*, 43 N.Y.U. L. REV. 108, 110-14 (1968) (describing the rejection of such statements by several courts).

66. *See, e.g., Santos*, 372 F.2d at 180-81 (excluding a sworn statement by a government agent that the agent was authorized to file with the court).

67. 372 F.2d 177 (2d Cir. 1967). *See generally* Younger, *supra* note 65, at 110-15 (criticizing the decision).

68. *Santos*, 372 F.2d at 179.

rejected the defendant's argument, offering two explanations. First, the court stated,

Though a government prosecution is an exemplification of the adversary process, nevertheless, when the Government prosecutes, it prosecutes on behalf of all the people of the United States; therefore all persons, whether law enforcement agents, government investigators, complaining prosecution witnesses, or the like, who testify on behalf of the prosecution, and who, because of an employment relation or other personal interest in the outcome of the prosecution, may happen to be inseparably connected with the government side of the adversary process, stand in relation to the United States and in relation to the defendant no differently from persons unconnected with the effective development of or furtherance of the success of, the prosecution.<sup>69</sup>

Second, despite this very broad view of those associated with the government in its role as prosecutor, the court went on to address the narrower agency issues raised by the defendant's argument. The court noted that it is unfair to allow statements of the defendant's agents to be admitted against the criminal defendant while limiting statements of federal agents to impeachment use.<sup>70</sup> Nevertheless, the court concluded that the difference was justified, reasoning that federal agents not only are "supposedly uninterested personally in the outcome of the trial" but also are "historically unable to bind the sovereign."<sup>71</sup> Thus, even though the agent had filed the sworn document in court, arguably adopting it, and had been authorized by the government to prepare it, the court did not treat the statement as a party admission.<sup>72</sup>

*Smith* and *Santos* represented the prevailing view at common law. When the Federal Rules of Evidence were adopted and did not contain any limitation on using party admissions against the government, one might have hoped that the courts would relax the barriers and allow the defendants to introduce the government's statements against it.<sup>73</sup> That did

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69. *Santos*, 372 F.2d at 180.

70. *Id.*

71. *Id.* See generally Imwinkelried, *supra* note 36, at 307-09 (arguing that agents are interested actors).

72. *Santos*, 372 F.2d at 181 ("[T]hese statements are not admissible against the Government . . .").

73. One could argue to the contrary that, because Rule 801(d)(2)(D) had no common law counterpart, the maxim that a statute should not be construed in derogation of the common law should operate. See *infra* Part II; see also *Morris v. Snappy Car Rental, Inc.*, 637 N.E.2d 253, 255 (N.Y. 1994) ("It is axiomatic concerning legislative enactments in derogation of common law . . . they are deemed to abrogate the common law only to the extent required by

not happen.

## II. THE RULES OF EVIDENCE AND RESISTANCE TO ADMITTING PARTY ADMISSIONS

In 1975, Congress enacted the Federal Rules of Evidence, which define party admissions as non-hearsay under Rule 801(d)(2). Similar rules have been enacted in most states.<sup>74</sup> Federal Rule of Evidence 801(d)(2) contains five subsections. Like the common law, the rule does not rest on assessments of the trustworthiness of the statements and does not require that the declarant have personal knowledge.<sup>75</sup> Three subsections of Rule 801(d)(2) offer avenues for introducing the statements against an entity like the government that speaks only through individuals who act for it.<sup>76</sup> Adoptive admissions are admissible under Rule 801(d)(2)(B), which provides that a third party's statement adopted by a party is admissible against the party as a party admission.<sup>77</sup> Authorized admissions are admissible under Rule 801(d)(2)(C),<sup>78</sup> which establishes that the statements of one whom the party authorized to speak for it are admissible. Although these two subsections of the party admission rule have strong common law credentials, subsection (D) does not. Rule 801(d)(2)(D) admits non-authorized vicarious admissions, treating the statements of agents who were authorized to act but not to speak as the principal's party

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the clear import of the statutory language." (citations omitted) (citing *Psota v. Long Island R.R.*, 159 N.E. 180, 181 (N.Y. 1927)); NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 45.12, at 101-02 (6th ed. 2000) ("Courts should not presume that the legislature in the enactment of a statute intends to overthrow long-established principles of law unless that intention is made clearly to appear either by express declaration or by necessary implication."). Of course, Rule 801(d)(2)(D) expressly provides for statements that were not admissible at common law, so it would be difficult not to read it in derogation of the common law.

74. See *supra* note 33.

75. See *Osterneck v. E. T. Barwick Indus., Inc.*, 106 F.R.D. 327, 332 (N.D. Ga. 1984) (relying on the Advisory Committee Notes to Federal Rule of Evidence 801(d)(2)).

76. Two other subsections offer no utility for the criminal defendant. Rule 801(d)(2)(A) defines the statements of the party as non-hearsay; it targets the statements of individuals who are parties and therefore should not apply against an entity party like the government or a corporation. Rule 801(d)(2)(E) admits statements of co-conspirators against one who is a member of a conspiracy. It would not operate against the government in a criminal case.

77. FED. R. EVID. 801(d)(2)(B).

78. *Id.* 801(d)(2)(C).

admissions.<sup>79</sup> This provision represents a significant departure from the common law.<sup>80</sup> This subsection of the rule admits the statements of a party's agent not authorized to speak but speaking about matters that fall within the scope of the agency as the admissions of the principal. Each of these subsections of the rule should be applied against the government in criminal cases as well as in civil actions.

Rule 801(d)(2) itself provides no support for the argument that party admissions operate differently against the government; it contains no language whatsoever that targets statements made or adopted by government agents.<sup>81</sup> Despite the seemingly clear language of the rule, however, some courts continue to resist admitting party admissions against the government, particularly in criminal cases.<sup>82</sup> Even though the courts note that neither Rule 801(d)(2) nor the Advisory Committee's notes on the rule express an exception for the government,<sup>83</sup> they have not consistently applied the rule to admit statements against the government and have failed to evaluate carefully the application of the rule to statements attributable to the government.<sup>84</sup>

*Santos* and other pre-Rules decisions accurately reflected the law of vicarious admissions when they were decided; the admissibility of vicarious admissions generally turned on the

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79. *Id.* 801(d)(2)(D).

80. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1239, 1245 (E.D. Pa. 1980), *aff'd in part, rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986); see also *Chicago v. Greer*, 76 U.S. 726, 732-33 (1869) (recognizing that statement of authorized agent was admissible against city); *Zenith Radio Corp.*, 505 F. Supp. at 1245 (describing Rule 801(d)(2)(C) as codifying common law); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* § 8.32, at 1125 (2d ed. 1999) ("Traditionally being an employee or agent did not make one's statements, even those relating to one's duties, admissible against the employer or principal because such status did not confer speaking authority."); David J. Wallman, *Employees' Admissions in New York: Time for a Change*, 11 *TOURO L. REV.* 231, 241-48 (1994) (comparing Rule 801(d)(2)(D) to the common law).

81. See Randolph N. Jonakait, *The Supreme Court, Plain Meaning, and the Changed Rules of Evidence*, 68 *TEX. L. REV.* 745, 774-78 (1990) (arguing that the plain meaning of rules would inappropriately admit vicarious admissions against the government that have traditionally been excluded).

82. See generally *id.* at 776-77 (discussing cases which reject such admissions).

83. See, e.g., *United States v. Morgan*, 581 F.2d 933, 938 (D.C. Cir. 1978) ("Moreover, there is nothing in the history of the Rules generally or in Rule 801(d)(2)(B) particularly to suggest that it does not apply to the prosecution in criminal cases.").

84. See *supra* note 40.

speaker's authority to speak and therefore was closely tied to the law of vicarious responsibility.<sup>85</sup> Courts in jurisdictions that have adopted the modern rule of party admissions, however, continue to cite *Santos* for the proposition that the law does not allow party admissions into evidence against the government.<sup>86</sup>

In *United States v. Kampiles*,<sup>87</sup> for example, the defendant was charged with delivering top secret material, including a particular handbook, to a foreign agent.<sup>88</sup> The defendant sought to introduce the statement of a Central Intelligence Agency senior watch officer.<sup>89</sup> In the offered statement, the watch officer said that he had never seen that handbook in the office where he and the defendant both worked.<sup>90</sup> The evidence would have supported the defendant's claim that he never had the handbook. The officer-declarant was unquestionably an agent of the United States at the time he made the statement, and the statement appeared to concern matters within the scope of his agency. The Court of Appeals for the Seventh Circuit, however, cited *Santos* and rejected the defendant's argument that the statements of a government employee fell within Rule 801(d)(2) as the admissions of a party's servant.<sup>91</sup> The court adopted *Santos*'s reasoning that the agents were both disinterested and traditionally unable to bind the sovereign, and then went on to state that statements of government agents "seem less the product of the adversary process and

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85. See *supra* notes 54-63 and accompanying text.

86. See, e.g., *United States v. Kampiles*, 609 F.2d 1233, 1246 (7th Cir. 1979) (noting from *Santos* that Government agents are disinterested in the outcome of the trial and traditionally cannot bind the sovereign); *United States v. Durrani*, 659 F. Supp. 1183, 1185 (D. Conn. 1987) ("Although *Santos* was decided prior to enactment of the Federal Rules, the Court finds nothing in Fed. R. Evid. 801(d)(2), the Advisory Committee notes, or recent Court decisions which would alter the *Santos* rule." (citations omitted)) *aff'd*, 835 F.2d 410 (2d Cir. 1987); *State v. Jurgensen*, 681 A.2d 981, 986 (Conn. App. Ct. 1996) (quoting *Santos*); *State v. Therriault*, 485 A.2d 986, 992 (Me. 1984) (citing *Santos* as explaining why a police laboratory report should not be admitted under the party admissions rule); *State v. Brown*, 784 A.2d 1244, 1255 (N.J. 2001); see also Geiger, *supra* note 49, at 420 (arguing that *Santos* is consistent with Rule 801(d)(2)). See generally Imwinkelried, *supra* note 36, at 279 ("Although the *Santos* decision predates the Federal Rules of Evidence, courts continue to adhere to its holding.").

87. 609 F.2d 1233 (7th Cir. 1979).

88. *Id.* at 1234-35.

89. *Id.* at 1245-46.

90. *Id.* at 1246.

91. *Id.*

hence less appropriately described as admissions of a party.<sup>92</sup>

The reasoning of *Kampiles* and similar cases is unsound. It does not respond to the rule's requirements for admissibility of party admissions or the reality of the ways in which agents act for the government. Nothing in Rule 801(d)(2) requires that a party admission be generated as part of the adversarial process. The rule turns only on the adversarial way in which the statements are used at trial. Party admissions are often made before litigation is even a prospect.<sup>93</sup> Moreover, the rule

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92. *Id.* The *Kampiles* court noted an additional argument to support its narrow reading of Rule 801(d)(2)(D), stating that a broad reading of that rule would render Rule 803(8), the exception for public records, unnecessary. *Id.* at 1246 n.16. The court overstated the relationship between the two rules. Even if Rule 801(d)(2) allows a criminal defendant to admit public records against the government in a criminal case, Rule 803(8) would still govern offers of public records against any party other than the government in civil or criminal cases. While the two rules overlap, they are not coextensive.

One aspect of the relationship between Rule 801(d)(2) and Rule 803(8), however, warrants consideration. Rule 803(8)(B) defines public records as those that set forth "matters observed pursuant to duty imposed by law as to which matters there was a duty to report" but excludes in criminal cases "matters observed by police officers and other law enforcement personnel." FED. R. EVID. 803(8)(B). The government could therefore argue that the official report is excluded from the public records exception in criminal cases and that the defendant should not be permitted to circumvent the limitation in Rule 803(8)(B) by turning to Rule 801(d)(2). A similar argument defeated the prosecution in *United States v. Oates*, 560 F.2d 45, 67 (2d Cir. 1977). In *Oates*, the prosecution overcame the defendant's hearsay objection to a chemist's report by characterizing it as a business record and introducing it under Rule 803(6); by doing so, the government avoided the restriction in Rule 803(8)(B) and (C) against use of public records in criminal cases. On appeal, however, the Second Circuit held that the government could not circumvent the legislative intent expressed in Rule 803(8) in this way. *Id.* at 68. This reasoning should not extend to the use of Rule 801(d)(2) by the criminal defendant. In limiting Rule 803(8) in criminal cases, Congress was primarily concerned with protecting the defendant's right to confrontation and limiting the advantage the prosecution might obtain if it could introduce its routinely prepared records against the defendant. *See id.* at 68-72; *see also* *United States v. King*, 613 F.2d 670, 673 (7th Cir. 1980); *United States v. Grady*, 544 F.2d 598, 604 (2d Cir. 1976). Despite the ambiguous language of Rule 803(8)(B), defendants in criminal cases may introduce government records that fall within this rule. *See* *United States v. Smith*, 521 F.2d 957, 967-68 (D.C. Cir. 1975); 3 GRAHAM, *supra* note 17, § 803.8, at 411 n.19.

93. *See supra* note 61 and accompanying text (illustrating that the officer's statement that "the person who broke into the place must have got cut" was made shortly after the arrest); *see also* *United States v. Agne*, 214 F.3d 47, 54-55 (1st Cir. 2000) (statements made during negotiation of a letter of credit); *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 561 (11th Cir. 1998) (statements concerning pricing arrangements); *MCI Communications Corp. v. AT&T Co.*, 708 F.2d 1081, 1143 (7th Cir. 1983) (statements in a corporation's internal report).

is unconcerned with the speaker's perception or the context in which the statement was made.<sup>94</sup> There is clearly no requirement that the declarant have perceived the statement to be against her own interest or that of the principal for whom she spoke or worked.

Courts that perpetuate common law limitations on the use of party admissions against the prosecution overlook three aspects of the modern law of party admissions codified in Rule 801(d)(2). First, they do not consider whether adoptive admissions should be admissible against the government and do not evaluate what government conduct might adopt a statement under Rule 801(d)(2)(B).<sup>95</sup> Second, they do not recognize the admissibility of authorized admissions against the government and therefore overlook the significance of authority to speak for the government.<sup>96</sup> Finally, they disregard the radical change Rule 801(d)(2)(D) injected into the law governing party admissions and do not apply the expanded rule admitting non-authorized vicarious admissions against the government.<sup>97</sup>

### III. APPLYING RULE 801(d)(2)

Courts should overcome their reluctance to give criminal defendants the benefit of Rule 801(d)(2). They should apply the rule to statements of government agents in criminal cases in the same way they apply it to statements of the agents of other non-human entities. This would allow defendants to inform the jury that the government is talking out of both sides of its mouth, and possibly reduce the chance of an unjust conviction.

Three provisions of Rule 801(d)(2) may operate to admit statements against the government in criminal cases. Each of the provisions has distinct requirements and is considered separately below. Section A considers Rule 801(d)(2)(B), under which the defendant may establish that the government adopted the statement. Section B considers Rule 801(d)(2)(C), under which the defendant may establish that the declarant was authorized to speak for the government. Section C

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94. See Imwinkelried, *supra* note 36, at 304. *But see* Geiger, *supra* note 49, at 401 (arguing that admissions should be admitted against the government only when the declarant's interests are substantially identical to the principal's).

95. FED. R. EVID. 801(d)(2)(B).

96. *Id.* 801(d)(2)(C).

97. *Id.* 801(d)(2)(D).

considers Rule 801(d)(2)(D), the most controversial of the provisions, under which the defendant may demonstrate that the declarant was an agent of the government speaking of matters concerning that agent's duties.

A. RULE 801(d)(2)(B): ADOPTIVE ADMISSIONS

Rule 801(d)(2)(B) defines as non-hearsay "a statement of which the party has manifested an adoption or belief in its truth."<sup>98</sup> To introduce a statement under Rule 801(d)(2)(B), the proponent must demonstrate that the party against whom it is offered has adopted the statement, either through action or through inaction.<sup>99</sup> While interesting questions concerning adoption can arise when the party is an individual,<sup>100</sup> issues of adoption become more complex when the party is an entity like the government that speaks through many people. Courts must consider both what constitutes adoption and who within government has the authority to adopt. Section 1 discusses what should serve as adoption by the government. It argues first that the government should be deemed to have adopted a statement if it is filed as a true statement with a court. It then outlines other forms of governmental endorsement that should be treated as adoption under Rule 801(d)(2)(B). Section 2 suggests that any agent authorized to speak or to act for the government may adopt a statement, making it a party admission under the rule. Section 3 discusses how some courts have inappropriately applied the reasoning of adoptive admission to statements that should be treated as vicarious admissions by government agents falling under Rule 801(d)(2)(C) or (D).

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98. *Id.* 801(d)(2)(B).

99. FED. R. EVID. 801 advisory committee's note ("Adoption or acquiescence may be manifested in any appropriate manner.").

100. See *United States v. Flecha*, 539 F.2d 874, 877-78 (2d Cir. 1976) (holding that, by itself, a party hearing a statement and not denying it is not sufficient to establish adoption by silence); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1245 (E.D. Pa. 1980) (noting [t]he Advisory Committee Notes to 801(d)(2)(B) recognize the possibility of an adoption by silence and state that 'the theory is that the person would, under the circumstances, protest the statement made in his presence if untrue.'"), *aff'd in part, rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986); *State v. Carlson*, 808 P.2d 1002, 1005-06 (Or. 1991) (discussing how to analyze an ambiguous act claimed to represent adoption); Peter Tiersma, *The Language of Silence*, 48 RUTGERS L. REV. 1, 78-80 (1995) (recognizing that some courts have refused to admit silence in the face of overheard accusations while others courts have admitted such statements).

### 1. Action Constituting Adoption

Adoption of another's statement can occur in various ways. In some instances, adoption takes the form of an express statement of agreement or endorsement. In many instances, however, adoption is implicit in the party's response to the statement.<sup>101</sup> If the party incorporates the statement in its own statements or takes action on the third party statement, that will be viewed as adoption and the statement will be admitted as a party admission under Rule 801(d)(2)(B).<sup>102</sup> When the government endorses a third party statement, particularly by asking a court to rely on it, or when the government itself takes action on a statement, that represents adoption by the government, and Rule 801(d)(2)(B) should apply.

#### a. *Filing with the Court as Adoption*

Any third party statement contained in a document submitted to the court on behalf of the government should be treated as an adoptive admission. Filing a document in court based on the statement of a third party represents at least implicit adoption and in some instances may entail express adoption.

Indeed, courts have been most receptive to applying Rule 801(d)(2)(B) in cases where the government has filed documents in court that rest on the truth of a third party's assertion.<sup>103</sup> In *United States v. Morgan*,<sup>104</sup> for example, the government obtained a search warrant to search a house.<sup>105</sup> The warrant was based on the affidavit of a detective who swore in part that a "reliable informant" had told him that

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101. See generally 2 MCCORMICK, *supra* note 15, §§ 261-62, at 163-72 (discussing admissions by conduct).

102. See *infra* Part III.A.1.a-b.

103. See *United States v. GAF Corp.*, 928 F.2d 1253, 1260 (2d Cir. 1991) ("We think that the same considerations of fairness and maintaining the integrity of the truth-seeking function of trials that led this Court to find that opening statements of counsel and prior pleadings constitute admissions also require that a prior inconsistent bill of particulars be considered an admission by the government in an appropriate situation."); *United States v. Woo*, 917 F.2d 96, 97-98 (2d Cir. 1990) (per curiam) (conceding that affidavit and grand jury testimony fell within Rule 801(d)(2)(B)). *But see* *United States v. Johnson*, 28 F.3d 1487, 1496 (8th Cir. 1994) (holding that the district court did not abuse its discretion when it did not admit the government's Prior Bill of Particulars because the bill alleged no inconsistent facts).

104. 581 F.2d 933 (D.C. Cir. 1978). The first hypothetical in this Article was based on *Morgan*. See *supra* notes 2-6 and accompanying text.

105. *Morgan*, 581 F.2d at 934.

“Timmy” was selling drugs from the location and that the informant had purchased drugs under the detective’s surveillance, which the informant said he bought from “Timmy.”<sup>106</sup> As a result of the raid to execute the search warrant, the defendant, William Morgan, was arrested and charged with a narcotics violation based in part on drugs and cash found in the basement of the house.<sup>107</sup> At trial, Morgan wanted the jury to hear the informant’s assertions, vouched for by the government, that Timmy was dealing out of this house.<sup>108</sup> Morgan hoped that these statements, taken with evidence that the owner’s son, Timmy, lived in the house, would raise a reasonable doubt regarding his involvement with the items found in the basement.<sup>109</sup> The court of appeals held that the statements should have been admitted under Rule 801(d)(2)(B).<sup>110</sup> The government’s sworn assertion that the informant’s statements were reliable manifested its belief in their truth.<sup>111</sup>

*Morgan* illustrates the emphasis that courts place on the government’s formal act of filing documents with the court. The court in *Morgan* rejected the government’s argument that Rule 801(d)(2) simply does not apply to statements by the government.<sup>112</sup> Even though the court saw no policy reason for a blanket limitation on the rule,<sup>113</sup> the court remarked that statements falling under Rule 801(d)(2)(B), particularly those which have been held out as trustworthy in a sworn statement to the court, “stand on more solid ground than mere out-of-court assertions by a government agent.”<sup>114</sup>

In *State v. Dreher*,<sup>115</sup> the court similarly stressed the formality of the judicial filing.<sup>116</sup> The state submitted an affidavit incorporating portions of a witness’s statement in order to obtain a search warrant.<sup>117</sup> At trial, the defendant

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106. *Id.*

107. *Id.*

108. *Id.* at 935-36.

109. *Id.*

110. *Id.* at 938.

111. *Id.*

112. *Id.* at 937-38.

113. *Id.* at 937-38 & n.11.

114. *Id.* at 938.

115. 695 A.2d 672 (N.J. Super. Ct. App. Div. 1997), *abrogated by* State v. Brown, 784 A.2d 1244 (N.J. 2001).

116. *Id.* at 721.

117. *Id.* at 719.

wanted the jury to hear the assertions in the affidavit, which were inconsistent with aspects of the prosecution's case against the defendant.<sup>118</sup> The court granted that the prosecution should not be bound by every statement made by an agent, but concluded that by submitting these statements to a judicial officer in support of the warrant application the state had adopted the statements, rendering them admissible as adoptive admissions.<sup>119</sup>

The New Jersey Supreme Court abrogated *Dreher* in *State v. Brown*.<sup>120</sup> In *Brown*, a law enforcement agent relied on a confidential informant's statement to obtain a search warrant.<sup>121</sup> The agent and informant reported two supervised drug purchases, both from Brown's codefendant and roommate.<sup>122</sup> Brown wanted to introduce the statements in the search warrant affidavit to support her claim that the drugs found in the apartment belonged to her roommate and not to her.<sup>123</sup>

The Supreme Court held that the statements were properly excluded.<sup>124</sup> Unfortunately, the exclusion resulted in an unfair process. The prosecution elected not to call the informant as a witness at trial or even to disclose the informant's identity.<sup>125</sup> As a result, the defendant was unable to support her claim that the codefendant was the drug owner with that factual information; the government insulated the potentially exculpatory information. Instead, at the two defendants' joint trial, the jury simply heard each deny that the drugs were hers

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118. *Id.* at 719-20.

119. *Id.* at 721. By asking whether the statements could "bind" the state, the court misconceived the issue somewhat. The question in the case was whether the defendant could use the statements as evidence, leaving the jury free to consider them or reject them as having no significance. The defendant was not asking that the state be bound to its earlier position, as it would be had the court applied the doctrine of judicial estoppel. *See supra* notes 44-45 and accompanying text.

120. 784 A.2d 1244 (N.J. 2001).

121. *Id.* at 1248.

122. *Id.*

123. *Id.* at 1249.

124. *Id.* at 1250-57. At trial, the defendant argued that the statements were admissible as statements against interest. *Id.* at 1249. It does not appear that she advanced a party admissions argument. *Id.* at 1265-66. The dissent, however, made that argument. *Id.* at 1265-66 (Stein, J., dissenting). This argument prompted the majority to respond and abrogate *Dreher*. *Id.* at 1256-57.

125. *Id.* at 1250.

and disbelieved and convicted both.<sup>126</sup>

The court should have recognized that the state adopted the statement by relying on it in the warrant application. The state advanced the statement as reliable and worthy of belief by the court by using it as a basis for authorizing a search warrant. When the state later took an inconsistent position, the defendant should have been permitted to inform the jury of the earlier statement.<sup>127</sup>

*b. Other Forms of Adoption*

In civil cases, courts have recognized as adoption action less formal than filing with the court. The willingness to accept a range of actions as adoption should be extended to criminal cases. Any act that signifies endorsement should suffice as adoption under Rule 801(d)(2)(B).

Signing off on a report should act as adoption. In *Pillsbury Co. v. Cleaver-Brooks Division of Aqua-Chem, Inc.*,<sup>128</sup> the court held that an employee of the party-company adopted the report by signing each page.<sup>129</sup> If someone with appropriate authority in government signs off on a report, this should be an adoption of the statement under Rule 801(d)(2)(B). Like private sector entities, the government may commission outside actors to conduct tasks such as investigations and studies. If the outside actor reports back to the governmental unit and the agent who could have acted for the government expresses agreement, as by signing off on the report, courts should regard that act as adoption under Rule 801(d)(2)(B).

Distribution of third party statements, when done without reservation and in a manner inviting reliance on them, also acts as adoption. Providing documents in response to

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126. *Id.* at 1248-49.

127. *See infra* Part III.D.3 for a response to the argument that statements made or adopted by the government at an early stage of investigation should not be admissible against the government.

128. 646 F.2d 1216 (8th Cir. 1981).

129. *Id.* at 1217-18. In criminal cases, confessions written out by someone else but signed by the defendant have been admitted as party admissions. *See* *United States v. Williams*, 571 F.2d 344, 348-49 (6th Cir. 1978) (holding that a signed statement of a witness prepared by a Secret Service Agent during questioning was admissible under 803(5)); *United States v. Johnson*, 529 F.2d 581, 584 (8th Cir. 1976) (upholding the admission of the defendant's statement, which a Secret Service Agent took down in longhand, and that the defendant read and signed).

interrogatories may constitute adoption.<sup>130</sup> Even holding documents out as reliable in a less formal setting may constitute adoption. In *Wagstaff v. Protective Apparel Corp.*,<sup>131</sup> for example, the court held that the defendant had manifested adoption in newspaper articles discussing the defendant's finances by reprinting and distributing those articles to those with whom the defendant did business.<sup>132</sup> The defendant's action held the statements out as accurate.<sup>133</sup> Similarly, if the government holds a third party's statements out in this manner, that should constitute adoption under Rule 801(d)(2)(B).

Taking action on a third party statement may likewise manifest adoption. In *Wright-Simmons v. City of Oklahoma City*,<sup>134</sup> for example, the City Manager received a report from the personnel department of the plaintiff's employer, the Metro Transit Department, and then sought the employee's resignation.<sup>135</sup> The City Manager invoked the report in demanding the resignation, saying that the information "seem[ed] to be substantiated."<sup>136</sup> The court held that the City Manager's actions adopted the report.<sup>137</sup> Similarly, in *Pilgrim v. Trustees of Tufts College*,<sup>138</sup> the plaintiff sought to introduce

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130. See *Lumbermans Mut. Ins. Co. v. Cantex Mfg. Co.*, 262 F.2d 63, 67 (5th Cir. 1958) (holding that the defendant's interrogatory answer admitted the amount of plaintiff's loss); *Brayton v. Crowell-Collier Pub. Co.*, 205 F.2d 644, 646 (2d Cir. 1953) (affirming the admissibility of pretrial interrogatories and defendant's answer); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1244 (E.D. Pa. 1980) (noting that written answers to interrogatories can be admissions but are not conclusive), *aff'd in part, rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986); *Ohio Valley Elec. Corp. v. Gen. Elec. Co.*, 244 F. Supp. 914, 954 (S.D.N.Y. 1965) (admitting answers to interrogatories compiled from documents); see also *Gadaleta v. Nederlandsch-Amerekaansche Stoomvaart*, 291 F.2d 212, 213 (2d Cir. 1961) (noting that the court was correct in excluding statements although "[a]nswers to interrogatories clearly may be utilized as admissions").

131. 760 F.2d 1074 (10th Cir. 1985).

132. *Id.* at 1078.

133. *Id.*

134. 155 F.3d 1264 (10th Cir. 1998).

135. *Id.* at 1267.

136. See *id.* at 1268-69. In *Wright-Simmons*, the plaintiff might have been able to rely on Rule 801(d)(2)(D). It appears likely that the personnel employee and all those she interviewed in her investigation were employees of the city who were speaking about matters within the scope of their duties. See *infra* Part III.C.

137. *Wright-Simmons*, 155 F.3d at 1268.

138. 118 F.3d 864 (1st Cir. 1997).

a Grievance Committee's report.<sup>139</sup> The court held that the defendant manifested adoption of the report by implementing its recommendations.<sup>140</sup> The court noted that the defendant did so "without disclaimer."<sup>141</sup>

Although the courts should extend this concept of adoption to criminal cases, they should exercise caution in doing so. The mere action of initiating a criminal investigation should not be viewed as governmental adoption of the statements of the complainant, witness, or informant who prompted the government action. Investigation is, by definition, a tentative response which is conditioned on a lack of information. Instead, the courts should require action that reflects affirmation of specific statements.

There are thus a variety of ways in which the government may adopt a third party's statement. When such adoption occurs, the defendant should be permitted to introduce the statement as the government's adoptive party admission.

## 2. Who Can Adopt Statements

Unlike the vicarious admissions rules,<sup>142</sup> the rule governing adoptive admissions does not include an agency requirement; the statement may be made by any declarant, regardless of relationship to the party.<sup>143</sup> Nevertheless, in the case of adoption by an entity such as the government, only an agent of the entity can effect the adoption.<sup>144</sup>

Any agent who is authorized to speak for the government should be able to effect adoption both explicitly and implicitly. In *Wright-Simmons*, for example, the City Manager's action sufficed to adopt the statements in question.<sup>145</sup> In *Morgan*,

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139. *Id.* at 869.

140. *Id.* at 870.

141. *Id.* Simple failure to disavow a statement will not normally be considered an adoption. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1245 (E.D. Pa. 1980), *aff'd in part, rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986).

142. FED. R. EVID. 801(d)(2)(C)-(D).

143. See *id.* 801(d)(2)(B).

144. The relationship of specific agents to the government is discussed at length in sections B and C below, so it will be treated only briefly here.

145. See *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1268-69 (10th Cir. 1998) (holding that the City Manager's firing of an employee based on written statements about that employee rendered the statement admissible).

however, the court appeared to suggest a limitation.<sup>146</sup> The court held that statements in an affidavit filed with the court were adopted and were therefore admissible under Rule 801(d)(2)(B), but noted that, in the District of Columbia, search warrant applications must be approved by a prosecutor.<sup>147</sup> The court also remarked that the agent's statements in the affidavit supporting the warrant application represented the government's position and were not "merely the views of its agent."<sup>148</sup>

To suggest that only government attorneys can adopt statements is to construe the rule too narrowly. For instance, if law enforcement officers are authorized to submit documents such as applications for search warrants to the court without the approval of a government attorney, the submission itself should suffice to establish the included statements as adoptive admissions. Even if no government attorney signed off on the warrant application in *Morgan*, the sworn statements of the agent vouching for the reliability of the information from the informant should render the statements admissible under Rule 801(d)(2)(B) as statements in which the government, through its agent, manifested its belief. The authority to speak on behalf of the government, whether to a court or not, should carry with it the authority to adopt statements, making them admissible under Rule 801(d)(2)(B).

Similarly, an agent authorized to act for the government may adopt statements by action. In *Wright-Simmons*, the City Manager had the authority to terminate the employee, so his action was authorized and also served as governmental adoption of the report.<sup>149</sup> Courts should admit statements under Rule 801(d)(2)(B) when action was taken on that statement because specific government action can indicate adoption of that statement.

### 3. Misapplication of the Adoptive Admissions Rule

Courts appear to be more comfortable admitting adoptive admissions against the government than recognizing vicarious governmental admissions. Some courts have relied on adoption

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146. See *United States v. Morgan*, 581 F.2d 933, 958 (D.C. Cir. 1978) (holding that sworn statements "clearly stand on more solid ground than mere out-of-court assertions by a government agent").

147. *Id.* at 938 n.10.

148. *Id.*

149. See *Wright-Simmons*, 155 F.3d at 1268-69.

arguments to admit statements uttered by government agents—rather than third parties—and have applied the adoptive admissions rule, Rule 801(d)(2)(B), to statements that are actually vicarious admissions falling within Rule 801(d)(2)(C) or (D). Unfortunately, overreliance on adoptive admission reasoning contributes to the narrow construction of governmental party admissions, bypassing opportunities for the court to clarify the application of the vicarious admissions rules to statements made by government agents.

In *United States v. Kattar*,<sup>150</sup> for example, the court evaluated a sentencing memorandum and a brief filed by the government in an earlier case as adoptive admissions under Rule 801(d)(2)(B).<sup>151</sup> The court held that the Justice Department “manifested its belief” in those statements by submitting them to the courts for the truth of their contents and that the statements were therefore admissible under Rule 801(d)(2)(B).<sup>152</sup> Instead, the court should have admitted the statements as authorized admissions under Rule 801(d)(2)(C) because the attorneys who prepared and filed the documents were authorized to speak for the government.<sup>153</sup>

Similarly, in *United States v. Warren*,<sup>154</sup> the court relied on the adoptive admissions rule to admit the statements of an agent contained in an affidavit.<sup>155</sup> The court should have admitted the statements as vicarious admissions because the agent was authorized to speak for the government in the affidavit.<sup>156</sup> The statements also could have been admitted under the non-authorized vicarious admissions rule, Rule 801(d)(2)(D), because the agent was an “agent” within the meaning of the rule and the affidavit, recounting aspects of an investigation, related to matters within the scope of the agency.<sup>157</sup>

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150. 840 F.2d 118 (1st Cir. 1988).

151. *Id.* at 130.

152. *Id.* at 131.

153. See *infra* Part III.B.2.a (arguing that statements made by attorneys are generally admissible and that prosecutors' statements should likewise be admissible).

154. 42 F.3d 647 (D.C. Cir. 1994).

155. *Id.* at 655.

156. See *id.*

157. See FED. R. EVID. 801(d)(2)(D) (noting that a statement made “by the party’s agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship” amounts to an admission). The statements in question were most likely made by the officer

In cases such as these, the courts' reliance on adoptive admissions reasoning narrows the scope of governmental party admissions. By emphasizing formal filing as adoption and declining to explore the use of vicarious admissions against the government, the courts impair the development of the law of party admissions and restrict the scope of the rule as it is used against the prosecution.

B. RULE 801(d)(2)(C): AUTHORIZED ADMISSIONS

Rule 801(d)(2)(C) defines statements of an agent with authority to speak as party admissions of the principal.<sup>158</sup> Many agents who act for the government or any other non-human entity lack authority to speak for the principal, so their statements are not admissible as authorized admissions.<sup>159</sup> Others, however, do have authority to speak for the entity.<sup>160</sup> To determine whether their statements are authorized admissions within Rule 801(d)(2)(C), a court must determine the extent of the authority.<sup>161</sup> Although some agents are empowered to speak generally for the government, they more commonly have authority to speak only on specific topics or occasions.<sup>162</sup> If an agent for a principal other than the government makes a statement within the scope of its authority to speak for the entity, the statement is admissible against the principal-entity as a party admission.<sup>163</sup> The rules that apply to other entities should apply to statements made by agents authorized to speak for the government. Section 1

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acting as an agent because the statements were made under oath and submitted to a magistrate. See *Warren*, 42 F.3d at 655.

158. FED. R. EVID. 801(d)(2)(C).

159. See generally 3 GRAHAM, *supra* note 17, § 801.22, at 163-66 (explaining the circumstances under which agent statements are admissible); 2 MCCORMICK, *supra* note 15, § 259, at 149-61 (explaining that statements made by agents explicitly authorized to act as agents are admissible against authorizing parties, but that absent explicit authorization, the admissibility of statements made in the scope of employment is much less clear).

160. See, e.g., 2 MCCORMICK, *supra* note 15, § 259, at 154-60 (explaining that statements made by attorneys are sometimes admissible against the client, statements made by partners are sometimes admissible against the partnership, statements made by a coconspirator are sometimes admissible against other conspirators, and statements made by an agent of an accused are generally admissible against the accused).

161. See 3 GRAHAM, *supra* note 17, § 801.22, at 163-64 (explaining that the authority of an agent to speak for a subject must be determined in court).

162. See *id.* § 801.22, at 163-66 (explaining that the scope of employment affects the admissibility of certain statements).

163. See *id.*

below briefly reviews sources of authority to speak for the government. Section 2 considers four types of governmental statements made with authority that may be authorized admissions within Rule 801(d)(2)(C): prosecutors' statements, documents filed with the court, official publications, and internal reports.

### 1. Sources of Authority

Authority to speak arises in a variety of ways and may be express or implied. Determinations of which government agents have authority should parallel the determinations of authority to speak for non-governmental entities. A fair application of the rule governing authorized admissions should recognize that many agents have authority to speak for the government.

A position may carry express or implied authority to speak. For example, the president of a corporation has authority to speak,<sup>164</sup> as does a party's attorney.<sup>165</sup> The heads of specific subdivisions within government should similarly be viewed as authorized to speak on matters falling within their domain.<sup>166</sup> The President has authority to speak for the Executive Branch. The Attorney General has authority to speak for the Department of Justice. Additional law enforcement personnel

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164. See, e.g., *City of Tuscaloosa v. Harcros Chems., Inc.*, 158 F.3d 548, 557 (11th Cir. 1999) (holding that the district court abused its discretion by excluding as hearsay witnesses' testimony concerning statements of chemical distributor's president); *California v. Celtor Chem. Corp.*, 901 F. Supp. 1481, 1486-87 (N.D. Cal. 1995) (holding the statements of a company president, who was also the largest stockholder and a member of the board of directors, admissible under Rule 801(d)(2) without discussion); *In re Commercial Oil Serv., Inc.*, 88 B.R. 126, 128 (N.D. Ohio 1987) (holding that written statements that were within the scope of the company president's authority were admissible); see also *Kingsley v. Baker/Beech-Nut Corp.*, 546 F.2d 1136, 1140-41 (5th Cir. 1977) (holding that a summary of a high ranking company officer drawn up by an attorney at the request of the court was admissible). But see *City of Tuscaloosa v. Harcros Chems., Inc.*, 877 F. Supp. 1504, 1519 (N.D. Ala. 1995) (recognizing that under Alabama law it is not assumed that corporation presidents have authority to speak for corporation), *aff'd in part, vacated in part, rev'd in part*, 158 F.3d 548 (11th Cir. 1998).

165. See *United States v. Ojala*, 544 F.2d 940, 946 (8th Cir. 1976) (holding that statements made by an attorney acting as an attorney were admissible when the statements were made within the scope of the attorney's authority).

166. The party offering the statement has the burden of demonstrating that the authority exists. Authority will not necessarily be assumed from a job title. See, e.g., *Overton v. City of Harvey*, 29 F. Supp. 2d 894, 905 (N.D. Ill. 1998) (noting that a description of the declarant as City Administrator was insufficient to establish foundation under Rule 801(d)(2)(C) or (D)).

may fall into the category of those implicitly authorized to speak. For example, if the police commissioner makes a public statement on behalf of the department, that statement would likewise be admissible as an authorized admission.

Alternatively, authority to speak may be express: An agent may be hired or designated to speak for the principal.<sup>167</sup> Press secretaries and other similar spokespersons for various governmental departments have the authority to state official positions of the department. If an authorized spokesperson speaks for a governmental office, the spokesperson's statements should be treated as the authorized admissions of the office.

An agent may be hired or designated as the spokesperson on a limited subject or occasion.<sup>168</sup> Lawyers hired to appear in court for the government fall into this category, acting as the spokesperson in the case the attorney is handling, but having no broad authority to speak for the government on other matters.

## 2. Statements Made with Authority

### a. Prosecutors' Statements as Party Admissions

A party's attorney is perhaps the clearest imaginable example of an agent authorized to speak.<sup>169</sup> The prosecutor

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167. See, e.g., *Michaels v. Michaels*, 767 F.2d 1185, 1201 (7th Cir. 1985) (holding that a broker was authorized to act as broker and contact potential buyers, and that telexes sent by that broker were therefore admissible); *Collins v. Wayne Corp.*, 621 F.2d 777, 781 (5th Cir. 1980) (holding that the testimony of an expert witness hired to give a deposition for a principal was admissible).

168. See, e.g., *Zearley v. Ackerman*, 116 F. Supp. 2d 109, 115 (D.D.C. 2000) (holding that statements of a school district official deposed as the superintendent's designee fell within Rule 801(d)(2)(C)); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1293 (E.D. Pa. 1980) (holding that where witnesses were authorized to testify on specific topics, testimony on other matters fell outside their authority under Rule 801(d)(2)(C)), *aff'd in part, rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986).

169. See, e.g., *United States v. McKeon*, 738 F.2d 26, 31 (2d Cir. 1984) (stating that a pleading prepared by an attorney constitutes an admission by "one presumptively authorized to speak for his principal" (quoting *Kunglig Jarnvagsstgrelsen v. Dexter & Carpenter, Inc.*, 32 F.2d 195, 198 (2d Cir. 1929))); *United States v. Margiotta*, 662 F.2d 131, 142-43 (2d Cir. 1981) (noting that attorney statements may be admissible against the client); *Rodriguez-Gonzalez v. INS*, 640 F.2d 1139, 1141 (9th Cir. 1981) (examining the binding nature of attorney statements made in the presence of the defendant and with the defendant's authority); *United States v. Ferreboeuf*,

acts as the government's formal representative to the court by filing documents and making statements to the court. Not only are prosecutors authorized to speak for the government in criminal cases, but they can also unquestionably bind the government on a range of legal matters through, for example, stipulations and plea agreements.<sup>170</sup> Therefore, their statements in other aspects of the case should be treated as party admissions. Some courts are willing to admit such statements.<sup>171</sup> Others, however, express reluctance and either refuse to admit the statements altogether or subject them to special scrutiny.

This reluctance is hard to comprehend. Long before the adoption of the Federal Rules of Evidence, courts recognized that attorneys speak for their clients and, therefore, that their statements are admissible against the client and may in some cases bind the client.<sup>172</sup> Despite the precedent treating counsel's statements as the client's admissions in civil cases, courts are hesitant to apply the rule in criminal cases.<sup>173</sup>

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632 F.2d 832, 836 (9th Cir. 1980) (holding that the defendant was bound by facts entered into the record and agreed to by defendant's counsel when made in the presence of the defendant).

170. See, e.g., *Santobello v. New York*, 404 U.S. 257, 262 (1971) (declaring that the fulfillment of prosecutor's promise in return for a guilty plea is a necessary safeguard for defendants); *United States v. Clark*, 55 F.3d 9, 12 (1st Cir. 1995) (finding that the government breached a binding plea agreement with the defendant); *United States v. Bakshinian*, 65 F. Supp. 2d 1104, 1106 (C.D. Cal. 1999) (noting that prosecutors have the power to bind the government and do so when they enter into a plea agreement).

171. See 5 WEINSTEIN & BERGER, *supra* note 40, § 801.33[3], at 801-72 to 801-73 (stating that "some courts have indicated that Rule 801(d)(2)(D) may be invoked against the government, particularly when dealing with statements made by government attorneys" (footnotes omitted)); see also cases cited *supra* note 40.

172. See, e.g., *Oscanyan v. Arms Co.*, 103 U.S. 261, 263 (1880) (recognizing the authority of a lawyer to speak for the client); *Rhoades, Inc. v. United Air Lines, Inc.*, 340 F.2d 481, 484 (3d Cir. 1965) (recognizing that opening statements made by the attorney were admissible). In some instances, the attorney's statement was given preclusive effect. See, e.g., *United States v. Smyth*, 104 F. Supp. 283, 306 (N.D. Cal. 1952) (stating that Assistant United States Attorneys can bind the United States with statements in court); see also *Dick v. United States*, 40 F.2d 609, 611 (8th Cir. 1930) (pointing to appellant's silence when his attorney conceded pertinent facts of the case as proof of purposeful admission); *Roman*, *supra* note 45, at 997-98 (examining the conclusive effect of admissions made in an amended pleading in which only added allegations were made).

173. See, e.g., *United States v. DeLoach*, 34 F.3d 1001, 1005-06 (11th Cir. 1994) (per curiam) (affirming a lower court's decision to exclude statements made by an attorney during closing arguments); *McKeon*, 738 F.2d at 30-31

The leading cases interpreting Rule 801(d)(2) as it applies to lawyers' statements in criminal cases are the decisions of the United States Court of Appeals for the Second Circuit in *United States v. McKeon*<sup>174</sup> and *United States v. Salerno*.<sup>175</sup> In *McKeon* and *Salerno*, the court detailed a test for determining the admissibility of attorney statements in criminal cases. *McKeon* established the test for evaluating the admissibility of the defense attorney's statements as the defendant's party admissions. *Salerno* applied the test to statements offered against the government. Section i discusses this test and concludes that, having developed initially as a test for admitting statements against the criminal defendant, the test is too heavily weighted against admissibility to govern the prosecution's party admissions. Section ii reviews decisions adopting the more permissive stance that should be applied to governmental admissions.

i. The *McKeon-Salerno* Test

*McKeon* was the first case to address admissibility of attorneys' statements in criminal cases under Rule 801(d)(2). In *McKeon*, the Court of Appeals for the Second Circuit considered the government's argument that defense counsel's inconsistent remarks from the opening statement in a prior trial were admissible against the defendant in a subsequent trial.<sup>176</sup> Concluding that lawyers' statements would sometimes be admissible, the court stated,

We believe that prior opening statements are not *per se* inadmissible

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(concluding that although opening statements made by defense attorneys in criminal trials are not *per se* inadmissible, caution should be used to not admit too much); *People v. Cruz*, 643 N.E.2d 636, 664-65 (Ill. 1994) (upholding a lower court's decision that prevented the defense from introducing the prosecution's strategy in an earlier related trial because of competing policy concerns); *People v. Morrison*, 532 N.E.2d 1077, 1088 (Ill. App. Ct. 1988) (refusing to admit the prosecutor's closing arguments in a codefendant's trial).

174. 738 F.2d 26 (2d Cir. 1984). Decisions prior to *McKeon* acknowledged that an attorney's statement could be an authorized party admission of a criminal defendant, but none had fully evaluated the question. See, e.g., *United States v. Flores*, 679 F.2d 173, 178 (9th Cir. 1982) (treating an attorney's letter as authorized admission under Rule 801(d)(2)); *Margiotta*, 662 F.2d at 142-43 (stating in dictum that attorney's statements would fall within Rule 801(d)(2)).

175. 937 F.2d 797 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 317 (1992).

176. See *McKeon*, 738 F.3d at 28-29 (noting the government's arguments that statements were admissible under Federal Rules of Evidence 801(d)(2)(B), (C), or (D)).

in criminal cases. To hold otherwise would not only invite abuse and sharp practice but would also weaken confidence in the justice system itself by denying the function of trials as truth-seeking proceedings. That function cannot be affirmed if parties are free, wholly without explanation, to make fundamental changes in the version of facts within their personal knowledge between trials and to conceal these changes from the final trier of fact.<sup>177</sup>

Despite this strong language, the court defined a restrictive test to be applied case by case to determine when counsel's earlier opening statement would be admitted.<sup>178</sup> The court feared the problems that could flow from the "expansive practices sometimes permitted" under the party admissions rule and concluded that the use of prior statements must be circumscribed.<sup>179</sup> The court identified five factors that persuaded it to limit admissibility of defense counsel's prior argument: consumption of time, unfairness to the party against whom the statement is offered, deterrence of advocacy, compromise of the defense, and disqualification of defense counsel.<sup>180</sup> Applying the test, the court in *McKeon* held that the defense attorney's statements in his prior opening statement were admissible under Federal Rule of Evidence 801(d)(2).<sup>181</sup>

Many courts apply the restrictive approach elaborated in *McKeon* to prosecutors' statements,<sup>182</sup> but they should do so with caution. *McKeon* concerned the admissibility of defense counsel's statements, so its multi-factor test is too strongly weighted against admitting prior statements to serve as an appropriate guide for prosecution statements. In fact, *Cruz*<sup>183</sup> illustrates the risk of applying *McKeon* to exclude prosecution

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177. *Id.* at 31.

178. *Id.* at 31-33 (requiring the court to be convinced of three factors before statements will be admitted).

179. *Id.*

180. *See id.* at 32-33. Considering all these factors, the *McKeon* court concluded that a trial court should not admit a defense counsel's statement unless its inconsistency with a prior statement is clear and it is the equivalent of a testimonial statement of the defendant. *See id.* at 33. The court also exhorted the trial court to determine that "the inference the prosecution seeks to draw from the inconsistency is a fair one and that an innocent explanation . . . does not exist." *Id.* The court further stated that if the question of innocent explanation could not be resolved, the statement should be excluded. *Id.*

181. *See id.* at 33-34 (relying on Federal Rules of Evidence 801(d)(2)(B)-(C))

182. *See, e.g.,* *Hoover v. State*, 552 So. 2d 834, 839-40 (Miss. 1989) (applying the *McKeon* test to the State's argument in a prior trial).

183. *People v. Cruz*, 643 N.E.2d 636 (Ill. 1994). *See supra* notes 7-14 and accompanying text.

statements.<sup>184</sup> Although the first two factors identified in *McKeon* apply with equal weight to prosecutors' prior statements, the other three do not.

The first factor is the consideration that free use of attorney statements in prior trials will "consume substantial time to pursue marginal matters."<sup>185</sup> This factor should guide courts in evaluating the admissibility of prosecution statements. In *McKeon*, the court recognized that predicting the evidence in the opening statement is difficult and that both evidence and tactics in a case may change from one trial to the next.<sup>186</sup> The court was therefore concerned that the explanations for the inconsistency could take too much time and would distract the jury's attention from the main issues at trial.<sup>187</sup> Like the defense, the prosecution may be surprised by a witness's actual testimony at trial or may discover new evidence. If the prosecution has a fair explanation for changing its position and explaining that change, it can present it at trial. Given the potential injustice in prosecutorial inconsistency, however, the trial court should weigh the defendant's argument carefully, alert for any danger signaled by the prosecution's change of position.<sup>188</sup> The threat to the fairness of the process justifies the necessary consumption of time.

The second factor considered in *McKeon* is the risk of inviting unfair inferences from inconsistent positions.<sup>189</sup> This factor is closely related to the first and is likewise a legitimate concern in determining the admissibility of government admissions. The courts can adequately protect against improper use of the admissions by carefully assessing the significance of the proffered evidence and the validity of the arguments based on it. As they do so, however, the courts should be receptive to admitting the prosecution's prior statements. In *McKeon*, the court acknowledged that its

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184. See *supra* notes 20-24 and accompanying text.

185. *McKeon*, 739 F.2d at 32.

186. See *id.* (commenting on possible diversionary problems with respect to marginal issues that can erupt from one trial to the next).

187. See *id.* (stating that detraction from the real issues could waste the jury's time and energy).

188. See Poulin, *supra* note 25, at 1460-74 (discussing possible reasons for the change in position by the prosecution, as well as the consequences on due process).

189. *McKeon*, 738 F.2d at 32 (examining the jury assessment of procedural obligations in subsequent trials).

reasoning rested on considerations unique to the use of the party admission rule against a criminal defendant, suggesting that a legitimate inconsistency might arise because of the defendant's limited burden in a criminal trial.<sup>190</sup> By contrast, the government bears the burden of production. It must therefore "present a coherent version of the facts" and should have a comprehensive understanding of the case at the outset.<sup>191</sup> Consequently, it will more often be fair to admit the prosecution's prior statements than to admit those of defense counsel.

The other three factors should not influence the consideration of governmental admissions. The third factor considered in *McKeon* is the fear of deterring "vigorous and legitimate advocacy."<sup>192</sup> The court's concern was that the prospect of having statements from the first trial admitted against the client in the later proceeding would discourage defense counsel from making zealous and appropriate arguments in one or the other proceeding.<sup>193</sup> Given the different standards that apply to prosecution and defense advocacy and the greater latitude accorded defense counsel, this factor should play no role in evaluating prosecutors' statements. Commentators and courts have noted that prosecutors have special obligations to do justice and to maintain the fairness of the proceeding.<sup>194</sup> The Supreme Court

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190. See *id.* (emphasizing that the defense's attack on different elements in separate trials may confuse the jury). A defendant might target one weakness in the government's case in the first trial and another in the later trial; this would unfairly appear to the jury as an inconsistency that undermined the legitimacy of the defense. See *id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. The rules of professional responsibility impose special obligations on prosecutors. See generally Michael Q. English, Note, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 *FORDHAM L. REV.* 525, 528-32, 551-56 (1999) (discussing the prosecutor's ethical duty). Prosecutors are expected to assume special responsibility for the fairness of criminal proceedings. Unlike their adversaries in the criminal justice process, prosecutors do not represent clients and are therefore unfettered by the client obligations imposed on most lawyers. See generally CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 13.10.1, at 759-60 (Student ed. 1986) (suggesting that while not representing an individual as a client, the prosecutor in a policy-making position should regard the public as a client, while those prosecutors in more subordinate roles should consider their office superiors as such); Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-*

has frequently emphasized the importance of prosecutorial fairness in criminal cases.<sup>195</sup> The difference in these advocacy

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*Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 931 (1996) (discussing the constituencies represented by the prosecutor as being victims, law enforcement agencies, and policies of the prosecutor's office); Roberta K. Flowers, *What You See Is What You Get: Applying the Appearance of Impropriety Standard to Prosecutors*, 63 MO. L. REV. 699, 728-30 (1998) [hereinafter Flowers, *What You See Is What You Get*] (characterizing the prosecutor's client as the government and the public); English, *supra*, at 528-42 (discussing the special obligations of the prosecutor). Prosecutors have a special obligation of candor and are often exhorted to "do justice" or "seek justice." Bruce A. Green, *Why Should Prosecutors "Seek Justice"?*, 26 FORDHAM URB. L.J. 607, 630-33 (1999) (asserting that prosecutors have a duty not to impeach true testimony or argue false theories, but rather to seek fairness and truth in order to obtain justice). Commentators have said that the prosecutor's clearest obligation is to refrain from convicting the innocent. *See id.* at 635; *see also* Flowers, *What You See Is What You Get*, *supra*, at 729-30 (noting that prosecutors have the dual role of prosecuting criminals while protecting the innocent from conviction).

195. In *Berger v. United States*, the Court set the bar for expectations of prosecutorial conduct, stating,

The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

295 U.S. 78, 88 (1935). In *Ake v. Oklahoma*, the Court stated,

The State's interest in prevailing at trial—unlike that of a private litigant—is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases. Thus, also unlike a private litigant, a State may not legitimately assert an interest in maintenance of a strategic advantage over the defense, if the result of that advantage is to cast a pall on the accuracy of the verdict obtained.

470 U.S. 68, 79 (1985); *see also* *Strickler v. Greene*, 527 U.S. 263, 281 (1999) (noting the prosecutor's special role "in the search for truth in criminal trials"); *Patterson v. Illinois*, 487 U.S. 285, 309 (1988) (Stevens, J., dissenting) (arguing that the prosecutor's offer of legal advice to defendant is unfair because "the prosecuting authorities' true adversary posture" may be underestimated); *Young v. United States ex rel. Vuitton Fils S.A.*, 481 U.S. 787, 814 (1987) (demanding assurance that prosecutors who exercise discretionary charging power "will be guided solely by their sense of public responsibility for the attainment of justice"); *United States v. Young*, 470 U.S. 1, 25 (1985) (Brennan, J., concurring in part and dissenting in part) (noting in dissent the majority's failure to acknowledge "that a representative of the United States Government is held to a *higher* standard of behavior" than the

standards weakens the argument against admitting inconsistent statements by the prosecution. Unlike deterrence of energetic defense advocacy, deterrence of prosecutorial exaggeration and excessive zeal serves the interest of justice.

The fourth factor in *McKeon* is the risk that forcing the defense to explain the source of inconsistency may “expose work product, trial tactics or legal theories” and thus compromise the defendant’s rights.<sup>196</sup> Again, these concerns are far less significant when evaluating the prosecution’s statements. Inquiry into explanations for apparent inconsistency on the part of the defense threatens attorney-client privilege. By contrast, no privilege exists in relation to the prosecution.<sup>197</sup> A prosecutor’s explanation may expose the prosecution’s theory and tactics, but that exposure is less harmful to the prosecution than to the defense.<sup>198</sup> As a general rule, the fairness of the proceeding warrants placing the burden of that risk on the prosecution. If in a particular case, the prosecution would have to expose protected material to explain the prior statement, the court could exclude the statement to protect the government’s work product.<sup>199</sup>

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ethical rules of conduct prescribe); *Imbler v. Pachtman*, 424 U.S. 409, 424 (1976) (“A prosecutor is duty bound to exercise his best judgment both in deciding which suits to bring and in conducting them in court.”); *Donnelly v. DeChristoforo*, 416 U.S. 637, 648-49 (1974) (Douglas, J., dissenting) (“The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.”); *United States v. Ash*, 413 U.S. 300, 320 (1973) (highlighting the ethical responsibility of the prosecutor” as a safeguard against accidental or purposeful subversion of the trial); *United States v. Wade*, 388 U.S. 218, 256 (1967) (White, J., concurring in part and dissenting in part) (stating, in dissent, that prosecutors “have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to . . . the ascertainment of the true facts . . .”).

196. *McKeon*, 738 F.2d at 32.

197. The prosecutor has no client whose confidential communications are protected.

198. The prosecution is obligated to provide more pretrial discovery than the defense. See *LAFAVE ET AL.*, *supra* note 28, § 20.1, at 910-15 (explaining the state’s advantages in the discovery process). At trial, the prosecution proceeds first and must present proof beyond a reasonable doubt on all elements of the offense, whereas the defendant may elect to introduce no evidence whatsoever. In addition, the question of attorney-client privilege may arise if the defendant is required to explain the inconsistency, but the privilege is not implicated by the prosecution’s explanation.

199. See FED. R. CRIM. P. 16(a)(2) (listing material not subject to disclosure); see also *United States v. Fernandez*, 231 F.3d 1240, 1247 (9th Cir. 2000) (applying the work product privilege to protect the prosecution

The final policy concern raised in *McKeon* is the prospect that admitting the statements will require removal of the attorney who made the prior statements.<sup>200</sup> This concern also carries less force when evaluating a prosecutor's inconsistent statements.<sup>201</sup> Removing a particular prosecutor is far less troublesome than removing defense counsel. Removal of a defendant's counsel of choice from the case raises constitutional concerns.<sup>202</sup> Furthermore, it undermines the effectiveness of the representation by depriving the defendant of the assistance of the attorney familiar with the case. The new defense attorney must attempt to establish a relationship of trust with the defendant while getting up to speed on the case. In contrast, a substitute prosecutor can be brought into the case far more easily than can substitute defense counsel. Most prosecutors' offices have a number of assistant prosecutors on staff, and the relationship between the prosecutor and the witnesses is not as critical as that between the defendant and defense counsel.<sup>203</sup> Moreover, there may be more than one prosecutor working on the case, as well as a consistent staff of law enforcement personnel.<sup>204</sup>

Having considered these five factors, the court in *McKeon* defined a circumscribed test for admitting prior statements of defense counsel.<sup>205</sup> In *Salerno*, the court adapted the reasoning

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memorandum). *But see* *Doubleday v. Ruh*, 149 F.R.D. 601, 605-08 (E.D. Cal. 1993) (declining to provide work product protection to the prosecutor's file).

200. *McKeon*, 738 F.2d at 33.

201. *See id.* (examining the consequences of the admission of opening statements). *But see* *State v. Cardenas-Hernandez*, 579 N.W.2d 678, 685-86 (Wis. 1998) (discussing the negative effect on the prosecutor of admitting a prior statement).

202. *See* *Wheat v. United States*, 486 U.S. 153, 158-59 (1988) (recognizing and reaffirming that the defendant has a Sixth Amendment right to counsel of choice); *United States v. Santos*, 201 F.3d 953, 958 (7th Cir. 2000) ("The Sixth Amendment entitles a federal criminal defendant to the assistance of counsel."); *see also* Vivian O. Berger, *The Supreme Court and Defense Counsel: Old Roads, New Paths—A Dead End?*, 86 COLUM. L. REV. 9 (1986); Stephen J. Schulhofer & David D. Friedman, *Rethinking Indigent Defense: Promoting Effective Representation Through Consumer Sovereignty and Freedom of Choice for All Criminal Defendants*, 31 AM. CRIM. L. REV. 73, 106-07 (1993). *But see* *Morris v. Slappy*, 461 U.S. 1, 19-20 (1983) (concluding that, although entitled to counsel, the relationship need not be "meaningful" under the Sixth Amendment).

203. *See* CAROL J. DEFRANCES & GREG W. STEADMAN, U.S. DEP'T. OF JUSTICE, PROSECUTORS IN STATE COURTS, 1996, at 2-3 (1998).

204. *See id.*

205. *See* *McKeon*, 738 F.2d at 32-34 (concluding that the prior opening statement had been properly admitted). In analyzing the case, the court

from *McKeon* to statements made by government lawyers and offered by a criminal defendant.<sup>206</sup> The Second Circuit test directs the trial court to make three determinations. First, it must ask whether the prior statement involves a factual assertion that is clearly inconsistent with the prosecution's later assertions.<sup>207</sup> Second, the court must determine whether the prosecutor's statements were the equivalent of the client's testimonial statements.<sup>208</sup> Finally, the court must determine by a preponderance of the evidence that the inconsistent statement fairly supports the inference to be drawn and is not subject to innocent explanation.<sup>209</sup>

The *McKeon-Salerno* test erects too many barriers to admissibility of inconsistent prosecution statements. The statements are generally authorized admissions, and Rule 801(d)(2)(C) should overcome the hearsay objection to a prosecutor's prior statement.<sup>210</sup> If the evidence presents problems such as risk of confusion, unfair prejudice, or waste of time, the appropriate objection falls under Rule 403.<sup>211</sup> Under Rule 403, the court may exclude the statement only if such negative considerations substantially outweigh the probative value.<sup>212</sup> In contrast, the *McKeon-Salerno* test is biased against admissibility—eschewing the Rule 403 balance in favor of admissibility—because of the factors discussed in *McKeon*. Although the special considerations that apply to statements of defense counsel may justify that approach, the *McKeon* policy considerations weigh less heavily against admitting prosecution statements, and the usual bias in favor of admissibility should prevail.

In some cases, of course, even the *McKeon-Salerno* test will admit the evidence. In *Salerno*, for example, the court held the evidence should have been admitted.<sup>213</sup> The government

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rested its decision on Rule 801(d)(2)(B) and (C). *Id.* at 33-34.

206. See *United States v. Salerno*, 937 F.2d 797, 811-12 (2d Cir. 1991) (expanding the application of *McKeon*), *rev'd on other grounds*, 505 U.S. 317 (1992).

207. *Id.* at 811.

208. *Id.*

209. *Id.* (directing the district court in the evidentiary use of prior jury arguments).

210. See FED. R. EVID. 801(d)(2)(C).

211. See *id.* 403.

212. *Id.*

213. See *United States v. Salerno*, 937 F.2d 797, 811 (2d Cir. 1991) (holding that the district court abused its discretion by not admitting evidence of

charged Auletta as a defendant and treated him as a culpable actor.<sup>214</sup> By contrast, in an earlier prosecution, the government had prosecuted other defendants on the theory that Auletta was a victim of extortion.<sup>215</sup> At his trial, Auletta sought to introduce portions of the prosecution's opening statement and closing argument from the prior trial.<sup>216</sup> He argued that these represented party admissions and should be presented to the jury to undermine the prosecution's claim that he was criminally liable.<sup>217</sup> The trial court excluded the statements, but the court of appeals disagreed and held that the opening and closing should have been admitted as party admissions.<sup>218</sup> The court noted that the assertions offered by the defendant were both factual and inconsistent with the government's position at his trial.<sup>219</sup> The court stressed the jury's need for the information, noting that "the jury, and not the government, must ultimately decide" the case.<sup>220</sup>

In other instances, however, subjecting prosecutorial statements to the special scrutiny called for by the *McKeon-Salerno* test results in excluding evidence that the defendant should be permitted to introduce.<sup>221</sup> In *United States v. DeLoach*,<sup>222</sup> for example, the Court of Appeals for the Eleventh Circuit affirmed the trial court's ruling excluding the prosecutor's statements from the earlier trial of a

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separate government theories), *rev'd on other grounds*, 505 U.S. 317 (1992).

214. *See id.* at 811-12.

215. *Id.* at 810-11.

216. *Id.* at 810-12 (explaining that the government actions were indicative of inconsistent positions). The defendant also tried to introduce the indictment from the prior trial. *Id.* at 810-11.

217. *See id.* (exploring the extent of defendant's argument).

218. *Id.* at 811-12 (reviewing the reasoning of the lower court). The court concluded that the indictment was a statement of the grand jury rather than the prosecution, and therefore that it did not fall within the rule. *Id.* at 810-11. The court did not specify which subsection of Rule 801(d)(2) applied to any of the statements. *See id.* at 811-12.

219. *See id.* at 812; *supra* note 218.

220. *Salerno*, 937 F.2d at 812.

221. *See, e.g., United States v. DeLoach*, 34 F.3d 1001, 1005 (11th Cir. 1994) (excluding the prosecutor's closing arguments, and citing the failure to meet the requirements of the *McKeon-Salerno* test); *Hoover v. State*, 552 So. 2d 834, 840-41 (Miss. 1989) (finding error, although harmless, on the part of the trial court for excluding statements made by the prosecutor at the prior trial); *State v. Cardenas-Hernandez*, 579 N.W.2d 678, 686 (Wis. 1998) (excluding the prosecutor's statements due to failure to meet *McKeon's* first guideline).

222. *DeLoach*, 34 F.3d at 1001.

codefendant.<sup>223</sup> The codefendant had defended by claiming reliance on advice of counsel, DeLoach.<sup>224</sup> At the codefendant's trial, the prosecutor argued in closing that DeLoach had not advised the codefendant to withhold information from the bank.<sup>225</sup> Of course, at DeLoach's trial the prosecution asserted the opposite, alleging that DeLoach had advised his client not to tell the bank.<sup>226</sup> The court cited *McKeon* and *Salerno* and concluded that the admissibility of prior argument "is tightly circumscribed."<sup>227</sup> The court upheld the trial court's ruling because the prosecutor's statements were not statements of fact and were not inconsistent with the government's position in its prosecution of DeLoach.<sup>228</sup>

The court should not have held the statements inadmissible on that basis. The prosecutor's argument from the codefendant's trial accurately stated the government's position that DeLoach had not given the advice. If the prosecution's theory in DeLoach's case relied in any way on the assertion that he had given the advice, the court should have viewed the statements as relevant party admissions because they were inconsistent with the position taken by the prosecution in DeLoach's trial. The jury should have learned of the inconsistency, even if the prosecution could have convicted DeLoach regardless of whether he gave the advice in question.

In *People v. Morrison*,<sup>229</sup> the defendant argued that he should be permitted to read to the jury excerpts of the prosecutor's argument at the codefendant's sentencing.<sup>230</sup> In its sentencing argument regarding aggravation, the prosecution had argued that the codefendant, a female, was a major player who had not engaged in drug transactions at the behest of any male in the household but had done so on her own.<sup>231</sup> Further, the prosecutor asserted that there was no hint that Morrison had forced her into the trade.<sup>232</sup> At his trial, Morrison claimed

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223. *Id.* at 1006.

224. *Id.* at 1005.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 1005-06.

229. 532 N.E.2d 1077 (Ill. App. Ct. 1988).

230. *Id.* at 1088.

231. *See id.*

232. *See id.*

that the codefendant owned all the drugs in the house.<sup>233</sup> She testified in his defense, claiming ownership.<sup>234</sup> The court nevertheless held the prosecution's prior statements inadmissible because they did not amount to an admission that the defendant was innocent and were not statements against interest.<sup>235</sup> The court applied the wrong standard. The statements were relevant to defendant's case, suggesting that the codefendant had greater responsibility for the drugs, and they were made by an agent for the state who was authorized to speak. They should have been admitted.

ii. Applying Rule 801(d)(2)(C) Without Special Scrutiny

The special scrutiny required by *McKeon* and *Salerno* is not appropriate when a criminal defendant offers a statement by a government agent authorized to speak for the government against the prosecution. The special consideration for the criminal defendant reflected in *McKeon* does not apply when the defendant offers the evidence against the prosecution.<sup>236</sup> Instead, the adoptive admission rule should be applied to prosecutors' statements without special scrutiny.

In some cases, courts have applied less restrictive tests, suggesting that prosecution statements will generally be admissible.<sup>237</sup> This approach is more appropriate than the

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233. See *id.* at 1087-88.

234. See *id.* at 1085, 1087-88.

235. See *id.* at 1088.

236. See *supra* notes 185-204 and accompanying text.

237. See, e.g., *United States v. Kattar*, 840 F.2d 118, 130-31 (1st Cir. 1998) (holding statements admissible under Federal Rule of Evidence 801(d)(2)); *United States v. GAF Corp.*, 928 F.2d 1253, 1260 (2d Cir. 1991) (concluding that the defendant can inform the jury "that the government at one time believed, and stated, that its proof established something different from what it currently claims" and holding that a bill of particulars constitutes a party admission when offered against the government); see also *United States v. Johnson*, 28 F.3d 1487, 1496 (8th Cir. 1994) (discussing the admissibility of a bill of particulars from a different trial, but concluding that the bill was not inconsistent with the current trial). Of course, under any test, some prosecutorial statements are properly excluded. Some statements are not truly inconsistent; others have innocent explanations. See, e.g., *United States v. Bailey*, No. 97-3130, 1998 WL 388802, at \*1 (D.C. Cir. May 7, 1998) (mem.) (upholding the exclusion of an inconsistent factual statement at a suppression hearing because the prosecution corrected the statement in a timely fashion and explained the mistake); *United States v. Orena*, 32 F.3d 704, 716 (2d Cir. 1994) (upholding the exclusion of the government's allegedly inconsistent statements, and concluding that the positions were consistent, since the prosecution merely expanded its theory); *Johnson*, 28 F.3d at 1496 (concluding

restrictive *McKeon-Salerno* test. In *United States v. Bakshinian*,<sup>238</sup> the district court applied Rule 801(d)(2) to the prosecution's statements without special scrutiny. The court reasoned that *McKeon's* analysis was peculiar to statements by defense counsel and that the government should not receive the same leeway.<sup>239</sup> The court asserted that the government "may not take inconsistent positions as to what occurred."<sup>240</sup> Consequently, the court simply enforced the usual rule that a party-opponent's statements—whether opinion or even argument—are admissible.<sup>241</sup> Similarly, in *United States v. Kattar*,<sup>242</sup> the court held that governmental statements submitted to the court should have been admitted as party admissions.<sup>243</sup> The court concluded that the jury should have been informed that the government advanced an inconsistent position in related litigation.<sup>244</sup>

As these decisions suggest, the test for admissibility of prosecutors' statements should not be biased against admissibility. The protective evaluation prescribed in *McKeon* for statements offered against a criminal defendant is inappropriate when attorney statements are offered against the prosecution. The risk of prejudice and the constitutional concerns that were the foundation of *McKeon* are simply not implicated when the defendant seeks to introduce the prosecution's earlier statement. In such cases, the test should instead turn on two key questions: whether the prosecution made an inconsistent assertion, and whether there is an innocent explanation that is so convincing that the statement has no evidentiary value.<sup>245</sup>

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that statements were not inconsistent); *State v. Cardenas-Hernandez*, 579 N.W.2d 678, 684-86 (Wis. 1998) (declining to admit statements made by the prosecutor during defendant's initial bail hearing because the statements were not clearly inconsistent with the government position at trial).

238. 65 F. Supp. 2d 1104 (C.D. Cal. 1999).

239. *See id.* at 1107-08.

240. *Id.* at 1108.

241. *See id.* at 1109. The court did not apply *McKeon's* requirement that the statement be one of fact, and the court did not specify which subsection of Federal Rule of Evidence 801(d)(2) applied. *See id.*

242. 840 F.2d 118 (1st Cir. 1988).

243. The court did not rely on Rule 801(d)(2)(C), but instead based its decision on Rule 801(d)(2)(B). *Id.* at 131.

244. *See id.*

245. *See United States v. Orena*, 32 F.3d 704, 715-16 (2d Cir. 1994) (describing the conditions necessary to permit defense introduction of a prosecutor's prior statements as evidence).

*b. Documents Filed with the Court*

When the government files a formal document with the court, it should be regarded as containing authorized admissions.<sup>246</sup> As the court noted in *Kattar*, the government should not be permitted to indicate to one federal court that certain statements are trustworthy and accurate, and then argue to another that they are hearsay.<sup>247</sup> The official filing reflects authorization and the statements it contains should accordingly be admissible against the government in that case or a later case.

Some pleadings should also be held to be authorized admissions within Rule 801(d)(2)(C).<sup>248</sup> In criminal cases, an indictment will not be viewed as the prosecution's statement, since it is issued by the grand jury.<sup>249</sup> Otherwise, the rule should apply broadly to the government's pleadings. An information, for example, is the charge of the prosecutor and, if inconsistent with later prosecution positions, should be treated as a party admission. Likewise, bills of particulars are the statements of the authorized spokesperson for the government and should fall within the rule.<sup>250</sup>

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246. Since a lawyer designated by the government will generally be responsible for the filing, these may be viewed as a subcategory of attorneys' statements.

247. See *Kattar*, 840 F.2d at 131.

248. In civil cases, if a party amends its pleadings, the prior pleadings may be admitted as party admissions. See *United States v. GAF, Corp.*, 928 F.2d 1253, 1260 (2d Cir. 1991) (concluding that not allowing the jury knowledge of the original complaint is "substantial abuse of discretion"); *Andrews v. Metro N. Commuter R.R.*, 882 F.2d 705, 707 (2d Cir. 1989) (same); *Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc.*, 32 F.2d 195, 198 (2d Cir. 1929) (stating that the original pleading "remains as a statement once seriously made by an authorized agent, and as such it is competent evidence of the facts stated"); MUELLER & KIRKPATRICK, *supra* note 80, § 8.31, at 1120-22 (explaining the admission of prior pleadings and their caveats); *Roman*, *supra* note 45, at 996 & n.96 (examining cases involving amended or superceded pleadings as evidentiary admissions).

249. See *United States v. Salerno*, 937 F.2d 797, 811 (2d Cir. 1991) (holding indictment inadmissible), *rev'd on other grounds*, 505 U.S. 317 (1992); see also *GAF*, 928 F.2d at 1261 (citing Judge Learned Hand's position in *Falter v. United States*, 23 F.2d 420, 425 (2d Cir. 1928), that indictments do not constitute pleadings).

250. See *GAF*, 928 F.2d at 1260 (stating that the fairness and integrity of the truth-seeking process dictate that a bill of particulars be considered an admission); cf. *United States v. Johnson*, 28 F.3d 1487, 1496 (8th Cir. 1994) (considering the admissibility of a bill of particulars from a different case but concluding it was not inconsistent without discussing the applicability of Rule 801(d)(2)).

Statements in other types of documents filed with the court should likewise be admissible as authorized admissions.<sup>251</sup> In *United States v. Kattar*,<sup>252</sup> for example, the defendant argued that the government's descriptions of the Church of Scientology made in other cases should be admitted as party admissions.<sup>253</sup> The descriptions were contained in a sentencing memorandum submitted by the government in a different criminal case and in a brief filed in a civil case.<sup>254</sup> The statements in those documents were at odds with the testimony of government witnesses and inconsistent with the prosecution's characterization of the Church in the present case.<sup>255</sup> Interestingly, the defendant did not argue that the statements were authorized admissions under Rule 801(d)(2)(C), even though statements by government lawyers appear to qualify as statements by agents authorized to speak on the subject.<sup>256</sup> The court held that, by submitting the statements to the courts for the truth of their contents, the Justice Department manifested its belief in those statements.<sup>257</sup> They were therefore held to be admissible as adoptive admissions under Rule 801(d)(2)(B).<sup>258</sup> A better approach would have been to characterize the memo and brief as authorized statements for the government and admit them as authorized vicarious admissions.<sup>259</sup>

*c. Official Publications*

An official publication issued by a governmental authority should also be treated as an authorized admission and be admissible under Rule 801(d)(2)(C).<sup>260</sup> By definition, such

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251. See, e.g., *United States v. Bailey*, No. 97-3130, 1998 WL 388802, at \*1 (D.C. Cir. May 7, 1998) (mem.) (agreeing that the government's statement in response to a motion to suppress may be a party admission).

252. 840 F.2d 118 (1st Cir. 1988).

253. See *id.* at 126.

254. See *id.*

255. See *id.*

256. The defendant argued that the statements should have been admitted under Rule 801(d)(2)(B) or (D). See *id.* at 130.

257. See *id.* at 131.

258. See *id.*

259. See *Freeland v. United States*, 631 A.2d 1186, 1193-94 (D.C. 1993) (holding that a statement by the prosecutor in a memorandum in support of a motion to admit evidence acted as a party admission).

260. Reliance on this rule may be unnecessary since the evidence may be admissible over a hearsay objection under Rule 803(8). See *supra* note 92.

publications are the authorized statements of the government subdivisions that issue them. When those publications contain statements that are useful to the defense, they should be admitted under the authorized admissions rule, Rule 801(d)(2)(C).<sup>261</sup>

In *United States v. Van Griffin*,<sup>262</sup> the court of appeals held that the trial court had improperly excluded a government manual offered by the defendant.<sup>263</sup> The defendant was charged with driving under the influence of alcohol in a federal recreation area.<sup>264</sup> The Park Ranger who arrested the defendant testified that he had administered several sobriety tests to the defendant, including a test which assessed the jerkiness of the defendant's eyes.<sup>265</sup> On cross-examination, defense counsel questioned the Ranger about his administration of this test.<sup>266</sup> The defense then asked to introduce the government manual setting out the proper method for administering the test.<sup>267</sup> The court of appeals held that the manual should have been admitted.<sup>268</sup> The court concluded that "[i]n this case the government department charged with the development of rules for highway safety was the relevant and competent section of the government" and that its pamphlet was therefore admissible as a party admission under Rule 801(d)(2)(D), the rule governing non-authorized vicarious admissions.<sup>269</sup>

The publication might better have been evaluated as an authorized admission under Rule 801(d)(2)(C). Rather than the statement of an employee concerning matters within the scope of the employee's duties, the publication was more likely a compilation of information from more than one source and likely included statements of government employees whose duties related to researching and writing and not to

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261. Similar items have been admitted in civil cases. See, e.g., *Geuss v. Pfizer, Inc.*, 971 F. Supp. 164, 172 n.11 (E.D. Pa. 1996) (concluding that official job descriptions are admissible under Rule 801(d), although not specifying which subsection governs).

262. 874 F.2d 634 (9th Cir. 1989).

263. See *id.* at 638.

264. See *id.* at 635-36.

265. See *id.*

266. See *id.* at 636.

267. See *id.*

268. See *id.* at 638.

269. *Id.* The court was careful to state that not every government publication would necessarily fall under Rule 801(d)(2)(D). See *id.*

administering the sobriety test. Disseminating the work as an official publication of the government, however, appears to qualify it as the statement(s) of agent(s) authorized to speak for the government on the topic. Government publications relating to other types of scientific testing may prove similarly useful to defendants in other criminal cases.<sup>270</sup>

In federal cases, defendants should be able to introduce relevant portions of the *United States Attorney's Manual (Manual)*. Although the *Manual* contains a disclaimer, providing that it is not a source of rights, it is an authorized publication of the Department of Justice.<sup>271</sup> Indeed, the *Manual* purports to collect departmental policies on most critical questions and to be the controlling authority in most instances.<sup>272</sup> Allowing evidentiary use of the *Manual* is not precluded by the disclaimer. By admitting excerpts from the *Manual* as authorized admissions, the defendant does not claim rights but merely uses the *Manual* as evidence of a relevant governmental position. For example, the defendant may wish to inform the jury of the Department of Justice policy on plea agreements in a particular kind of case to demonstrate the benefit obtained by a cooperating witness.<sup>273</sup> The rule should be applied to permit the defendant to do so.

#### d. Internal and External Reports

The government generates a large number of reports.<sup>274</sup>

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270. See, e.g., RICHARD H. FOX & CARL L. CUNNINGHAM, U.S. DEP'T OF JUSTICE, CRIME SCENE SEARCH AND PHYSICAL EVIDENCE HANDBOOK 41-43 (1973) (describing how to photograph deceased persons so as to increase the evidentiary value of the photograph); BARBARA A. MANILI ET. AL., U.S. DEP'T OF JUSTICE, POLICE DRUG TESTING 9-11 (1987) (providing instruction on the methods of conducting drug tests, including screening tests and confirmation tests); U.S. DEP'T. OF JUSTICE, HANDBOOK OF FORENSIC SERVICES (Colleen Wade et al. eds., rev. ed. 1999) (U.S. Department of Justice Federal Bureau of Investigation Laboratory Division CD-ROM) (providing instructions on gathering forensic evidence).

271. See U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS MANUAL § 1-1.100 (David M. Nissman et. al. eds., 1997).

272. See *id.* § 1-1.200 (stating that the *Manual*, which "is intended to be a comprehensive collection of policies" is controlling where it "conflicts with earlier Department statements, except for Attorney General's statements").

273. See, e.g., *id.* §§ 6-4.310, 6-4.320 (outlining policies related to plea agreements in tax cases and stating the Department of Justice's policy that government attorneys oppose *nolo contendere* pleas).

274. See JOE MOREHEAD, INTRODUCTION TO UNITED STATES GOVERNMENT INFORMATION SOURCES 115 (5th ed. 1996) (providing examples of numerous types of government reports).

Some are internal reports, prepared by government employees assigned to prepare the reports.<sup>275</sup> Others, however, are external reports, prepared by individuals or groups outside the government asked to investigate a particular issue and report back.<sup>276</sup> While internal reports will normally qualify as authorized admissions, external reports should rarely be admissible under the party admission rule.<sup>277</sup>

Internal reports are normally prepared by employees acting with authority to report. In other settings, courts have held that statements that are authorized to be made internally may be admitted as authorized party admissions.<sup>278</sup> Courts should use this reasoning to admit internal government reports as authorized admissions under Rule 801(d)(2)(C).<sup>279</sup>

External reports, on the other hand, should not normally be admissible against the government as authorized admissions. The government regularly commissions special reports on matters requiring governmental action from special boards with members from outside government.<sup>280</sup> The assigned task is typically to gather information and prepare a

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275. *Id.* at 123 (explaining that the Clerk of the House is required to publish certain documents annually for the House of Representatives).

276. *See, e.g.,* NAT'L COMM'N ON RESPONSIBILITIES FOR FIN. POSTSECONDARY EDUC., MAKING COLLEGE AFFORDABLE AGAIN: FINAL REPORT ii (1993) (noting that the Commission, created to study college financing, is submitting its final report to Congress); NAT'L EDUC. COMM'N ON TIME AND LEARNING, PRISONERS OF TIME: RESEARCH 3 (1994) (introducing research the Commission prepared for Congress).

277. *See infra* notes 280-88 and accompanying text.

278. *See Theriot v. J. Ray McDermott & Co.*, 742 F.2d 877, 882 (5th Cir. 1984) (holding that a statement made in an internal Personal Injury Report was admissible); *Kingsley v. Baker/Beech-Nut Corp.*, 546 F.2d 1136, 1140-41 (5th Cir. 1977) (construing the rule to encompass internal statements within the definition of party admissions); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1246 (E.D. Pa. 1980) (noting that the Advisory Committee expressed an intention to settle the split in precedent and provide that an authorized statement that remained within the organization and was never communicated to a third party could nevertheless be admitted under Federal Rule of Evidence 801(d)(2)(C)), *aff'd in part, rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986).

279. This application of the party admission rule is likely to be insignificant because most internal reports will fall within the hearsay exception for public records. *See* FED. R. EVID. 803(8); *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 154 (1988) (applying FED. R. EVID. 803(8) and holding that a report of a naval investigation of an accident was admissible as a public record).

280. *See* MOREHEAD, *supra* note 274, at 114 (discussing House and Senate reports prepared by independent committees).

report for the responsible government department.<sup>281</sup> The reports are intended to inform official governmental action, but the reports themselves should not be characterized as official publications. If official action is taken on the basis of a report, then its admissibility as an adoptive admission is clear.<sup>282</sup> If, however, action has not been taken, the party offering the report might argue that it is an authorized statement admissible under Rule 801(d)(2)(C).

That argument should generally fail. The courts should draw a line between outsiders asked to give an impartial evaluation of an issue and agents who speak with authority for the government. In civil cases, courts have rejected the argument that a party's expert witness is necessarily a speaker authorized to speak for the party and therefore able to make authorized vicarious admissions for the party; the expert's statement will be a vicarious admission only if clearly authorized by the party.<sup>283</sup> In the government context, courts should distinguish between independent investigative bodies and agents. In *United States v. Durrani*,<sup>284</sup> for example, the court rejected the defendant's effort to introduce portions of a report of the President's Special Review Board.<sup>285</sup> The Board was appointed by the President to conduct a comprehensive study of the National Security Council, which entailed investigation of the Iran-Contra operation.<sup>286</sup> The defendant offered excerpts of the report to support his claim that he had

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281. *Id.*

282. *See supra* Part III.A.1.

283. *See* 3 GRAHAM, *supra* note 17, § 801.22, at 163 n.1 (discussing cases).

284. 659 F. Supp. 1183 (D. Conn. 1987).

285. *See id.* at 1185 (citing *United States v. Santos*, 372 F.2d 177, 180 (2d Cir. 1967), the court rejected the defendant's argument that the report fell within Rule 801(d)(2)). A report such as this does not fall within Rule 801(d)(2)(D) because the Board, while arguably acting as an agent of the Executive Branch, did not speak about matters related to its duties. Although one could conceive of situations where the Executive Branch does adopt the report, rendering it admissible under Rule 801(d)(2)(B), in this case, the defendant offered no evidence that the Executive Branch had acted on the basis of the report or had adopted the report in any other way. *See* *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1268-69 (10th Cir. 1998) (holding that a City Manager's action on the report of the personnel department acted as adoption); *Pilgrim v. Trs. of Tufts Coll.*, 118 F.3d 864, 870 (1st Cir. 1997) (finding the report of the Grievance Committee to have been adopted by action taken on it by the President of the College). In *Durrani*, the court also rejected the defendant's attempt to admit the report as a public record under Rule 803(8). 659 F. Supp. at 1186.

286. *Durrani*, 659 F. Supp. at 1184.

been acting for the government in selling missile parts.<sup>287</sup> The court should have considered whether the report was an authorized statement that fell within Rule 801(d)(2)(C). The applicability of the subsection would then have turned on whether the Board acted as an agent of the Executive Branch or as an outside body asked to explore the problem.<sup>288</sup>

Even if the Board in *Durrani* was the President's agent, however, not all portions of the report would be admissible. The report explained that the "Board was not established . . . as an investigative body nor was it to determine matters of criminal culpability [but] was established to gather the facts, to place them in their proper historical context, and to make recommendations about what corrective steps might be taken."<sup>289</sup> The portions of the report that merely relayed information that the Board had gathered do not fall neatly within the party admissions rule; they contain the hearsay statements of persons without government authority, and those statements are subject to independent hearsay analysis.<sup>290</sup> The recommendations and any fact findings, however, fell within the Board's authority to speak, because it was charged to report back to the President.<sup>291</sup> Of course, the President was free to reject their conclusions, but the report was intended to become part of the Executive Branch's position on the question and the President had not disavowed it.<sup>292</sup>

In sum, although a line should be drawn limiting the rule's application to external reports, many statements and documents emanating from the government should qualify as authorized admissions. Since the government can speak only through its agents, numerous employees speak with authority

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287. *Id.* at 1184.

288. See, e.g., *Osterneck v. E. T. Barwick Indus., Inc.*, 106 F.R.D. 327 (N.D. Ga. 1984). In *Osterneck*, the court considered the admissibility of a report by a board that was appointed by the corporation pursuant to consent decree. *Id.* at 331-34. Under the terms of the decree, the membership of the board had to be approved by the Securities and Exchange Commission. *Id.* at 330. Such a group should not be viewed as the agent of the corporation, and its statements should not fall within Rule 801(d)(2).

289. *Durrani*, 659 F. Supp. at 1186 (emphasis omitted) (quoting from the report).

290. See *Osterneck*, 106 F.R.D. at 333 (holding inadmissible a report that relayed information from third parties and did not purport to digest or evaluate it); see also *infra* notes 440-44 and accompanying text.

291. Exec. Order No. 12,575, 51 Fed. Reg. 43,718 (Dec. 1, 1988).

292. *Durrani*, 659 F. Supp. at 1187 (noting that the President established the Board to study the facts as they related to national security policies).

for the government. Their statements may be oral statements on behalf of the government or may take the form of official publications or other writings. Courts should recognize that these authorized statements are the government's vicarious admissions under Rule 801(d)(2)(C).

C. RULE 801(d)(2)(D): NON-AUTHORIZED VICARIOUS ADMISSIONS

The subsection of the rule that courts are most reluctant to apply against the government is subsection (D), which defines non-authorized statements by agents as non-hearsay.<sup>293</sup> This provision departed from the common law, eliminating the requirement that the principal authorize the statement and admitting statements solely because the agent spoke concerning an appropriate subject matter.<sup>294</sup> Rule 801(d)(2) unquestionably separates the law of party admissions from the law of vicarious liability and treats agents' statements as admissions of the principal even when the agent was authorized neither to speak nor to bind the principal.<sup>295</sup> The Advisory Committee supported this change in its discussion of Rule 801(d)(2)(D):

The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusion of the

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293. See *United States v. Morgan*, 581 F.2d 933, 938 (D.C. Cir. 1978) (emphasizing the distinction between adopted statements admissible under Rule 801(d)(2)(B) and the statements of an agent relating to matters within the scope of the agency); *United States v. Pandilidis*, 524 F.2d 644, 650 (6th Cir. 1975) (holding that it was not error to exclude evidence that an agent of the Internal Revenue Service believed that the defendant was guilty of nothing more than a civil offense); *United States v. Powers*, 467 F.2d 1089, 1095 (7th Cir. 1972) (approving the exclusion of an IRS agent's opinions about whether the proceeds from certain checks were taxable income); *United States v. Santos*, 372 F.2d 177, 180 (2d Cir. 1967) (stating that agents of the government are supposedly disinterested in the outcome of a trial and are traditionally unable to bind the sovereign); *People v. McDaniel*, 647 N.E.2d 266, 272 (Ill. 1995) (holding that out-of-court statements by agents of the State in a criminal prosecution were properly excluded); *State v. Therriault*, 485 A.2d 986, 992 (Me. 1984) (holding that a crime lab report was properly excluded at the request of the defendant as there was no clear exception found under Maine Rule of Evidence 801(d)(2)); *State v. Asbridge*, 555 N.W.2d 571, 575-76 (N.D. 1996) (taking a narrow view of the agent's admissions).

294. See FED. R. EVID. 801(d)(2)(D) advisory committee's note (discussing the inapplicability of traditional agency tests).

295. See *id.*

statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment.<sup>296</sup>

To introduce non-authorized statements of agents against the government under Rule 801(d)(2)(D), a defendant should merely be required to demonstrate that the speaker was an agent of the government at the time the statement was made and that the statement related to matters within the scope of the agent's duties. If the statement satisfies these criteria, it should be admissible against the prosecution under the rule.

Courts must first determine who is an agent of the government in the context of a criminal prosecution. Courts applying the vicarious admissions rules in civil cases sometimes wrestle with questions of agency but conclude that the term is used in its ordinary legal sense in the rule and is not subject to narrow construction.<sup>297</sup> Concepts of agency law are sometimes elusive within the framework of criminal law.<sup>298</sup>

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296. See *id.* The Advisory Committee cited *Grayson v. Williams*, in which the court held that the statements of an agent relating to matters within the scope of his duties should be admissible against the principal and cited Wigmore's condemnation of the more limited rule as "absurd." 256 F.2d 61, 66 (10th Cir. 1958); see also *Woodman v. Haemonetics Corp.*, 51 F.3d 1087, 1094 (1st Cir. 1995) (noting that a statement need only concern matters within the scope of agency and need not be directed by the employer).

297. See, e.g., *City of Tuscaloosa v. Hacros Chems., Inc.*, 158 F.3d 548, 557 n.9 (11th Cir. 1998) (concluding that because the Federal Rules of Evidence do not define the term "agent," the court "must assume that Congress intended to refer to general common law principles of agency when it used the term"); *Zaken v. Boerer*, 964 F.2d 1319, 1322-23 (2d Cir. 1992) (holding that when factors proving the existence of an agency relationship are present, testimony should not be excluded simply because it is offered against a corporate employee rather than the company itself); *United States v. Paxson*, 861 F.2d 730, 734 (D.C. Cir. 1988) (concluding that it would be "a hyper-technical construction of the rule" to conclude that it does not apply when there is a sufficient supervisory relationship between two individuals even though there is no actual agency relationship between the two); *Crawford v. Garnier*, 719 F.2d 1317, 1324 (7th Cir. 1983) (holding that an individual was the defendant's agent through his job of handling and processing applications); *Nekolny v. Painter* 653 F.2d 1164, 1171-72 (7th Cir. 1981) (concluding that a witness was the township supervisor's agent and that his statements concerned a matter within the scope of his agency or employment so as to be excluded from hearsay); DAVID W. LOUISELL & CHRISTOPHER B. MUELLER, FEDERAL EVIDENCE § 426, at ¶25 (1980) ("the interpretation of the Rule should not be hobbled by the definitions of [agent and servant] which would apply under the substantive law"). But see *Boren v. Sable*, 887 F.2d 1032, 1038 (10th Cir. 1989) (applying the common law definitions of "agent" and "servant" to Rule 801(d)(2)(D)).

298. A Special Agent of the Federal Bureau of Investigation once told the

Section 1 discusses the agency relationship, arguing that not only government employees, but also some non-employees, may be agents whose non-authorized statements may be admissible under Rule 801(d)(2)(D). Section 2 considers the question of what statements relate to the government agent's duties and consequently fall within the rule.<sup>299</sup>

## 1. The Agency Relationship

### a. *Employee Agents*

A straightforward application of Rule 801(d)(2)(D) leads to the conclusion that a government employee's statement about matters within the scope of the employee's duties should be admitted when offered by a criminal defendant. In *Rodela v. State*,<sup>300</sup> the Texas court applied the rule to reach this result. The defendant wanted to call a witness who would testify that he and a police sergeant had a conversation over drinks in a bar in which the officer indicated he had used force to extract the defendant's confession.<sup>301</sup> The court treated the question of admissibility as routine under Texas Rule of Criminal Evidence 801(e)(2)(D), which defines as a party admission an agent's

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author that, when he testified, he was frequently asked on cross-examination, "What makes you so special, Agent?" Perhaps the question would have the desired effect on the jury, but it reflects a misunderstanding of the term "special agent." The FBI agent was titled Special Agent to differentiate him from a general agent, who would have the authority to enter binding commitments for the United States Government. The Special Agent, by contrast, represents the United States for only limited purposes. Under Rule 801(d)(2)(D), the Special Agent as well as a broad range of other government agents are declarants whose statements concerning their work may be the government's party admissions.

299. Of course, to be admissible under Rule 801(d)(2)(D), the agent must have made the statement while the agency existed. See, e.g., *Escalante v. Municipality of Cayey*, 967 F. Supp. 47, 51 (D.P.R. 1997) (noting that a police officer's statements made when the officer was no longer employed are hearsay); see also *Burns v. Republic Sav. Bank*, 25 F. Supp. 2d 809, 820 (N.D. Ohio 1998) (declaring that statements were not admissible because the declarant had left the defendant's board before making them). If the employee has been fired, the rule does not apply. Similarly, if the non-employee agent is no longer acting for the government, the rule does not apply. See *United States v. Pena*, 527 F.2d 1356, 1361 (5th Cir. 1976) (side-stepping the question of whether an informant's statement could fall within Rule 801(d)(2), and holding instead that the statements were made after agency had terminated).

300. 829 S.W.2d 845, 849 (Tex. App. 1992); see also *Sadrud-Din v. City of Chicago*, 883 F. Supp. 270 (N.D. Ill. 1995) (recognizing in a civil rights action that police officers were agents of the city).

301. *Rodela*, 829 S.W.2d at 848.

statement concerning a matter within the scope of the agency.<sup>302</sup> The court merely noted that the sergeant was an employee of the police department and spoke concerning actions taken in his official capacity.<sup>303</sup>

A number of courts, however, have not treated the question as routine and have refused to admit under Rule 801(d)(2)(D) statements by government employees that were unquestionably related to the scope of their duties.<sup>304</sup> In *State v. Therriault*,<sup>305</sup> for example, the court rejected the defendant's argument that an exculpatory report from the state police crime lab should be admissible under Maine Rule of Evidence 801(d)(2), which is identical to the federal rule.<sup>306</sup> The report was prepared by a state trooper whose job was to conduct laboratory analyses for the state.<sup>307</sup> The report contained his statements based on his evaluation of two rape kits and other evidence relevant to the

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302. *Id.* at 849.

303. *Id.*

304. See, e.g., *State v. Jurgensen*, 681 A.2d 981, 985-86 (Conn. App. Ct. 1996) (concluding that the testimony of an informant would be admissible even if the court had chosen to view the police and its agents as opposing parties because the informant had only introduced the defendant to an undercover officer, and even if the informant were an agent of the police, his phone calls would have fallen outside the scope of any possible agency relationship); *People v. McDaniel*, 647 N.E.2d 266, 271-72 (Ill. 1995) (concluding that the statements of an assistant state's attorney were not admissible as admissions of party opponent); *State v. Asbridge*, 555 N.W.2d 571, 575-76 (N.D. 1996) (concluding that the deposition of a state toxicologist in a different case was not admissible against the State as a party admission); *State v. Cardenas-Hernandez*, 579 N.W.2d 678, 686 (Wis. 1998) (holding that "a court should not admit into evidence in a criminal proceeding a prior statement made by a prosecutor unless the court concludes that the three guidelines established in *McKeon*, and applied in *Salerno*, *Orena*, and *DeLoach*, are satisfied"); *State v. Smith*, 153 N.W.2d 538, 543 (Wis. 1967) (concluding that a statement made at a burglary scene by a municipal police officer was not admissible against the State absent evidence of the officer's authority to speak for the State).

305. 485 A.2d 986 (Me. 1984).

306. *Id.* at 992. The court held that the trial court should have admitted the report under Maine Rule of Evidence 803(6), the business records exception. *Id.* at 994. That rule requires personal knowledge and business routine, and permits the court to exclude the evidence if circumstances suggest a lack of trustworthiness. *Id.* Three justices dissented from this holding. *Id.* at 998 (Wathen, J., dissenting).

307. *Id.* at 991. The report concluded that no semen or foreign hairs were found and that the victim's clothes had no rips or tears. *Id.* The court also considered whether the report would be admissible under Maine Rule of Evidence 803(6), the business records exception, and concluded that the defendant could rely on that exception but would have to lay a sufficient foundation. *Id.* at 993-95.

crime with which the defendant was charged.<sup>308</sup> Had the trooper been an employee of a private sector corporation, and had the report been offered against the corporation in civil litigation, there would be little question as to the admissibility of the report. The same result should attend the offer of the report of a government employee against the prosecution in a criminal case.

Similarly, in *United States v. Warren*,<sup>309</sup> the court rejected the defendant's argument that statements in an officer's arrest reports should have been admitted over a hearsay objection.<sup>310</sup> The officer stated in the reports that two suspects other than the defendant carried pistols and sold drugs from the arrest location.<sup>311</sup> The court evaluated the statements solely under the rules governing business records and public records<sup>312</sup> and held that the trial court had not committed plain error by excluding them.<sup>313</sup> It never discussed the possibility of admitting them under the rule governing non-authorized vicarious admissions.<sup>314</sup> In fact, the court should have admitted the statements under that rule. The lieutenant made the arrest reports while he was an agent of the government, and the reports related to matters within the scope of his employment, specifically the investigation of the criminal violations in question.<sup>315</sup> Accordingly, the statements were admissible non-authorized vicarious admissions under Rule 801(d)(2)(D), and they should have been admitted.

*Warren* illustrates the risk of unfairness when courts narrowly apply the rule to governmental statements. To obtain convictions of the defendant on drug trafficking and firearm charges, the prosecution's key pieces of evidence were drugs and a single handgun found in the apartment where the

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308. *Id.* at 991.

309. 42 F.3d 647 (D.C. Cir. 1994).

310. *Id.* at 655.

311. *Id.* at 656.

312. *Id.* at 656-67.

313. *Id.*

314. *See id.* The court concluded that, under Rule 803(6), the officer's apparent lack of personal knowledge was fatal to the defendant's argument, and that the defendant had a credible argument under Rule 803(8)(C), which has a more relaxed personal knowledge requirement, but had not raised it at trial. *See id.* at 656-57. The court held that statements attached to a criminal complaint submitted to the court are admissible under Rule 801(d)(2)(B). *Id.* at 655.

315. *See id.* at 656-57.

defendant was arrested.<sup>316</sup> One of the law enforcement officers responsible for the investigation identified two other people associated with that location as selling drugs and possessing a pistol.<sup>317</sup> The jury should have been permitted to learn of his statements. The evidence might have triggered reasonable doubt concerning the prosecution's theory that the drugs and gun belonged to the defendant. If the prosecution believed that the officer was mistaken or had made the statement without adequate investigation, it was fully empowered to present that position to the jury.

*b. Non-Employee Agents*

In applying the rule governing non-authorized statements of agents, it is important to realize that one can be an agent without being an employee of the principal. Some agency relationships are far more limited in time and purpose than an employment relationship. In criminal cases, the paradigm of the non-employee agent is the confidential informant who works with law enforcement agents in developing a case against a target. Defendants have argued that informants' statements should be admitted as governmental party admissions.<sup>318</sup> Although some courts have accepted this characterization,<sup>319</sup> others are reluctant to accept the argument that informants are agents.<sup>320</sup> Close examination of the role

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316. See *id.* at 650.

317. *Id.* at 655.

318. See, e.g., *United States v. Pena*, 527 F.2d 1356, 1360-61 (5th Cir. 1976) (holding that an unavailable informant's alleged statement to a witness that he had set the defendant up was inadmissible as hearsay); *United States v. Finley*, 708 F. Supp. 906, 910 (N.D. Ill. 1989) (concluding that even though the witness was a government informant, his statement was not admissible as a party admission).

319. See, e.g., *United States v. Reed*, 167 F.3d 984, 987-89 (6th Cir. 1999) (concluding that although the defendant had a meritorious theory—that taped statements should be admitted against the government because the informants acted as government agents in procuring them—defendant had not raised this theory at trial, and the district court's exclusion of the statements was not clearly erroneous); *United States v. Branham*, 97 F.3d 835, 851 (6th Cir. 1998) (concluding that conversations between the informant and defendant were in furtherance of a goal “to establish a trusting relationship” and therefore were within the scope of the agency relationship).

320. See, e.g., *Finley*, 708 F. Supp. at 910-11 (rejecting defendants' argument that an informant's statements fell within Rule 801(d)(2)); *State v. Thompson*, 622 N.E.2d 735, 741 (Ohio Ct. App. 1993) (rejecting the argument that an informant was an employee of the police, and holding that Rule 801(d)(2) did not apply); cf. *Lippay v. Christos*, 996 F.2d 1490, 1498-99 (3d Cir.

played by some informants, however, leads to the conclusion that at least some of their out of court statements fall within Rule 801(d)(2)(D).<sup>321</sup>

Law enforcement has various types of arrangements with informants. Some informants merely come forward with information that helps develop a case or focus an investigation.<sup>322</sup> Other informants work for law enforcement agents by arranging meetings with targets, encouraging targets to enter into transactions with undercover government agents, or engaging in transactions with targets under government supervision and surveillance.<sup>323</sup> Some informants cooperate in a single case or for a short period of time; others work with the government over a period of years.<sup>324</sup> The law enforcement

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1993) (holding that the informant's statements were improperly admitted under Rule 801(d)(2)(D) in a civil suit against the defendant, an undercover agent in the state Bureau of Narcotics, because the informant was not shown to be an agent of the defendant himself). *But see Lippay*, 996 F.2d at 1505 (Becker, J., concurring) (suggesting that the informant was at least under the supervision of officials at the Bureau).

321. In some cases, the government may adopt an informant's statement, making it admissible under Rule 801(d)(2)(B). *See supra* Part III.A. The statements informants make will rarely be authorized and therefore admissible under Rule 801(d)(2)(C). The informant's authorized conversations will be the false statements made to win the target's confidence.

322. *See* Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 *FORDHAM L. REV.* 917, 929-30 (1999).

323. The incentives for these arrangements vary. Some informants are drawn to the work primarily by the payment they receive, others to receive leniency when facing criminal charges. *See, e.g., Roy v. United States*, 38 Fed. Cl. 184, 185-86 (1997) (describing an informant's agreement to cooperate with the FBI as the result of a plea agreement and payment).

324. *See, e.g., Howard v. United States*, 31 Fed. Cl. 297, 300-06 (1994) (describing a relationship of long duration between informants and federal authorities); *see also Khairallah v. United States*, 43 Fed. Cl. 57, 58-59 (1999) (rejecting a claim for payment brought by an informant who worked with the government for a substantial period of time); Shelley Murphy & Ralph Ranalli, *U.S. Tightens Rules on Informants*, *BOSTON GLOBE*, Jan. 9, 2001, at A1, available at 2001 WL 3914202 (discussing the problems associated with retaining several FBI informants over a period of twenty to thirty years); Bill Varian, *Informers Arrest Raises Questions in Citrus*, *ST. PETERSBURG TIMES*, May 15, 2000, at 3, available at 2000 WL 5613840 (discussing the Sheriff's Department's use of an informant to build cases against at least twenty-six people, and how the informant was one of at least 300 used by the Sheriff's Department since the early 1980s); Michael D. Sorkin, *Lying by Informer Causes U.S. to Drop Drug Charges Against Four in Miami*, *ST. LOUIS POST-DISPATCH*, Mar. 7, 2000, at A1, available at 2000 WL 3512544 (discussing the case of a DEA informant who was paid more than \$2.2 million over a sixteen year period to help in over 400 arrests).

agency working with an informant may pay the informant for specific results, such as arrests, or may essentially maintain the informant on a stipend while the informant is helping to develop a particular case.<sup>325</sup>

While working with law enforcement, an informant is not a full-time employee or agent of the government, but the informant is an agent for some purposes. For example, if the informant badgers the defendant into committing a crime to which the defendant was not predisposed, the defendant should be acquitted by reason of entrapment.<sup>326</sup> If the informant pressures the defendant to confess, the confession will be treated as involuntary.<sup>327</sup> In both instances, the conduct of the informant is attributed to the government. The law of party admissions should follow the substantive criminal law in this regard. Thus, if the informant makes a statement concerning a case while working with the government on that case, it should be admissible against the government as a non-authorized vicarious admission under Rule 801(d)(2)(D).

Consider, for instance, how the rule might operate in a case where the defendant raises an entrapment defense. The informant's statements to the defendant creating the pressure to commit the crime would be admissible as non-hearsay because they are relevant for their effect on the hearer (the

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325. See, e.g., *United States v. Yater*, 756 F.2d 1058, 1060 n.1 (5th Cir. 1985) (explaining that the DEA paid informants expense money and a contingent fee to be paid upon a successful arrest).

326. See *Sherman v. United States*, 356 U.S. 369, 376-77 (1958) (recognizing that the informant is an agent of the government for entrapment purposes); see also *United States v. Brown*, 43 F.3d 618, 623 (11th Cir. 1995) (noting that an informant's actions, as recounted by the defendants, were sufficient to establish government inducement, a necessary element for entrapment); *United States v. Groll*, 992 F.2d 755, 759 (7th Cir. 1993) (holding that pressure exerted on a defendant by an informant could establish the government inducement element of the entrapment defense); *United States v. Pena*, 527 F.2d 1356, 1361 (5th Cir. 1976) (citing *United States v. Gomez-Rojas*, 507 F.2d 1213 (5th Cir. 1975), to acknowledge that an informant's actions are chargeable to the government in entrapment cases); *United States v. Bueno*, 447 F.2d 903, 905 (5th Cir. 1971) (holding that an informant's action in supplying narcotics for sale constituted entrapment, and noting that an agent and an informant "must be treated as acting in concert").

327. See, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 286-87 (1991) (finding a confession involuntary where it was the result of a paid informant exerting pressure on the defendant in prison); see also *Maine v. Moulton*, 474 U.S. 159, 176-77 (1985) (holding that an informant's conversation with an indicted defendant violated the defendant's Sixth Amendment right to counsel).

defendant) rather than for the truth of the assertions.<sup>328</sup> The hearsay problem arises if the informant makes a statement after the encounter with the defendant, describing what transpired. For example, the informant may tell someone, “I really leaned on the defendant to get her to do this deal.” That statement should be admissible to prove the truth of the assertion—that the informant pressured the defendant. If the informant is available, the government can attempt to correct any factual errors by calling the informant as a witness. If the informant is unavailable, the government is still fairly accountable for the informant’s representations concerning the events in which he was involved.<sup>329</sup>

In civil cases, courts have recognized such non-employee agency relationships as a basis for admitting statements under the party admission rule. In *EEOC v. Watergate*,<sup>330</sup> for example, the defendant argued against applying the rule to admit the statements of residents who served as volunteers on the condominium association’s governance boards.<sup>331</sup> The defendant pointed out that the residents were neither officials of, nor employed by, the Watergate and played a limited role in its governance.<sup>332</sup> The court, however, focused on the particular business of the defendant that precipitated the

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328. See, e.g., *United States v. Cantu*, 876 F.2d 1134, 1137 (5th Cir. 1989) (noting that a statement is not hearsay if its significance “lies solely in the fact that it was made”).

329. Interestingly, in *State v. Dreher*, 695 A.2d 672 (N.J. Super. 1997), *abrogated by State v. Brown*, 784 A.2d 1244 (N.J. 2001), the court noted, in support of its holding, that the agent who swore to the accuracy of the statements as affiant was testifying at the time of the offer and could therefore correct or explain any inaccuracy. See *id.* at 721. Under Rule 801(d)(2) the presence or absence of the declarant should have no impact on the admissibility of the statement. Moreover, limiting the use of Rule 801(d)(2) against the government to those cases in which the declarant testifies accords the prosecution too much control over the jury’s access to information that calls the prosecution’s case into question. If the defendant can introduce the statement only when the declarant testifies, the prosecution may be able to bury the evidence by declining to call the declarant as a witness. Cf. *United States v. Finley*, 708 F. Supp. 906, 910 (N.D. Ill. 1989) (considering the defendant’s arguments based on the government’s represented intention not to call its informant). In addition, the defendant may have substantial reasons for not calling a witness identified with the government. See *Freeland v. United States*, 631 A.2d 1186, 1194 n.11 (D.C. 1993) (declining to elaborate on the reasons why the defense would not want to call the prosecutor as its own witness).

330. 24 F.3d 635 (4th Cir. 1994).

331. *Id.* at 637-38.

332. *Id.* at 639.

litigation.<sup>333</sup> The sixty-three-year-old complainant claimed age discrimination. She alleged that the Watergate had dismissed her as manager and tennis professional of the Racquet Club and not hired for a newly created manager position that took over all her duties.<sup>334</sup> To support her case, she offered statements by two residents speaking of the complainant's age as a negative factor.<sup>335</sup> The court held that the statements fell within Rule 801(d)(2)(D) as non-authorized vicarious admissions because both residents served on the volunteer committee that was charged with addressing the problem and crafted the reorganization that eliminated the complainant's job.<sup>336</sup> One of them was also on the committee that made the hiring recommendation to the Board.<sup>337</sup>

The government could argue that a confidential informant is comparable to an independent contractor whose statements are not admissible.<sup>338</sup> In some instances, confidential informants may be independent contractors, gathering information independently and then approaching law enforcement authorities hoping to be rewarded. Frequently, however, the informant works more closely with the government.<sup>339</sup> If the informant is carrying out specific assignments for law enforcement agents, pursuant to an agreement for some kind of prosecutorial leniency or an understanding that the informant will be paid, then the informant's statements should fall within the rule. Civil cases have established that one does not become an agent merely by being engaged as an expert to perform an evaluation or to testify.<sup>340</sup> Some greater degree of direction and supervision is essential to establish the agency relationship.<sup>341</sup> When an informant works at the direction or under the supervision of

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333. See *id.* at 640.

334. *Id.* at 637.

335. *Id.* at 638.

336. See *id.* at 640.

337. See *id.* at 639.

338. See 5 WEINSTEIN & BERGER, *supra* note 40, § 801.33[2][b], at 801-67 n.12.

339. See *supra* notes 322-25 and accompanying text.

340. See, e.g., *Sanford v. Johns-Manville Sales Corp.*, 923 F.2d 1142, 1149-50 (5th Cir. 1991) (holding that a physician is not an agent of his patient); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1440 (9th Cir. 1990) (holding that statements were made by independent contractors, not agents).

341. See *Lippay v. Christos*, 996 F.2d 1490, 1504-05 (3d Cir. 1993) (Becker, J. concurring).

law enforcement, that relationship exists because the informant does not exercise significant independent judgment and is closely identified with the law enforcement mission. Therefore, the informant's statements should be admissible.

*c. Crime Victims and Other Witnesses*

By contrast, the statements of the crime victim and other witnesses are not admissible as government party admissions.<sup>342</sup> In some cases, the defendant has argued that such statements are admissible as the government's vicarious admissions. For example, in *Halstead v. State*,<sup>343</sup> the defendant wanted to introduce a letter written by an alleged victim of sexual abuse expressing her affection for the defendant and her desire to remain in his custody if her mother died.<sup>344</sup> The defendant had confronted and impeached the victim with the letter on cross-examination, but the defendant still wanted to introduce the letter itself and invite the jury to credit the truth of the assertions.<sup>345</sup> The court properly held that the letter did not qualify as a party admission.<sup>346</sup> The State brings the prosecution on behalf of the executive, or the people—not as the representative of the victim.<sup>347</sup> The victim does not embody the State in the litigation, but merely occupies the role of an especially important witness. Furthermore, the government does not adopt the witness's statements merely by calling the witness to testify.<sup>348</sup>

342. The statements may be admissible under Rule 801(d)(2)(B) if the government adopts the statement by, for example, including the statement and relying on it in a submission to the court. See *supra* notes 104-41 and accompanying text.

343. 891 S.W.2d 11 (Tex. App. 1994).

344. *Id.* at 12.

345. *Id.*

346. *Id.* at 12 n.1. The court overruled *Cuyler v. State*, 841 S.W.2d 933 (Tex. App. 1992), in which the court stated, without discussion, that the victim's statements "were admissions by a party opponent." *Id.* at 935.

347. See *State v. Brady*, 59 A. 6, 7 (N.J. 1904) (rejecting the argument that a victim's prior statement was admissible; the court held that "[t]he state, not the girl, was the party, and no admission made by her could bind the state").

348. Courts have rejected the analogous argument that the statements of a party's expert witness are party admissions except when the witness was specifically authorized to make the statement for the party. See, e.g., *Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 163-64 (3d Cir. 1995) (rejecting the proposition that an expert, who is not an agent of the party who called him, can make an admission for the party). See generally 3 GRAHAM, *supra* note 17, § 801.22, at 163 n.1 ("An expert's statement is not an admission of the party hiring the expert unless the court finds that the expert is an agent of the party

## 2. Matters Relating to Agent's Duties

To be admissible as a non-authorized vicarious admission, the statement must relate to matters within the scope of the agent's duties.<sup>349</sup> The principal, however, does not have to approve the statement. Indeed, provided that the statement relates to a matter within the scope of the agency, it will be admissible even though contrary to the principal's interest, as party admissions often are.<sup>350</sup>

In some cases, the relationship of the statement to the duties will be quite clear. If a law enforcement officer speaks about a case on which she is working, the statement is a non-authorized vicarious admission and falls within Rule 801(d)(2)(D). In *State v. Smith*,<sup>351</sup> for example, the police officer made a factual observation about a burglary that he had investigated and for which he arrested the defendant.<sup>352</sup>

In other instances, the question can be more difficult, particularly in cases involving non-employee agents. In *State v. Ogden*,<sup>353</sup> for example, the defendant claimed that the confidential informant, who set up the transaction between the police and the defendant, actually owned the marijuana that was delivered to the police.<sup>354</sup> In support of this defense, the defendant attempted to introduce testimony that, shortly before the transaction, the informant had said that she would soon have money to repay a debt.<sup>355</sup> The court conceded that the informant might be a government agent, but held that the statement did not relate to matters within the scope of her

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and is authorized to speak on behalf of the party.”).

349. FED. R. EVID. 801(d)(2)(D) (treating as non-hearsay “a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship”).

350. See, e.g., *Woodman v. Haemonetics Corp.*, 51 F.3d 1087, 1093-94 (1st Cir. 1995) (holding that a supervisor's statement reflecting discriminatory intent was admissible even though she was not directed to speak on the topic by the employer). See generally 3 GRAHAM, *supra* note 17, § 801.23, at 172 n.7 (listing cases from various circuits holding that, to constitute a vicarious admission, all that is required is that the statement concern a matter within the scope of agency or employment).

351. 153 N.W.2d 538 (Wis. 1967).

352. See *id.* at 543-44; see also *United States v. Warren*, 42 F.3d 647, 655-56 (D.C. Cir. 1994) (indicating that a police officer's factual statements were wrongly excluded as hearsay, but ultimately concluding that the error was harmless).

353. 640 A.2d 6 (Vt. 1993).

354. See *id.* at 11.

355. *Id.*

agency because she was not authorized to sell marijuana for personal profit.<sup>356</sup> Therefore, the court concluded that her statement concerning her profit did not fall within Rule 801(d)(2)(D).<sup>357</sup>

*Ogden* illustrates an overly restrictive reading of the rule. The informant was the government's agent for purposes of arranging the transaction; if the informant's actions constituted entrapment of the defendant, those actions would be imputed to the government. As a result, statements by the informant relating to the way in which she dealt with the defendant should be admissible, even if the agents had directed her not to pressure the defendant and she was acting in disregard of those instructions. If she had told the witness that she was expecting to sell marijuana to the undercover agent, or even that she was expecting to sell marijuana on the day of the transaction with the defendant, the statement would be sufficiently related to the transaction she was conducting as an agent for the government, and therefore should be admissible. The problem with the statement actually proffered in the trial was that the defendant failed to connect the statement to the transaction in question.

In *State v. Jurgensen*,<sup>358</sup> the court also read the rule narrowly.<sup>359</sup> The defendant claimed that he had been entrapped and sought to support his entrapment defense with proof of an informant's statement.<sup>360</sup> The law enforcement agents who pursued the defendant had been assisted by two confidential informants—Mowel and Guarco, the ex-husband of the defendant.<sup>361</sup> The defendant's girlfriend was prepared to testify that Mowel had told her that Guarco had offered him \$15,000 to harm the defendant and that Mowel had asked her for \$10,000 to leave the defendant alone.<sup>362</sup> The court

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356. *Id.* at 12.

357. *Id.*

358. 681 A.2d 981 (Conn. App. Ct. 1996).

359. *Id.* at 986 (concluding that "statements [that] would be admissions binding upon an agent's principal in civil cases, are not so admissible here [in a criminal case] as 'evidence of fact,'" and that the informant was never an agent as he only introduced the defendant to the detective, and that phone calls placed by the informant to the defendants would have "fallen outside the scope of any possible agency relationship") (quoting *United States v. Santos*, 372 F.2d 177, 180 (2d Cir. 1967)).

360. *Id.* at 984-86.

361. *Id.* at 984-85.

362. *Id.* at 985.

concluded that even if Mowel had been an agent of the state, this conversation fell outside the scope of the agency.<sup>363</sup> To the contrary, assuming that the agency relationship was established by a showing that the informant was cooperating with the detective in setting up the defendant, the statement was sufficiently related to the informant's execution of that task that it should have been admissible against the state.

*United States v. Branham*<sup>364</sup> reflects an appropriate view of the scope of an informant's duties. The court recognized that the informant's job, in part, was to cultivate the defendant's trust and found that the statements from conversations between the informant and the defendant were therefore within the scope of the agency.<sup>365</sup> The court concluded that the statements that the informant made attempting to get the defendant involved in illegal activities should have been admitted.<sup>366</sup>

The courts should not construe the scope of government agents' duties restrictively. If a statement fairly relates to the government function being performed by the agent, it should be viewed as a vicarious admission falling under Rule 801(d)(2)(D).

#### D. ADDITIONAL QUESTIONS

Courts that decline to admit statements against the government under Rule 801(d)(2) have raised additional concerns and objections in various cases. These are addressed below. Section 1 considers the line sometimes drawn between a statement of fact and a statement of opinion, and argues that a vicarious admission should not be excluded on the ground that it merely states the agent's opinion. Section 2 addresses the question of which part or parts of the government constitute the party opponent in a criminal case for the purposes of the party admission rule. The section concludes that the entire Executive Branch, but only the Executive Branch, should be regarded as the party opponent. Section 3 reviews and rejects the argument that statements made before full investigation

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363. *Id.* at 986.

364. 97 F.3d 835 (6th Cir. 1996).

365. *Id.* at 851; see also *Sadrud-Din v. City of Chicago*, 883 F. Supp. 270, 274 (N.D. Ill. 1995) (noting a broad range of matters that fell within the police officer's scope of employment).

366. *Branham*, 97 F.3d at 851 (concluding that the trial court committed error but that the error was harmless).

should not be admitted as party admissions. Finally, section 4 discusses the personal knowledge requirement, concluding that, like other party admissions, the government's party admissions should be admitted without regard to the personal knowledge of the speaker.

#### 1. The Distinction Between Opinion and Fact

Some courts appear willing to apply the party admission rule against the government in criminal cases but decline to admit specific statements because they represent opinion rather than fact.<sup>367</sup> This limitation has no foundation in Rule 801(d)(2) and should be eliminated. If the statement is relevant and otherwise satisfies the requirements of the party admission rule, it should be admitted.<sup>368</sup>

In *United States v. Zizzo*,<sup>369</sup> the defendant attempted unsuccessfully to introduce the prosecution's statements from earlier proceedings that characterized two individuals, whose statements were used against the defendant, as liars.<sup>370</sup> The court should have admitted the statements. Even though they were the prosecutor's opinion, fairness requires that the jury be told that the prosecution once condemned as untruthful the witnesses it now relies on for its case against the defendant.<sup>371</sup>

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367. In *McKeon* and *Salerno*, the court required that the prosecutor's inconsistent statement be one of fact in order for it to be admissible. See *supra* Part III.B.2.a.i.

368. In a related argument, some contend that evidence is not admissible under Rule 801(d)(2) unless it fits the definition of a statement found in Rule 801(a). They conclude that such evidence should not be admitted under the rule because it is not an assertion. In fact, Rule 801(d)(2) has no role unless the evidence is subject to exclusion as hearsay under Rule 802; Rule 801(d)(2) only responds to a hearsay objection and only excepts the challenged evidence from exclusion on that basis. If the challenged evidence is not a statement, it is not hearsay—so the hearsay exceptions of Rule 801(d)(2) are irrelevant. See, e.g., *Finch v. Hercules Inc.*, 865 F. Supp 1104, 1126 n.22 (D. Del. 1994) (refusing to accept the proposition that under Rule 801(d)(2) the agent's statement must be an intentional assertion of fact); *In re A.H. Robins Co.*, 575 F. Supp. 718, 728 (D. Kan. 1983) (concluding that the application of Rule 801(d)(2) is not a barrier to the admission into evidence of deposition exhibits).

369. 120 F.3d 1338 (7th Cir. 1997).

370. *Id.* at 1351-52.

371. *But see* *Johnson v. State*, 326 A.2d 38, 44-45 (Md. Ct. Spec. App. 1974) (holding immaterial the prosecutor's statement at a bench conference that the prosecution had rejected the defendant's statements implicating himself), *aff'd per curiam*, 339 A.2d 289 (Md. 1975); *State v. Nichols*, 388 P.2d 739, 746 (Or. 1964) (excluding the prosecutor's statement that the state could not say that the defendant intended to kill his victim, on the ground that it was a statement of opinion rather than fact).

Similarly, in *United States v. DeLoach*,<sup>372</sup> the court noted that the statement offered by the defendant was made during closing argument and was not a statement of fact.<sup>373</sup> This distinction is not useful. The line between fact and law or fact and opinion is often blurry. In closing argument, the prosecution encourages the jury to adopt the prosecution's view of the evidence and convict the defendant. If in a later case the government pursues a different theory, the inconsistent position on the legal and logical implications of the evidence should be disclosed to the jury. The prosecution should not be permitted to preclude consideration of earlier positions simply because they were expressed during closing argument.

In civil cases, courts appear to admit statements that qualify as opinion under Rule 801(d)(2) without special scrutiny.<sup>374</sup> For example, in *Brookover v. Mary Hitchcock Memorial Hospital*,<sup>375</sup> the court admitted nurses' statements that the injured patient should have been restrained to prevent him from getting out of bed.<sup>376</sup> The evidence was clear that the patient had not been restrained, so the statements were offered to establish the hospital had failed to exercise due care.<sup>377</sup>

Although the courts should admit some statements that may be characterized as opinion, other statements have such tenuous probative value that they should be excluded. In *United States v. Delgado*,<sup>378</sup> the defendant wanted to introduce the plea agreement and guilty plea colloquy conducted when his codefendant pleaded guilty.<sup>379</sup> The defendant argued that the prosecution's agreement to dismiss the conspiracy charges against the codefendant constituted an admission that the codefendant was not guilty of conspiracy and should serve as

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372. 34 F.3d 1001 (11th Cir. 1994) (per curiam).

373. *Id.* at 1005-06.

374. See, e.g., *Hybert v. Hearst Corp.*, 900 F.2d 1050, 1053 (7th Cir. 1990) (upholding the admission of statements about the feeling within company management that older employees would be replaced); *United States v. D.K.G. Appaloosas, Inc.*, 630 F. Supp. 1540, 1564 (E.D. Tex. 1986) (affirming the admission of government attorneys' statements of opinion in civil cases), *aff'd*, 829 F.2d 532 (5th Cir. 1987); *Donnelly Corp. v. Gentex Corp.*, 918 F. Supp. 1126, 1135 (W.D. Mich. 1996) (holding admissible under Rule 801(d)(2) statements in affidavits that items were provided for experimental use only and not for public use or sale).

375. 893 F.2d 411 (1st Cir. 1990).

376. *Id.* at 413.

377. See *id.* at 417-18.

378. 903 F.2d 1495 (11th Cir. 1990).

379. *Id.* at 1499.

evidence that the defendant was not guilty of conspiracy.<sup>380</sup> The court appropriately rejected the evidence, commenting that a prosecution agreement to drop charges is influenced by too many factors to have probative value.<sup>381</sup> If, however, the prosecutor appearing at the codefendant's change of plea hearing stated the opinion that the codefendant had not engaged in a conspiracy, that statement should constitute an admissible party admission even though it has the character of an opinion.<sup>382</sup>

## 2. The Government as Adverse Party: Monolith or Multiple Entities?

The government has sometimes argued that it is not a party opponent within the meaning of the party admission rule.<sup>383</sup> As the courts have recognized, there is no support for that position in Rule 801, the Advisory Committee Notes, or in the case law interpreting the rule.<sup>384</sup> The more challenging question relates to what parts of the government constitute the party opponent in criminal cases. While there seems to be no basis for arguing that statements emanating from the Judicial or Legislative Branches of government should be treated as party admissions when offered by a criminal defendant, statements from the Executive Branch should be.

Applying the party admission rule to government litigation, courts have recognized that the Justice Department, as the litigation and enforcement arm of the government, is the adversary. In *United States v. Kattar*,<sup>385</sup> for example, the court concluded that at least the Justice Department is the defendant's party opponent in a criminal case.<sup>386</sup> In *United States v. AT&T*,<sup>387</sup> a civil antitrust action, the government

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380. *Id.*

381. *Id.* (concluding that even if the evidence were relevant, it would be excluded under Federal Rule of Evidence 403).

382. *But see* State v. Klosterboer, 529 N.W.2d 705, 711-12 (Minn. Ct. App. 1995) (holding that a prosecutor's statement that it would be difficult to prove guilt was inadmissible because it was personal opinion).

383. *See, e.g.,* United States v. Zizzo, 120 F.3d 1338, 1351 n.4 (7th Cir. 1997).

384. *See* FED. R. EVID. 801; United States v. Kattar, 840 F.2d 118, 130 (1st Cir. 1988); *see also* United States v. Morgan, 581 F.2d 933, 937 n.10 (D.C. Cir. 1978).

385. 840 F.2d 118 (1st Cir. 1998).

386. *Id.* at 130.

387. 498 F. Supp. 353 (D.D.C. 1980).

acknowledged that the Justice Department was the party opponent in the litigation for purposes of Rule 801(d)(2), while arguing that other parts of the Executive Branch were not.<sup>388</sup> Those parts of government immediately responsible for criminal cases—the prosecutor’s office and the law enforcement agencies—should certainly be regarded as the party opponent in criminal litigation.<sup>389</sup>

The more difficult question is whether other parts of the Executive Branch, besides the Department of Justice, qualify as the party opponent in criminal cases. In *AT&T Co.*,<sup>390</sup> the government objected that statements of various officials of agencies in the Executive Branch were hearsay.<sup>391</sup> The government argued unsuccessfully that the party opponent was only the Justice Department and not other parts of the Executive Branch.<sup>392</sup> The court, rejecting this argument, pointed out that an earlier ruling in the case on a discovery question established that the entire Executive Branch comprised “the plaintiff” in the case.<sup>393</sup> The court further noted that the antitrust action protected the interests of all citizens and had implications that were national in scope.<sup>394</sup>

The government also tried to persuade the court that a broad application of the party admission rule was contrary to the policy underlying the rule. The government argued that

Rule 801(d)(2) treats statements by party-opponents as non-hearsay (a) because the party against which the statement is being used has no need to challenge the trustworthiness of its own statement and (b) because that party has the ability to provide an explanation for the statement should the need therefor [sic] arise.<sup>395</sup>

Because officials from different departments within the Executive Branch “represent a variety of diverse and often conflicting interests, and explanations of their statements at trial could be secured by the Department of Justice only

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388. *Id.* at 358.

389. *But see* *State v. Asbridge*, 555 N.W.2d 571, 575-76 (N.D. 1996) (concluding that statements by government investigative agents are not admissible as party admissions); 2 MCCORMICK, *supra* note 15, § 259, at 160-61 (suggesting that the various policy concerns may be balanced by admitting statements made by government attorneys once the proceeding has begun, but excluding statements by government investigative agents).

390. 498 F. Supp. 353 (D.D.C. 1980).

391. *Id.* at 356-57 & n.6.

392. *Id.* at 357-58.

393. *Id.*

394. *Id.* at 357.

395. *Id.*

through a massive effort," the government argued that the rule should not apply.<sup>396</sup> The court disagreed. Instead, it accepted the view that the justification for admitting party admissions is based on fairness in the adversary system and not on the trustworthiness of the statements or the lack of burden on the party against which they are admitted.<sup>397</sup> The court therefore saw no reason to limit party admissions to statements from the Justice Department.<sup>398</sup>

In this regard, the Executive Branch is no different in any relevant way from a large corporation with numerous agents operating in various aspects of the corporate business. If a statement is made by an agent of such a large entity, it is admissible as a non-authorized vicarious admission provided that it relates to the agent's duties.<sup>399</sup> Similarly, the statement of any agent of the Executive Branch of government may be a party admission of the government in a criminal case.

A related question arises when agents for different governmental entities have made pertinent statements. Investigation of criminal wrongdoing often involves law enforcement officers from various state and local units as well as from the federal system. In some cases, there are successive related prosecutions in state and federal courts. The courts need to determine which governmental units constitute the party opponent in a criminal prosecution.

To do so, the courts should refer to the dual sovereignty doctrine developed in applying the double jeopardy clause. If successive prosecutions by the different units would be allowed because they are separate sovereigns, the statement of one should not be admissible against the other. Conversely, if the units are not separate sovereigns, the statement of one should be admissible against the other.

Normally, prosecution for an offense raises a double jeopardy bar against any further prosecution for the same offense.<sup>400</sup> The Court has recognized an exception, however, when the prosecutions are brought by separate sovereigns.<sup>401</sup>

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396. *Id.*

397. *See id.*; *see also* 2 MCCORMICK, *supra* note 15, § 254, at 136-37.

398. *See AT&T*, 498 F. Supp. at 357.

399. *See supra* Part III.C.

400. LAFAVE ET AL., *supra* note 28, § 25.1(f), at 1171.

401. Ronald J. Allen et al., *The Double Jeopardy Clause, Constitutional Interpretation and the Limits of Formal Logic*, 26 VAL. U. L. REV. 281, 285 (1991); Anne Bowen Poulin, *Double Jeopardy Protection Against Successive*

Separate sovereigns vindicate separate interests through their criminal prosecutions, and therefore should not bind one another with their prosecutorial decisions and actions.<sup>402</sup> By contrast, however, prosecutions by different subdivisions within a single sovereign raise a double jeopardy bar; the interests are not separate and the subdivisions are all accountable to the sovereign of which they are part.<sup>403</sup>

It makes sense to employ similar reasoning in defining the party opponent under the party admission rule. Statements by representatives of one sovereign should not be admissible as the party admissions of another sovereign. Thus, for example, if a state prosecutor makes statements concerning the case in documents filed in court, those statements should not be admissible if offered by the defendant in a federal prosecution or a prosecution in another state.

On the other hand, if the declarant and the prosecutor are agents of the same sovereign, the party admission rule should apply. Thus, statements by federal agents are potential party admissions in any federal prosecution. In *Freeland v. United States*,<sup>404</sup> the trial court rejected the defendant's effort to introduce a statement by a prosecutor in a separate proceeding on the ground that the United States Attorney's Office in Virginia and the Office in the District of Columbia were not the same party.<sup>405</sup> The court of appeals disagreed, remarking that the two cases were prosecuted by the same sovereign and both prosecutors spoke for the Department of Justice.<sup>406</sup>

Similarly, statements by representatives of the Executive Branch of subdivisions of a state should be treated as party admissions in a prosecution by the state or any subdivision of the state. Thus, if a law enforcement officer from a municipality within a state makes a statement related to a case, that statement should be treated as a party admission in

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*Prosecutions in Complex Criminal Cases: A Model*, 25 CONN. L. REV. 95, 150 (1992) (explaining that the Court established this exception in *Abbate v. United States*, 359 U.S. 187, 195 (1959), and *Bartkus v. Illinois*, 359 U.S. 121, 139 (1959), and later reaffirmed this exception in *Heath v. Alabama*, 474 U.S. 82, 88 (1985)).

402. LAFAVE ET AL., *supra* note 28, § 25.5, at 1191.

403. See *Waller v. Florida*, 397 U.S. 387, 394-95 (1970) (holding that prosecution by a municipality barred prosecution by the state of which it was a subordinate unit).

404. 631 A.2d 1186 (D.C. 1993).

405. *Id.* at 1191.

406. *Id.* at 1193.

any prosecution brought by the state or any of its subdivisions. In *State v. Smith*,<sup>407</sup> for example, the defendant tried to introduce the statement of an arresting officer.<sup>408</sup> The court expressed doubt that the officer, a municipal employee, was the agent of the state in its prosecution function.<sup>409</sup> Since the municipality was a subdivision of the state, however, the statement of the municipal officer should have been regarded as a party admission in a prosecution by the state.

### 3. Statements Made Before Full Investigation

One argument for excluding certain governmental admissions is that the statements were made before full investigation of the facts.<sup>410</sup> Rule 801(d)(2) contains no such requirement and none should be created for special application in criminal cases. If a party speaks prematurely, its words are admissible as a party admission and the party is free to explain to the jury why they should not credit the admission. The government, like any other party, can explain party admissions made early in the criminal process, telling the jury how later investigation disclosed the error in the earlier assertion.

In some cases, a statement made before full investigation may provide valuable insight. For example, in *State v. Smith*,<sup>411</sup> one of the officers who investigated a break-in stated, as he arrested the defendant, that whoever committed the crime “must have got[ten] cut.”<sup>412</sup> The defendant, who was not cut, wanted to introduce the statement.<sup>413</sup> The statement related to the officer’s duties of investigation and should have been treated as a party admission. It represented precisely the type of information that the party admission rule should enable the defendant to present. The statement reflected the informed impression of an agent of the state responsible for investigating the crime. Once the police focused on the defendant, pressure may have developed to conform the official view of the facts to

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407. 153 N.W.2d 538 (Wis. 1967).

408. *See id.* at 542-43.

409. *Id.* at 543.

410. *See, e.g.,* United States v. Ramirez, 894 F.2d 565, 571 (2d Cir. 1990) (noting that the trial court’s refusal to admit evidence amounted to a harmless error because the evidence was gathered in the early part of the investigation and therefore subject to change).

411. 153 N.W.2d 538 (Wis. 1967).

412. *Id.* at 543.

413. *Id.*

the circumstances of the particular defendant and to downplay the likelihood that the perpetrator “got cut” while breaking in. Admitting the officer’s statement would have permitted the defendant to alert the jury to the fact that the official view was not always the position of all involved. Such information may have led the jury to scrutinize the prosecution’s case more carefully or even to entertain a reasonable doubt.

In *State v. Brown*,<sup>414</sup> the court emphasized the timing of the statement, holding that the affidavit submitted to obtain a search warrant during the investigation of the case should not be admitted against the state at trial.<sup>415</sup> The court argued that admitting statements made during the investigation would have a negative impact on law enforcement by forcing police officers to ensure that every fact was true before applying for a warrant.<sup>416</sup>

The court overstated this concern.<sup>417</sup> Treating statements as party admissions does not make them binding on the state. Like any other party confronted with its own statement made before adequate investigation, the prosecution can explain that later investigation proved the earlier statement wrong.<sup>418</sup> *Brown*, however, insulates the prosecution from having to address the earlier statement at all. When a statement supports the defendant’s defense, as it did in *Brown* by identifying the codefendant as the one selling drugs from their shared apartment, the jury should be permitted to consider it. To hold, as the New Jersey court did, that the state is not accountable for any statements made by its agents before the defendant is indicted deprives the defendant of important evidence generated before law enforcement narrowed its focus to the defendant. Governmental statements made in the earlier stages may point away from the defendant’s culpability and provide important insight into the case.

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414. 784 A.2d 1244 (N.J. 2001).

415. *Id.* at 1256.

416. *Id.* at 1257.

417. See Imwinkelried, *supra* note 36, at 305 (discussing the ability of the government to effectively pursue law enforcement goals regardless of the admissibility of statements).

418. In *Brown*, the prosecution could have called the confidential informant as a witness to explain the transactions reported in the warrant application. It could also simply have argued to the jury that the sales from the codefendant were not inconsistent with the defendant’s guilt.

## 4. Rule 801(d)(2) and the Personal Knowledge Requirement

A key feature of the rule governing party admissions is that the declarant need not have personal knowledge. Normally, both in-court witnesses and out-of-court declarants whose statements are admitted in evidence must have personal knowledge of the facts they recount.<sup>419</sup> Under Rule 602, a non-expert witness is not competent to testify unless the court has sufficient evidence that the witness has personal knowledge of the matters about which the witness testifies.<sup>420</sup> The rules governing the admissibility of hearsay are generally read as incorporating the requirement that the out-of-court declarant have personal knowledge unless the requirement is specifically excused.<sup>421</sup> Thus, unless there is an adequate basis on which to conclude that the declarant has personal knowledge of the facts asserted, hearsay will be excluded even if it falls within an exception. When a statement is admitted as a party admission, however, the proponent is generally relieved of the obligation to demonstrate the declarant's personal knowledge.<sup>422</sup> For example, in the classic case of *Reed v. McCord*,<sup>423</sup> the defendant, who was not present when the workplace accident that killed the plaintiff's decedent occurred, testified in a coroner's hearing as to the cause of the accident.<sup>424</sup> He clearly lacked personal knowledge. His statement was nevertheless admissible as a party admission even though it would not have been admissible under any other hearsay exception because of the lack of personal knowledge.<sup>425</sup>

Although the express language of the rule takes no position on personal knowledge, the Advisory Committee alluded to "the

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419. FED. R. EVID. 602.

420. *Id.*

421. FED. R. EVID. 803 advisory committee's note ("In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of first hand knowledge."); *see also* 5 WEINSTEIN & BERGER, *supra* note 40, § 802.03[5][b], at 802-12.

422. *United States v. McKeon*, 738 F.2d 26, 32 (2d. Cir. 1984); *Mahlandt v. Wild Canid Survival & Research Ctr., Inc.*, 588 F.2d 626, 630-31 (8th Cir. 1978); FED. R. EVID. 801 advisory committee's note; 5 WEINSTEIN & BERGER, *supra* note 40, §§ 801.30-801.31, at 801-42 to 801-60.1.

423. 54 N.E. 737 (N.Y. 1899).

424. *Id.* at 740.

425. The court held that "admissions by a party of any fact material to the issue are always competent evidence against him." *Id.* Under the modern Rules of Evidence, party admissions are characterized as non-hearsay, rather than as an exception to the prohibition of hearsay. FED. R. EVID. 801(d)(2).

freedom which admissions have enjoyed . . . from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge."<sup>426</sup> Most cases considering statements by a party's agent have concluded that the agent's statement may be admitted as a party admission even though the agent has not been shown to have, or even clearly lacked, personal knowledge.<sup>427</sup> There is disagreement, however, concerning whether third party admissions should be admitted even though the declarant lacked personal knowledge, particularly whether the statements of an agent without personal knowledge should be admitted against the principal. Those who argue in favor of a personal knowledge requirement generally cite Judge Weinstein's observation that "[g]ossip does not become reliable merely because it is heard in an office rather than a home."<sup>428</sup>

The role of personal knowledge on the part of the declarant has different significance under each of the provisions of Rule 801(d)(2). The following sections examine the role of personal knowledge for adoptive admissions, authorized admissions, and non-authorized vicarious admissions, concluding that no statements falling within Rule 801(d)(2) should be subject to a personal knowledge requirement. The courts should not impose a personal knowledge requirement for any governmental party admissions.

*a. Personal Knowledge and Adoptive Admissions*

A personal knowledge requirement for adoptive admissions could mean either that the speaker whose statement was adopted had personal knowledge or that the agent adopting the

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426. FED. R. EVID. 801 advisory committee's note.

427. See *Brookover v. Mary Hitchcock Mem'l Hosp.*, 893 F.2d 411, 415 (1st Cir. 1990) (distinguishing Rule 801(d)(2)(D) from other hearsay rules and concluding that personal knowledge is not required); *Fed. Deposit Ins. Corp. v. First Interstate Bank*, 885 F.2d 423, 435 (8th Cir. 1989) (holding that personal knowledge is not required under Rule 801(d)(2)(D)); *United States v. Ammar*, 714 F.2d 238, 254 (3d Cir. 1983) (rejecting the argument that the personal knowledge requirement applies to co-conspirators' statements under Rule 801(d)(2)(E)); *Mahlandt*, 588 F.2d at 630-31 (holding that personal knowledge is not required). But see *MUELLER & KIRKPATRICK*, *supra* note 80, § 8.31, at 1119 (arguing that personal knowledge is required under Rule 801(d)(2)(C)).

428. See, e.g., *Brookover*, 893 F.2d at 416 (quoting 4 J. WEINSTEIN & M. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 801(d)(2)(D)[01] at 226-27 (1988 & Supp. 1989)); *Litton Sys., Inc. v. AT&T Co.*, 700 F.2d 785, 816 (2d Cir. 1983); *In re A.H. Robins Co.*, 575 F. Supp. 718, 725 (D. Kan. 1983); see also 3 GRAHAM, *supra* note 17, § 801.24, at 183-88.

statement for the government had personal knowledge. The requirement should not be imposed in either case.<sup>429</sup>

Consider, for instance, the paradigm adoption in a criminal case. To obtain a warrant, an agent submits an affidavit based in part on information received from an informant or some other witness held out to be reliable. The government thereby adopts the statement under Rule 801(d)(2)(B), but the agent who acts as affiant probably does not have personal knowledge of the facts recounted by the informant; otherwise, the agent would simply swear to those facts rather than endorsing the statement of the third party. On the other hand, if the third party spoke without personal knowledge, that should not prevent the defendant from using the statement against the government as an adoptive admission under Rule 801(d)(2)(B). To do so would allow the government to solicit judicial action on the basis of third party statements and later disavow those assertions on the ground that the source of the information lacked personal knowledge.

*b. Personal Knowledge and Authorized Admissions*

Personal knowledge should never be required for authorized admissions. A personal knowledge requirement is simply inconsistent with the routine applications of this aspect of the party admission rule. Spokespersons are rarely agents with personal knowledge of the facts about which they speak. A declarant authorized to speak on a matter will often speak without personal knowledge. For example, in the government setting, those who speak for the various departments will generally base their assertions on collected information rather than personal knowledge and are unlikely to be sufficiently

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429. In civil cases, courts have not imposed a personal knowledge requirement on adoptive admissions. See *Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1268-69 (10th Cir. 1998) (holding that the City Manager's reliance on a personnel department report constituted an adoption and that notes based on that adoption were admissible as non-hearsay under Rule 801(d)(2)(B)); *Pilgrim v. Trs. of Tufts Coll.*, 118 F.3d 864, 870 (1st Cir. 1997) (holding that the Tufts president adopted the report of the Grievance Committee by taking action based on its recommendations, despite his lack of personal knowledge of the underlying facts); see also *A.H. Robins*, 575 F. Supp. at 728. In *A.H. Robins*, the court concluded that employee statements that incorporated the reports of third parties were admissible because the employees made use of the reports in their daily activities. *Id.* The court based its holding on Rule 801(d)(2)(D). *Id.* A more appropriate analysis would be to treat the reception of, and reliance on, the third party statements as adoptive admissions. See *supra* Part III.A.3.

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involved with day to day operations to have personal knowledge. Similarly, lawyers speak with authorization, but will rarely have personal knowledge of the underlying facts, basing their assertions instead on others' representations and their own investigation. An official publication will not be based on the personal knowledge of any declarant, but nevertheless represents the position of the government based on information gathered from various sources.

*c. Personal Knowledge and Non-Authorized Vicarious Admissions*

The courts are most concerned about the need for a personal knowledge requirement when applying Rule 801(d)(2)(D)'s expanded definition of vicarious admissions, the non-authorized statements of agents speaking about matters related to their duties. Given the absence of any limiting language in the rule and the clear directive of the Advisory Committee,<sup>430</sup> such non-authorized statements should be admissible provided that they satisfy the other requirements of this subsection—even if the agent spoke without personal knowledge.

Even though the rule does not require personal knowledge, the requirements of the rule make it likely that a declarant whose statement is admitted under Rule 801(d)(2)(D) will have personal knowledge. While those acting for the government in adopting third party statements or speaking with authority for the government may be quite removed from the matters about which they speak, under Rule 801(d)(2)(D) the agent's statement must relate to matters falling within the scope of the agency.<sup>431</sup> This limitation makes it more likely that the statement relates to matters in which the agent is sufficiently involved to have either first hand knowledge of the facts or at least a good basis of knowledge. The concern that tempts courts to impose the personal knowledge requirement is the risk that the rule will allow defendants to introduce statements of those who are ill-informed yet speak about cases or other matters on which they are working. The courts can protect the government against this risk by applying the requirements of the Rules of Evidence with care.

First, when the agent lacks personal knowledge, the courts

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430. See *supra* note 426 and accompanying text.

431. FED. R. EVID. 801(d)(2)(D).

should strictly enforce the requirement that the statement relate to a matter within scope of the agent's duties.<sup>432</sup> At the same time, the courts should view employees as being in the loop as to matters within their job duties, even when they may not have first-hand knowledge of the facts asserted.<sup>433</sup> The more highly placed the agent is, the more willing the court may be to construe their duties broadly.<sup>434</sup> Nevertheless, if it appears that the assignment of the government agent who is the declarant is not sufficiently related to the topic, the court should conclude that the statement does not fall within the rule.<sup>435</sup> In *Stagman v. Ryan*,<sup>436</sup> for example, the court held that an employee's statement concerning the circumstances of the plaintiff's discharge was admissible because the employee was responsible for disciplining the plaintiff and also wrote the memorandum concerning the discharge.<sup>437</sup> As to other statements by the same employee, however, the court concluded that he was repeating the statements of another employee speaking about matters not within her demonstrated duties. The evidence therefore did not qualify as a party admission.<sup>438</sup>

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432. See *City of Tuscaloosa v. Harcos Chems., Inc.*, 158 F.3d 548, 557-62 (11th Cir. 1998) (assessing the scope and boundaries of several declarants' employment duties); *Woodman v. Haemonetics Corp.*, 51 F.3d 1087, 1094 (1st Cir. 1995) (considering carefully the scope of an employee's duties); *Hill v. Spiegel, Inc.*, 708 F.2d 233, 237 (6th Cir. 1983) (concluding that statements concerned matters falling outside the duties of the declarants); cf. *MUELLER & KIRKPATRICK*, *supra* note 80, § 8.32, at 1132 (suggesting that the relationship to duties requirement makes it likely that an agent has a competent basis of knowledge).

433. Cf. *Swanson v. Leggett & Platt, Inc.*, 154 F.3d 730, 733 (7th Cir. 1998) (stating that under Rule 801(d)(2)(D), when an employee's supervisor makes statements regarding reasons for firing, "the supervisor is presumed to speak for the decision maker").

434. See, e.g., *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1190, 1293 (E.D. Pa. 1980) (inferring that a senior official in the company was likely to have duties relating to export, despite a lack of any indication in the record), *aff'd in part, rev'd in part*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds*, 475 U.S. 574 (1986).

435. See, e.g., *Krause v. City of La Crosse*, 246 F.3d 995, 1002 (7th Cir. 2001) (holding that an assistant police chief's remarks concerning the finance department's treatment of a city employee did not relate to his job duties and were therefore inadmissible).

436. 176 F.3d 986 (7th Cir. 1999).

437. *Id.* at 996.

438. *Id.* at 997; see also *Union Mut. Life Ins. Co. v. Chrysler Corp.*, 793 F.2d 1, 8 (1st Cir. 1986) (holding that a letter written by lower level employee who responded to billing questions was admissible under Rule 801(d)(2)(D)).

Second, the court should scrutinize statements that reflect multiple levels of repetition or gossip, analyzing them as hearsay within hearsay.<sup>439</sup> When evidence contains layers of hearsay, each layer of hearsay must fall within an exception to be admissible.<sup>440</sup> Thus, if the agent speaking about matters within the scope of her duties repeats the statement of a third party without adopting it, the third party's statement is also subject to the hearsay rule. Unless the repeated statement falls outside the definition of hearsay or within a hearsay exception, it should be excluded.

In *Litton Systems, Inc. v. AT&T Co.*,<sup>441</sup> the court employed this approach to exclude under Rule 801(d)(2)(D) the notes of a party's attorney from interviews with company employees recounting alleged improprieties committed by other employees.<sup>442</sup> The court concluded that there were too many layers of hearsay and chided AT&T for failing to lay an adequate foundation.<sup>443</sup> Although the attorney's notes related to matters within the scope of the attorney's agency, AT&T had failed to demonstrate that the interviewed employees were speaking about matters within the scope of their duties or that

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because the letter in question was within the scope of his duties).

439. See *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 134 (3d Cir. 1997) (concluding that statements reported in a party admission were attributable to employees with authority to speak); *Carden v. Westinghouse Elec. Co.*, 850 F.2d 996, 1002 (3d Cir. 1988) (holding that an employee's statement was inadmissible under Rules 801(d)(2)(D) and 805 because it included hearsay from an unidentified source); *Union Mut.*, 793 F.2d at 8-9 (assessing the basis for an employee's statement and concluding it was not based on hearsay statements); *Pillsbury Co. v. Cleaver-Brooks Div. of Aqua-Chem, Inc.*, 646 F.2d 1216, 1217-18 (8th Cir. 1981) (holding that statements of one employee repeating a statement of another that also fell within Rule 801(d)(2)(D) were admissible); *Cedeck v. Hamiltonian Fed. Sav. & Loan Ass'n.*, 551 F.2d 1136, 1138 (8th Cir. 1977) (excluding a supervisor's statement because it related a statement of an unidentified third party); *Edwards v. Schlumberger-Wells Servs.*, 984 F. Supp. 264, 276 (D.N.J. 1997) (holding an employee's statement concerning what "they" would do inadmissible because it was unclear whose statements the employee was reporting); *Finch v. Hercules, Inc.*, 865 F. Supp. 1104, 1126 (D. Del. 1994) (examining a party admission containing layers of hearsay and concluding that each layer fit within the 801(d)(2)(D) hearsay exclusion).

440. FED. R. EVID. 805 ("Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.").

441. 700 F.2d 785 (2d Cir. 1983).

442. *Id.* at 816.

443. *Id.* at 816-17.

their statements fell within some other hearsay exception.<sup>444</sup> A careful analysis of each layer of hearsay should provide adequate protection against the risk of merely repeating gossip.

#### CONCLUSION

When a criminal defendant discovers that a government agent made a statement inconsistent with the prosecution's position in the criminal case, the defendant should be able to introduce that statement over a hearsay objection as the government's party admission. Rule 801(d)(2), the modern rule defining party admissions, was written broadly and contains no special rule for the government, either explicit or implicit. The courts should apply the three pertinent sections of the rule to statements offered against the government, permitting the jury to be fully informed about the government's stance in the case and restricting the government's freedom to talk out of both sides of its mouth.

The courts should admit adoptive admissions against the prosecution under Rule 801(d)(2)(B). A variety of governmental actions manifest adoption. The government adopts statements when it relies on their truth in documents filed with the courts. It adopts statements when it engages in conduct which affirms the statement, such as taking formal action on the statement. The courts should not rely solely on adoption analysis in evaluating statements offered by the defendant as governmental party admissions, however. Instead, the court should invoke the rule governing adoptive admissions only when the statement cannot be a vicarious admission because it was made by a third party who was not an agent of the government.

The government acts and speaks only through its agents. When a statement is that of a government agent, the courts should evaluate it as a vicarious rather than an adoptive admission. If the agent spoke with authority, the court should apply Rule 801(d)(2)(C), which admits authorized admissions. The most common example of an authorized admission in a criminal case is likely to be a statement of the prosecution in a prior case or proceeding. In addition, however, courts should

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444. *Id. But cf. Brookover v. Mary Hitchcock Mem'l Hosp.*, 893 F.2d 411, 418 (1st Cir. 1990) (holding that nurses employed in a hospital were not required to have personal knowledge of the exact circumstances surrounding a patient's fall in order for their statements made to plaintiff concerning the use of bed restraints to be admissible in regards to the patient's fall).

recognize that documents filed with the court, official government publications, and internal government documents are also authorized government statements that should be treated as vicarious admissions under Rule 801(d)(2)(C).

When the government agent spoke without authority, courts should evaluate the statement under Rule 801(d)(2)(D), admitting it only if it relates to matters within the scope of the agent's duties. The Federal Rules extended the party admission rule to treat as vicarious admissions the non-authorized statements of an agent, provided that the statement relates to the agent's duties. The rule should apply as written to government agents. The courts should not refuse to apply the rule against the government, nor should they read protective restrictions into the rule as they apply it to the government. Instead, if a government agent makes a statement related to matters within the scope of the agency, the court should treat the statement as a party admission admissible against the prosecution.

By adopting this approach to governmental party admissions, the courts will better protect the fairness of the criminal justice process. A judicial stance more receptive to admitting party admissions against the prosecution will prevent the government from adopting inconsistent positions without consequence. It will allow defendants to inform the jury of the government's more favorable earlier positions and may shed useful light on criminal cases. Most importantly, it will make unjust convictions less likely.