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Text Messages and the Hearsay Rule in the Aaron Hernandez Case

Jeffrey Bellin

William & Mary Law School, jbellin@wm.edu

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June 30, 2013

Text Messages and the Hearsay Rule in the Aaron Hernandez Case

Thanks to Colin for the opportunity to guest post about text messages and the Aaron Hernandez murder prosecution. I am particularly interested in the (reported) text messages from the victim in the case, Odin Lloyd.

Specifically, the NY Times provides this [description](#) of some of the evidence against Hernandez (former star player for the NFL's New England Patriots):

In his final moments alive, Lloyd texted his sister to alert her. When she asked whom he was with, he answered, "NFL," and added, "Just so you know."

The ominous text features prominently in the evidence alleged against Hernandez in various [news stories](#) about the case. As I have written [elsewhere](#), this kind of evidence (text messages and social media posts) is becoming increasingly prevalent as police, attorneys and other investigators start to develop the same degree of tech-savvy as the people they investigate. Consequently, its admissibility is an important question for courts, policymakers and evidence scholars.

Obviously the reported text message from Lloyd to his sister is hearsay. It is an out of court statement offered for the truth of what it asserts: that Lloyd was with Hernandez ("NFL") moments before Lloyd's death.

Is it nevertheless admissible?

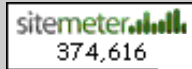
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The prosecution needs a hearsay exception for the text, or a jury will never see it. The requirement of authentication, the hurdle the prosecution is encountering in the **Bradley Manning prosecution**, is likely not a major obstacle here assuming testimony from Lloyd's sister and, if necessary, the phone service provider, which likely would constitute "evidence sufficient to support a finding that the [text] is what its proponent claims." Rule of Ev. 901; see also [here](#).

As for the hearsay question, a strong argument can be made that the text fits the present sense impression exception for "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Fed. R. Evid. 803(1). Lloyd's alleged statement, essentially, "I am currently with [Hernandez]" fits. See *United States v. Murillo*, 288 F.3d 1126, 1137 (9th Cir. 2002) (noting the defendant's concession that the statement "I'm with Diana...and Rico" was a present sense impression).

Unfortunately for prosecutors, Massachusetts is among the minority of States that has not adopted the present sense impression hearsay exception. So the text is not coming in through that exception in a Massachusetts court, where Hernandez appears headed. (The statement could be admitted in federal court in Massachusetts under the Federal Rules of Evidence.)

The prosecution could argue that the text is a dying declaration, but to my mind, a lot more is needed to make the requisite showing that, at the time it was written, "all hope of recovery has gone from the mind of the declarant, and he speaks under a sense of impending death." *Com. v. Dunker*, 298 N.E.2d 813, 815 (Mass. 1973); Mass. Ev. R. 804(b)(2) ("under the belief of imminent death").

The text message, important enough given its role in a high profile murder prosecution, illustrates the dilemma posed by the new electronic communication norm for our existing hearsay framework. The ultimate question comes down to whether juries should see a message like this, and why (or why not). I think most people would find it odd that the text message might be excluded from the evidence in a trial. True, Hernandez would be unable to cross-examine Lloyd as

to what he meant, something that might be useful given the ambiguity in the text (using “NFL” to mean, allegedly, Hernandez). At the same time, Lloyd is not available to explain in person, and depriving the jury of his text messages to his sister moments before his death seems bizarre to anyone not already acquainted with the byzantine hearsay rules.

That said, it is hard to fault Massachusetts for not adopting the present sense impression (PSI) exception. In fact, the exception, designed for a simpler age of oral communication, is a terrible fit for these kinds of statements (something I explain at length [here](#), but see [here](#)). The dying declaration exception is no solution either, as it applies in only the narrowest of circumstances. There should be a way to introduce reliable texts and social media posts, over a hearsay objection, and it is no surprise that our current rules (written before these communications existed) do not provide it. In a forthcoming article, I propose bringing back a modified form of the Statement of Recent Perception hearsay exception, tailored to electronic communication, available [here](#). The precise wording of such an exception (included in my proposal) is a complex question, and a topic for another post. But the key point is that the evidence world needs to start thinking about how to handle this type of evidence – as the Hernandez case shows. The evidence is here, and courts do not have the tools they need to analyze its admissibility in a way that meaningfully separates statements that should be admitted from those that should not.

Lastly, for those of you wondering about the role the Sixth Amendment, Confrontation Clause could play in this context, keep in mind that the Clause now only applies if a statement is “testimonial,” something that will generally not be the case in light of recent case law for most texts and social media posts, see [here](#).

- [Jeff Bellin](#)

Associate Professor of Law, College of William and Mary (jbellin@wm.edu)

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