

CRIMINAL AND FORENSIC
EVIDENCE:
CASES, MATERIALS, PROBLEMS

LexisNexis Law School Publishing Advisory Board

Paul Caron

Professor of Law
Pepperdine University School of Law
Herzog Summer Visiting Professor in Taxation
University of San Diego School of Law

Olympia Duhart

Professor of Law and Director of Lawyering Skills & Values Program
Nova Southeastern University, Shepard Broad Law School

Samuel Estreicher

Dwight D. Opperman Professor of Law
Director, Center for Labor and Employment Law
NYU School of Law

Steven I. Friedland

Professor of Law and Senior Scholar
Elon University School of Law

Joan Heminway

College of Law Distinguished Professor of Law
University of Tennessee College of Law

Edward Imwinkelried

Edward L. Barrett, Jr. Professor of Law
UC Davis School of Law

Paul Marcus

Haynes Professor of Law
William and Mary Law School

John Sprankling

Distinguished Professor of Law
McGeorge School of Law

Melissa Weresh

Director of Legal Writing and Professor of Law
Drake University Law School

CRIMINAL AND FORENSIC EVIDENCE:

Cases, Materials, Problems
4th Edition

Robert J. Goodwin

J. Russell McElroy Professor of Law
Samford University, Cumberland School of Law

Jimmy Gurulé

Professor of Law
Notre Dame Law School

2014

ISBN: 978-0-7698-9438-6

ISBN: 978-0-7698-9439-3 (eBook)

Looseleaf ISBN: 978-0-7698-9440-9

Library of Congress Cataloging-in-Publication Data

Goodwin, Robert J., 1949- author.

Criminal and forensic evidence: cases, materials, problems / Robert J. Goodwin J. Russell McElroy Professor of Law, Samford University, Cumberland School of Law Jimmy Gurule, Professor of Law, Notre Dame Law School. -- 4th edition.

p. cm.

Includes index.

ISBN 978-0-7698-9438-6

1. Evidence, Criminal--United States--Cases. 2. Evidence, Expert--United States--Cases. I. Gurul?, Jimmy, author. II. Title.

KF9660.G66 2013

345.73'06--dc23

2013045426

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. Matthew Bender and the Matthew Bender Flame Design are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2014 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Offices
121 Chanlon Rd., New Providence, NJ 07974 (908) 464-6800
201 Mission St., San Francisco, CA 94105-1831 (415) 908-3200
www.lexisnexis.com

MATTHEW  BENDER

DEDICATION

Professor Goodwin dedicates his work on this project to his son Andrew.

Professor Gurulé dedicates this book to his loving parents, Rita and Mauro Franco.

PREFACE TO THE THIRD EDITION

We are pleased to publish the Fourth Edition of *Criminal and Forensic Evidence*. The new edition represents a major revision of the casebook. Virtually every chapter has been updated with new and more recent cases and materials. A total of twenty-six new cases have been added to the fourth edition, followed by comprehensive notes and questions. These new cases and materials make *Criminal and Forensic Evidence* more current and relevant for students seriously considering a career litigating criminal cases. For example, there have been substantial revisions to Chapter 5 — Evidence Based on Research in Social and Behavioral Science, with the inclusion of several new cases on the admissibility of expert testimony on eyewitness identification, rape trauma syndrome, child sex abuse syndrome, and battered woman syndrome. Moreover, in Chapter 8 — Hearsay Where the Availability of the Declarant is Immaterial, three recent U.S. Supreme Court cases have been added which examine whether the admission of hearsay statements, including laboratory reports where the analyst that prepared the report was not required to testify, violate the Sixth Amendment Confrontation Clause. These cases include *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011), *Michigan v. Bryant*, 131 S. Ct. 1143 (2011), and *Williams v. Illinois*, 132 S. Ct. 2221 (2012). Additionally, a case recently decided by the California Supreme Court discussing the implications of *Williams* has been added to the new edition. Further, Chapter 10 on Impeachment has been substantially revised with the addition of several new cases on impeachment by prior conviction, misconduct not resulting in a conviction, and opinion testimony regarding the truthfulness of a government witness, as well as impeachment by contradiction. Finally, Chapter 11 — Photographs, Videotapes, Audio Recordings, and Demonstrations, includes new cases on the admission of graphic autopsy photographs, the foundational requirements for the admission of videotape recordings, and a new section discussing the admission of computer-generated evidence, e.g., computer animations and computer simulations.

Acknowledgments

Professor Gurulé would like to compliment Arielle Seidman (NDLS Class of 2015) and Steven Nyikos (NDLS Class of 2015) for their diligent, hard work researching, cite-checking cases and other legal sources, and proofreading drafts of chapters of the Fourth Edition. These students made an invaluable contribution to the new edition and their efforts are greatly appreciated. Further, I would like to thank Christopher O’Byrne, Notre Dame Law School research librarian, whose competence, professionalism, and timely response to research requests greatly contributed to the Fourth Edition. Finally, I would like to recognize Leslie Berg for her valuable assistance in formatting book chapters and footnotes. Completion of the Fourth Edition was truly a team effort.

Table of Contents

Part 1	Scientific Evidence and Techniques	1
Chapter 1	FORENSIC SCIENCE AND THE CRIMINAL JUSTICE SYSTEM	3
A.	THE NATURE OF FORENSIC SCIENCE AND THE CRIMINAL JUSTICE SYSTEM	3
[1]	Introduction	3
[2]	The Nature of Forensic Science	5
	National Academy of Sciences, National Research Council, Strengthening Forensic Science in the United States: A Path Forward (2009)	5
	Michele Nethercott, <i>The Role of Forensic Science and Scientific Evidence in the Defense of Criminal Cases</i>	6
	Note	7
	Matthew R. Durose, <i>Census of Publicly Funded Forensic Crime Laboratories, 2005</i>	8
	Notes	10
[3]	The “Corruption” of Forensic Science	10
	Paul C. Giannelli, <i>Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs</i>	10
	Notes	12
B.	THE RELIABILITY OF FORENSIC SCIENCE	14
[1]	The Problem of Inaccuracy: Testing Errors and Irregularities	14
	<i>Miller v. Pate</i>	14
	Notes	17
	Questions	19
	Paul C. Giannelli, <i>Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs</i>	19
	Notes	21
	<i>Melendez-Diaz v. Massachusetts</i>	24
	Note	29
	Questions	29
[2]	The Problem of Inaccuracy: Invalid Scientific Theory	30
	<i>State v. Bullard</i>	31
	Mark Hansen, <i>Believe It or Not</i>	37
	Notes	40
	Questions	40
[3]	The Problem of Inaccuracy: Identifying, Exposing, and Correcting	

Table of Contents

	Untrustworthy Forensic Science Evidence	42
	Paul C. Giannelli, <i>Independent Crime Laboratories: The Problem of Motivational and Cognitive Bias</i>	42
	Bernadette M. Donovan & Edward J. Ungvarsky, <i>Strengthening Forensic Science in the United States: A Path Forward — or Has it Been a Path Misplaced?</i>	44
	Notes and Questions	47
	Problem	49
Chapter 2	INSURING RELIABILITY OF SCIENTIFIC THEORY AND TECHNIQUE	51
A.	INTRODUCTION	51
B.	ESTABLISHING RELIABILITY OF THE THEORY AND TECHNIQUE	53
[1]	Admissibility Tests	53
[a]	The <i>Frye</i> Test: Scientific General Acceptance	53
	<i>People v. Kelly</i>	54
	Notes	60
	Questions	66
	Problems	66
	<i>In re Girard</i>	67
	Note	71
	Questions	72
	Problems	73
	<i>State v. Hasan</i>	74
	Notes	77
	Questions	80
	Problems	80
[b]	The <i>Daubert</i> Test: Reliability and Relevancy	82
	<i>Daubert v. Merrell Dow Pharmaceuticals, Inc.</i>	82
	Notes	90
	Questions	93
	Problem	93
[i]	<i>Daubert</i> Refined — The <i>Joiner</i> Case: Examining Expert Conclusions, and Establishing “Abuse of Discretion” as the Standard of Review	94
	<i>General Electric Co. v. Joiner</i>	95
	Notes and Questions	100
	Problem	101
[ii]	<i>Daubert</i> Refined — The <i>Kumho Tire</i> Case: Extending <i>Daubert</i> to Nonscientific Expert Testimony, and Granting Trial Courts “Broad Latitude” in Deciding <i>How</i> to Determine Reliability	102

Table of Contents

	<i>Kumho Tire Company v. Carmichael</i>	102
	Notes	109
	Questions	112
	Problem	113
[c]	The <i>Daubert</i> Trilogy Applied in Criminal Cases	114
[i]	The <i>Daubert</i> Trilogy Applied in Criminal Cases — Forensic Science Techniques that Have Been Routinely Used for Years	114
	<i>United States v. Crisp</i>	115
	Notes	122
	Questions	123
[ii]	The <i>Daubert</i> Trilogy Applied in Criminal Cases — Nonscientific Experts; Personal Knowledge and Experience as Reliability Factors	123
	<i>United States v. Hankey</i>	124
	<i>United States v. Mamah</i>	128
	Notes	131
	Questions	133
[iii]	The <i>Daubert</i> Trilogy Applied in Criminal Cases — The Pretrial Hearing and Taking Reliability “For Granted”	134
	<i>United States v. Alatorre</i>	134
	Notes	139
	Questions	142
	Problems	142
[2]	Judicial Notice	144
	Notes	144
	Problem	147
[3]	Legislative Recognition	147
	Notes and Questions	148
[4]	Stipulations	150
Chapter 3	ENSURING PROPER APPLICATION AND INTERPRETATION OF THE SCIENTIFIC TECHNIQUE ON A PARTICULAR OCCASION	151
<hr/>		
A.	PROPER APPLICATION AND INTERPRETATION	152
[1]	The Proper Procedures and Proper Working Order Requirements	152
[a]	Expert Testimony Establishing What Procedures and Maintenance Are Necessary	152
	<i>People v. Tobey</i>	152
	Notes and Questions	154
	Problems	159
[b]	Legislative Action: Mandated Admissibility and Prescribed Procedures	

Table of Contents

	and Maintenance	159
	<i>State v. Shirley</i>	160
	<i>McDaniel v. State</i>	164
	Notes	166
	Questions	169
	Problem	170
[2]	The Qualified Operators and Interpreters Requirement	170
	<i>Reynolds v. State</i>	171
	Note	174
	Questions	175
B.	EXPERT CERTAINTY AND PREJUDICING THE JURY: ULTIMATE OPINIONS AND PROBABILITY TESTIMONY	176
[1]	The Constitutional Dimension	176
	<i>United States ex rel. DiGiacomo v. Franzen</i>	176
	Note	180
	Questions	181
	Problem	181
[2]	The Admissibility of Probability Testimony	182
[a]	The Majority View	182
	<i>Davis v. State</i>	182
[b]	The Minnesota View	186
	<i>State v. Kim</i>	186
	Notes and Questions	190
	Problems	194
C.	INSURING RELIABILITY: CHAIN OF CUSTODY	195
[1]	When Is a Chain Required?	198
[a]	When the Item Is <i>Not</i> “Readily Identifiable”	198
	<i>Lucas v. State</i>	198
	Questions	200
[b]	When the Condition of Real Evidence is Relevant: Problems of Alteration, Tampering, and Contamination	200
	<i>Whaley v. Commonwealth</i>	200
	Notes and Questions	202
	Problems	204
[2]	The Adequacy of Proof of the Chain: “Missing Links” and “Weak Links”	205
[a]	Circumstantial Proof of a “Link”	205
	<i>Ex parte Mills</i>	206
	<i>Suttle v. State</i>	210
	Questions	212
	Notes	213
	Problems	215

Table of Contents

[b]	Links for Which No Proof is Required	216
	<i>United States v. Jones</i>	216
	Notes	218
	Problem	219
[3]	Burden of Proof and Standard of Proof	219
	<i>United States v. Hon</i>	219
	Note	222
[4]	When Does the Chain Begin and End?	223
[a]	The Chain’s Beginning	223
[i]	The Time of the Incident	223
	<i>United States v. White</i>	223
[ii]	When the Item Comes into the Possession of the Police	224
	<i>Wash v. State</i>	224
	Note	226
	Questions	227
	Problems	227
[b]	The Chain’s Ending	228
	<i>State v. Conley</i>	228
	Note	231
	Problems	231
Chapter 4	PROBLEMS OF ADMISSIBILITY AND USE ASSOCIATED WITH SPECIFIC SCIENTIFIC TECHNIQUES	233
<hr/>		
A.	INTRODUCTION	233
B.	TRUTH-SEEKING DEVICES	234
[1]	A Scientific Device that Detects Truth: The Polygraph	234
[a]	The Admissibility of Polygraph Evidence	234
[i]	Per Se Exclusion	235
	Notes	239
	Questions	241
	Problems	241
[ii]	Discretionary Admission: <i>Daubert’s</i> Impact Upon Per Se Exclusion	242
	<i>United States v. Cordoba (“Cordoba III”)</i>	243
	Questions	251
	<i>United States v. Benavidez-Benavidez</i>	251
	Notes	254
	Questions	259
	Problems	259
[iii]	Admissibility Pursuant to Stipulation.	260
[2]	Scientific Techniques that Compel One to Tell The Truth	261

Table of Contents

[a]	Hypnosis	261
[i]	Overview	261
	Paul C. Giannelli & Edward J. Imwinkelried, 1 <i>Scientific Evidence</i>	262
	<i>Borawick v. Shay</i>	264
[ii]	The Admissibility of Statements Made While Under Hypnosis	265
	<i>Greenfield v. Commonwealth</i>	265
	<i>Greenfield v. Robinson</i>	268
	Notes and Questions	270
[iii]	In-Court Testimony that Has Been Hypnotically Refreshed	271
	<i>State v. Moore</i>	271
	Notes and Questions	279
[iv]	Constitutional Considerations: An Exception to the Per Se Exclusion Rule	284
	<i>Rock v. Arkansas</i>	284
	Note	289
	Problems	289
[b]	Narcoanalysis (“Truth Serums”)	290
	Notes	290
C.	DEOXYRIBONUCLEIC ACID (DNA)	291
[1]	Introduction	291
[2]	The Use of Proper Procedures to Create a DNA Profile and Declare a “Match” — An Admissibility Requirement or a Weight Issue for the Jury?	292
[a]	The Beginning	293
	Howard Coleman & Eric Swenson, <i>DNA in the Courtroom: A Trial Watcher’s Guide</i>	293
[b]	DNA Science	297
	<i>Commonwealth v. Blasioli</i>	297
	Notes and Questions	298
[c]	The Judicial Response	300
	<i>Ex parte Perry v. State</i>	301
	Notes and Questions	306
	Questions	309
	Problems	309
[3]	The Debate Over the Significance of a Match	311
[a]	Overview	311
	Problem	313
[b]	The Judicial Response to the Scientific Debate Over Population Substructures	314
	<i>State v. Johnson</i>	315

Table of Contents

	Questions	320
	<i>Commonwealth v. Blasioli</i>	321
	Notes	325
	Questions	326
	Problem	326
[c]	What Does the Probability of a Random Match Really Mean?	327
	<i>United States v. Shea</i>	327
	Note	330
	Andre A. Moenssens, <i>A Mistaken DNA Identification? What Does It Mean?</i>	331
	Questions	334
[d]	Can DNA Evidence Alone Be Sufficient to Convict?	334
	<i>People v. Rush</i>	334
	Notes	337
[4]	Polymerase Chain Reaction (PCR)	339
	<i>United States v. Ewell</i>	340
	Notes	347
	Questions	351
[5]	Summary	352

Chapter 5 EVIDENCE BASED ON RESEARCH IN SOCIAL AND BEHAVIORAL SCIENCE 355

A.	INTRODUCTION: “SOFT SCIENCE”	355
[1]	Characteristics of “Soft Science”	355
	David McCord, <i>Syndromes, Profiles and Other Mental Exotica: A New Approach to the Admissibility of Nontraditional Psychological Evidence in Criminal Cases</i>	356
[2]	Admissibility Issues: Evidence Rules 702 and 403	361
B.	EYEWITNESS IDENTIFICATIONS	362
[1]	The Accuracy of Eyewitness Identifications	362
	Paul C. Giannelli & Edward J. Imwinkelried, 1 <i>Scientific Evidence</i> § 9.02	363
[2]	The Admissibility of Expert Testimony	365
[a]	The Admission of Expert Testimony Under <i>Daubert</i>	365
	<i>State v. Guilbert</i>	365
[b]	The Admission of Expert Testimony Under <i>Frye</i>	372
	<i>Minor v. United States</i>	372
	Notes and Questions	379
	<i>People v. McDonald</i>	383
	Notes	391
	Questions	391

Table of Contents

	Problem	392
C.	SYNDROMES	393
[1]	Rape Trauma Syndrome	393
	Paul C. Giannelli & Edward J. Imwinkelried, 1 <i>Scientific Evidence</i> § 9.04 & § 9.04[a]	393
[a]	Rape Trauma Syndrome Offered by the Prosecution	395
	<i>State v. Obeta</i>	396
	Notes and Questions	401
	Problems	405
[b]	Rape Trauma Syndrome: Offered by the Prosecution to Explain the Victim’s Behavior	406
	<i>United States v. Simmons</i>	407
	Notes and Questions	410
	Problems	411
[c]	Rape Trauma Syndrome: Offered by the Defense	413
	<i>Henson v. State</i>	413
	Problems	416
[2]	Child Sexual Abuse Syndrome	417
	<i>State v. Gaona</i>	419
	Notes and Questions	424
	Problems	430
[3]	Battered Woman Syndrome	431
	Paul C. Giannelli & Edward J. Imwinkelried, 1 <i>Scientific Evidence</i> § 9.03	431
	<i>State v. Stewart</i>	436
	Notes and Questions	443
	Problems	446
[4]	Syndromes: Where to Draw the Line	447
[a]	Extending the Coverage of Accepted Syndromes: The Battered Child Syndrome	447
	<i>State v. Janes</i>	447
	Notes	452
	Questions	455
[b]	“New” Syndromes	458
	<i>Werner v. State</i>	458
	Notes	464
	Questions	465
D.	PROFILES	465
[1]	Profiles Offered by the Prosecution to Suggest the Defendant Committed a Crime	465
	<i>State v. Loebach</i>	466

Table of Contents

	Notes	469
	Question	471
	Problems	472
[2]	Profiles Offered by the Defense to Show that Defendant’s Character Is Incompatible with the Crime Charged	473
	<i>United States v. St. Pierre</i>	473
	Note	475
	Question	475
	Problems	476
E.	DIMINISHED CAPACITY	476
	Notes	478
	Questions	479
	Problems	480
Chapter 6		
	CHARACTER EVIDENCE	481
A.	INTRODUCTION	481
B.	PROPER USE OF THE DEFENDANT’S CHARACTER	483
[1]	Evidence of a Pertinent Trait of Accused’s Character Offered by the Accused — Fed. R. Evid. 404(a)(1)	483
[a]	Invoking the Exception	483
[b]	Defensive Use of Character Evidence by the Prosecution	485
	<i>United States v. Bright</i>	485
	Note	486
[2]	Evidence of Prior Bad Acts Offered for Purposes Other than to Prove the Defendant Acted in Conformity — Fed. R. Evid. 404(b)	486
[a]	Standard of Proof	487
	<i>United States v. Huddleston</i>	487
	Question	492
[b]	Motive	492
	<i>United States v. Lloyd</i>	492
	Notes and Questions	498
[c]	Intent	499
	<i>United States v. Torres</i>	499
	Notes and Questions	505
	Problem	508
[d]	Plan or Scheme	509
	<i>United States v. DeCicco</i>	509
	Notes and Questions	514
	Problem	516
[e]	Knowledge	517
	<i>United States v. Vizcarra-Martinez</i>	517

Table of Contents

	Notes and Questions	524
[f]	Identity	526
	<i>United States v. Trenkler</i>	526
	<i>United States v. Luna</i>	532
	Notes and Questions	539
	Problem	541
[g]	Evidence of Prior Sexual Assault or Child Molestation to Prove	
	<i>Propensity</i> — Rules 413 and 414	542
	<i>United States v. Castillo</i>	543
	Notes and Questions	548
	<i>United States v. Horn</i>	551
	Notes and Questions	556
[3]	Reverse 404(b) — Evidence of Prior Bad Acts Offered by the Defendant	
	to Prove Another Person Committed the Offense Charged	558
	<i>United States v. Stevens</i>	559
	Notes and Questions	566
	Problem	567
C.	PROPER USE OF THE VICTIM’S CHARACTER	567
[1]	Evidence of a Pertinent Trait of Victim’s Character Offered by the	
	Accused — Fed. R. Evid. 404(a)(2)	567
	<i>United States v. Keiser</i>	567
	Notes and Questions	574
[2]	Evidence of Rape Victim’s Character for Chastity — Fed. R. Evid. 412	
	(Rape Shield Statute)	576
[a]	Introduction	576
[b]	The Confrontation Clause Dilemma	580
	<i>United States v. Begay</i>	581
	Notes and Questions	585
[c]	Introduction of Evidence of Prior Sexual Behavior to Prove	
	Knowledge by Victim of Minor Years	587
	<i>State v. Budis</i>	588
	Notes and Questions	595
[d]	Admission of Prior Sexual Behavior to Prove Bias or Motive	
	to Fabricate Charges	596
	Notes and Questions	598
[e]	Evidence of Complainant’s Prior False Allegations of Rape	599
	<i>United States v. Stamper</i>	599
	Notes and Questions	606
	Problem	607

Table of Contents

Chapter 7	HEARSAY — ADMISSIONS	609
A.	THE ACCUSED’S CONDUCT — CONSCIOUSNESS OF GUILT	609
	<i>United States v. Dillon</i>	610
	Notes and Questions	613
	Problem	615
B.	VICARIOUS ADMISSIONS OF THE ACCUSED — STATEMENTS OF A CO-CONSPIRATOR	616
[1]	Standard of Proof	617
	<i>Bourjaily v. United States</i>	617
	Notes and Questions	621
	1997 Amendment	623
[2]	The First Requirement — Proof of a Conspiracy Between the Declarant and the Defendant	624
	<i>United States v. Breitzkreutz</i>	624
	Notes and Questions	628
[3]	The Second Requirement — Statements Made During the Pendency of the Conspiracy	630
	<i>United States v. Haddad</i>	630
	Notes and Questions	634
	Problem	635
[4]	The Third Requirement — Statements that “Further” the Conspiracy . .	636
	<i>State v. Cornell</i>	636
	Notes and Questions	640
	Problem	641
C.	VICARIOUS ADMISSIONS OF THIRD PARTIES OFFERED AGAINST THE GOVERNMENT — FED. R. EVID. 801(d)(2)(B)	642
	Notes and Questions	643
Chapter 8	HEARSAY — EXCEPTIONS WHERE THE AVAILABILITY OF THE DECLARANT IS IMMATERIAL	645
A.	INTRODUCTION	645
B.	THE SIXTH AMENDMENT CONFRONTATION CLAUSE — LIMITATIONS ON THE ADMISSIBILITY OF “TESTIMONIAL” STATEMENTS	646
	<i>Crawford v. Washington</i>	646
	Notes and Questions	655
[1]	The “Primary Purpose” Test	660
	<i>Davis v. Washington</i>	660
	Notes and Questions	669
	<i>Michigan v. Bryant</i>	672
	Notes and Questions	681

Table of Contents

C.	EXCITED UTTERANCE	683
[1]	The Confrontation Clause — The Requirement of Unavailability	684
	<i>United States v. Arnold</i>	684
	Notes and Questions	692
D.	STATE OF MIND	694
[1]	Statements Showing the Victim’s State of Mind Used to Rebut the	
	Accused’s Defense	696
	<i>United States v. Donley</i>	696
	Notes and Questions	698
	Problem	701
[2]	Statements of the Accused Offered by the Defense — The Self-Serving	
	Problem	701
	<i>Kelly v. State</i>	701
	Notes and Questions	704
E.	MEDICAL DIAGNOSIS OR TREATMENT	705
	<i>United States v. Peneaux</i>	707
	Notes and Questions	712
	<i>State v. Krasky</i>	714
	Notes and Questions	720
	Problem	722
F.	BUSINESS AND PUBLIC RECORDS	723
[1]	Sixth Amendment Confrontation Clause — Reports	
	Prepared in Anticipation of Litigation	726
	<i>Melendez-Diaz v. Massachusetts</i>	726
	Notes and Questions	740
	<i>Bullcoming v. New Mexico</i>	745
	Notes and Questions	755
	Rule 703. Bases of an Expert’s Opinion Testimony	757
	<i>People v. Lopez</i>	761
	Notes and Questions	767
[2]	Reports of Non-Adversarial Matters	769
	<i>United States v. Enterline</i>	769
	Notes and Questions	772
[3]	“Law Enforcement Personnel”	773
	Problem	773
G.	RESIDUAL HEARSAY RULE	774
[1]	The Confrontation Clause — Demonstrating “Particularized	
	Guarantees of Trustworthiness”	775
	<i>United States v. El-Mezain</i>	775
	Notes and Questions	783
	Problem	787

Table of Contents

Chapter 9	HEARSAY — EXCEPTIONS REQUIRING THAT THE DECLARANT BE UNAVAILABLE	789
A.	UNAVAILABILITY — AN OVERVIEW	789
[1]	Privilege	790
[2]	Refusal to Testify	790
[3]	Lack of Memory	791
[4]	Death or Infirmary	791
[5]	Absence	792
[6]	Procurement of Unavailability of Declarant	793
B.	THE SIXTH AMENDMENT CONFRONTATION CLAUSE	794
C.	“UNAVAILABILITY” AND THE VICTIM OF CHILD ABUSE — THE PROBLEM OF TRAUMA AND BEING “PSYCHOLOGICALLY UNAVAILABLE”	794
	<i>Maryland v. Craig</i>	794
	Notes and Questions	801
	Problem	804
D.	SPECIFIC TYPES OF STATEMENTS	804
[1]	Former Testimony — The Use of Grand Jury and Preliminary Hearing Testimony	804
[a]	Introduction	804
[b]	Grand Jury Testimony Offered Against the Government — The Problem of Motivation to Develop Testimony	806
	<i>United States v. Salerno</i>	806
	Notes and Questions	811
[c]	Preliminary Hearing Testimony	812
	<i>State v. Howell</i>	812
	Notes and Questions	817
	Problem	818
[d]	Foreign Depositions Offered Against the Defendant	819
	<i>United States v. Salim</i>	819
	Notes and Questions	824
	Problem	826
[2]	Dying Declaration	826
[a]	The Confrontation Clause Dilemma — Are Dying Declarations “Testimonial” Statements?	827
	<i>State v. Lewis</i>	827
	Notes and Questions	834
	Problem	836
[3]	Statements Against the Penal Interest of the Unavailable Declarant — The Problem of the Accomplice Who “Takes the Rap” or Implicates the Defendant	836

Table of Contents

[a]	Third-Party Statements Offered Against the Defendant	838
	<i>Williamson v. United States</i>	838
	Notes and Questions	843
	Problem	846
	<i>United States v. Jordan</i>	847
	Notes and Questions	850
[b]	Third-Party Statements Offered by the Accused to Exculpate	851
	<i>United States v. Garcia</i>	851
	Notes and Questions	857
[4]	Forfeiture by Wrongdoing	857
	<i>Giles v. California</i>	858
	Notes and Questions	864
Chapter 10		
IMPEACHMENT		867
A.	INTRODUCTION: BOLSTERING, IMPEACHMENT AND REHABILITATION IN A CRIMINAL CASE	867
B.	BOLSTERING THE CREDIBILITY OF THE PROSECUTION’S WITNESS	868
[1]	The Plea Bargain Witness	868
	<i>United States v. Cosentino</i>	869
	Notes	874
[2]	Expert Testimony of Modus Operandi	876
	<i>United States v. Tapia-Ortiz</i>	876
	Question	880
	Problem	881
C.	IMPEACHMENT	882
[1]	Introduction	882
[a]	Methods	882
[b]	Impeaching One’s Own Witness	882
[2]	Methods that Are Attacks on the Witness (<i>Ad Hominem</i> Attacks)	883
[a]	Showing that the Witness Is Predisposed to Lie: Character for Untruthfulness	883
[i]	Conviction of a Crime	884
	Edward J. Imwinkelried, Paul C. Giannelli, Francis A. Gilligan & Fredric I. Lederer, 1 <i>Courtroom Criminal Evidence</i> § 708	884
	Questions	888
	<i>United States v. Montgomery</i>	889
	Notes	892
	Questions	894
	Problem	894
	<i>United States v. Penta</i>	895

Table of Contents

	Questions	898
[ii]	Misconduct Not Resulting in Conviction that Shows a Predisposition to Lie	899
	Edward J. Imwinkelried, Paul C. Giannelli, Francis A. Gilligan & Fredric I. Lederer, 1 <i>Courtroom Criminal Evidence</i> § 709	899
	<i>United States v. Lundy</i>	900
	<i>United States v. Clemons</i>	909
	Notes and Questions	911
	Problems	912
[iii]	The Character Witness: Opinion and Reputation Evidence of a Witness' Character for Untruthfulness	913
	Edward J. Imwinkelried, Paul C. Giannelli, Francis A. Gilligan & Fredric I. Lederer, 1 <i>Courtroom Criminal Evidence</i> § 707	913
	Questions	915
	<i>United States v. Garza</i>	915
	Notes and Questions	918
	Problem	918
[b]	Sensory or Mental Deficiencies that Limit the Ability to Perceive, Remember, or Relate	919
	<i>United States v. Love</i>	919
	Notes and Questions	923
[c]	Bias	926
	<i>Olden v. Kentucky</i>	927
	Notes and Questions	930
	Problems	931
[3]	Methods that Attack the Witness' Testimony	932
[a]	Prior Inconsistent Statement or Act	932
[i]	Mechanics	933
	Edward J. Imwinkelried, Paul C. Giannelli, Francis A. Gilligan & Fredric I. Lederer, 1 <i>Courtroom Criminal Evidence</i> § 711	933
	<i>United States v. Strother</i>	935
	Note	940
	Questions	941
	Problem	941
[ii]	Preventing Abuse	942
	<i>United States v. Buffalo</i>	942
	Notes and Questions	948
	Problem	950
[b]	Contradiction	951
	<i>Walder v. United States</i>	951
	<i>United States v. Gilmore</i>	953

Table of Contents

	Notes	957
	Questions	959
	Problems	960
D.	REHABILITATION	961
[1]	Evidence of Truthful Character to Rehabilitate	962
	<i>United States v. Dring</i>	962
	Notes	966
	Questions	967
	Problems	967
[2]	Evidence of a Prior Consistent Statement to Rehabilitate	968
	<i>United States v. Quinto</i>	969
	<i>United States v. Stuart</i>	974
	Notes	976
	Problems	977
Chapter 11	PHOTOGRAPHS, VIDEOTAPES, AUDIO RECORDINGS AND DEMONSTRATIONS	979
A.	INTRODUCTION	979
B.	PHOTOGRAPHS AND VIDEOTAPES	981
[1]	Photographs of Homicide Victims	981
	<i>United States v. Collins</i>	981
	Notes and Questions	986
[2]	Video Recordings — The “Silent Witness” Theory	989
	<i>People v. Taylor</i>	989
	Notes and Questions	995
C.	AUDIO RECORDINGS AND THE USE OF TRANSCRIPTS	998
	<i>United States v. Stone</i>	998
	Notes and Questions	1003
D.	DEMONSTRATIONS AND COURTROOM REENACTMENTS	1007
	<i>United States v. Gaskell</i>	1007
	Notes and Questions	1010
	<i>People v. Duenas</i>	1012
	Notes and Questions	1018
	Appendix A Federal Rules of Evidence	1021
	<i>Table of Cases</i>	TC-1
	<i>Index</i>	I-1