



CRIMINAL DEFENSE AND COMPLIANCE PRACTICE GROUP

**FEDERAL RULE 902(11) CRIMINAL DEFENSE ALERT**  
**CERTIFICATION V. SIXTH AMENDMENT**

Rule 902(11) of the Federal Rules of Evidence allows the foundation for the receipt of business records into evidence to be laid by certification, essentially an affidavit of the business records' custodian, without requiring testimony by a live witness.

In the past, defense counsel may have been reluctant to challenge a prosecutor who offered business records wholesale pursuant to 902(11). But with the Supreme Court decision in *Crawford v. Washington*, 124 S. Ct. 1354 (2004), and a recent federal court Order from the U.S. District Court in Kansas, defense counsel now have new and effective ammunition against 902(11) certifications.

In *Crawford*, the Supreme Court held that the Confrontation Clause prohibits admission of "testimonial hearsay" unless the witness is available for cross-examination. Although the Court declined to give a definition of "testimonial hearsay," it did conclude that ex parte in-court testimony or its functional equivalent, such as affidavits that would reasonably be expected to be used prosecutorially, would most likely be considered testimonial. Until recently, no federal court had addressed the

issue of whether Rule 902(11) certifications are "testimonial."

On May 23, 2005, Judge Julie Robinson, United States District Court for the District of Kansas, issued an Order in *United States v. Wittig and Lake*, Case No. 03-40142, precluding the government from using 902(11) to introduce business records in a criminal trial. Judge Robinson interpreted *Crawford* as precluding such certification because the Rule 902(11) procedure violates a defendant's right to confrontation. Judge Robinson held that 902(11) certifications are testimonial statements because they contain "'solemn declarations or affirmations made for the purpose of establishing or proving some fact,' namely that the proper foundation for the admission of business records exists. They are the functional equivalent of ex parte in-court testimony that defendants cannot cross-examine."

In the future, defense counsel will have support for a motion to preclude Rule 902(11) certifications, thereby forcing the prosecutor to put a live witness on the stand and creating the opportunity to underscore defense themes through innovative cross-examination.

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