Evidence: Teaching Materials for an Age of Science and Statutes (with Federal Rules of Evidence Appendix

EIGHTH EDITION

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Chapter 4: The Examination of a Witness

Page 71. Before Problem, add:

Earlier this year a new edition of the McCormick treatise was released. MCCORMICK ON EVIDENCE (8th ed. 2020). The new edition discusses a threshold question which must be resolved even before dealing with the consequences of a witness's refusal to answer: What if, rather than outright refusing to answer, the witness purports to fail to remember? The treatise notes that there is a split of authority. 1 MCCORMICK ON EVIDENCE §19 (8th ed. 2020). Some cases treat the witness's response as an implied refusal. However, other courts treat the witness as available. In the words of one court, "[t]he witness . . . is in fact subject to cross-examination, providing the jury with an opportunity to see the demeanor and assess the credibility of the witness . . . ." *People v. Noriega*, 237 Cal. App. 4th 991, 188 Cal. Rptr. 3d 527 (2015). In this situation, during summation the opponent can mount a powerful attack on the quality of the witness's memory of the relevant events and, on that basis, urge the jury to discount the witness's testimony about the events the witness purported to remember.

Chapter 9: Specialized Aspects of Logical Relevance: Authentication of Writings

Page 199. Add note.

3. The notoriety of Bitcoin has raised the visibility of blockchain technology. Blockchain is essentially shared or Distributed Ledger Technology (DLT). The blockchain is a peer-to-peer (P2P) network. There are numerous types of blockchains. Some are public and permission-less; anyone can download and run the open source software that enables one to participate in the blockchain. In permission-less blockchains such as Bitcoin, the participants often rely on pseudonyms and digital signatures. Other blockchains are private and permissioned; in this type of blockchain, an administrator or gatekeeper decides who will be granted access and allowed to participate. In permissions blockchains, persons and entities frequently use their actual names. Blockchains can be used for a wide variety of purposes, including simple record keeping (accounting). Statutes in Arizona, Delaware, and Ohio already have been amended to reflect the fact that many businesses are now turning to blockchain technology.

Previous systems relied on a centralized, trusted intermediary or middleperson. For example, as a trusted intermediary a bank could act as a central authority for verifying financial transactions and as a centralized repository for records of transactions with multiple customers. However, there are disadvantages to reliance on trusted human intermediaries. For example, systems reliant on central authorities are more vulnerable to hacking. If there is one central authority, that authority becomes the obvious target and the successful hack of that target's records poses a risk to all the persons and entities relying on the accuracy of those records.

The following is a basic description of blockchain technology and how it operates:

---The blockchain network consists of participating computers or nodes. In some blockchains, the participating nodes have different privileges. For example, some blockchains distinguish between "lightweight" nodes with limited privileges and "full" nodes with full privileges. A lightweight

node might not be able to print out the entire ledger; it might have the more limited right to print out only the blocks directly relating to that node. In many blockchains, though, all nodes enjoy the same privileges.

---Suppose that a business creates a private, permissioned blockchain in which all participating nodes have equal privileges. Any node can therefore create the first or genesis block in a chain. Assuming that all participants are full nodes, they all will immediately have a copy of that block. The first participant that concluded the initial business transaction posts that block.

---Now assume that there is a second transaction. In some blockchains, only designated "miner" nodes can propose an addition to the blockchain. However, in other blockchains, any node can serve as a miner. When a miner node conducts the second transaction, it will create a header for the second block. That header contains two things: a hash for the second transaction and a pointer with the hash of the preceding block, in this case the genesis block. A hash is a string of digits of fixed length that is probabilistically unique. For instance, suppose that this blockchain uses SHA 256 (Secure Hashing Algorithm 256). No matter how long or short the input hashed, the algorithm will produce a string that is 256 bits in length. It is theoretically possible that hashing a different input would yield the same hash value but, given the length of the string, the odds are astronomically against such a coincidence.

---The miner then broadcasts or propagates the proposed second block to the network. At this point, a consensus protocol comes into play. The protocol is a consensus algorithm that determines whether the proposed second block is added to the blockchain. Different blockchains have different protocols. In some blockchain protocols, all nodes can participate in this step. The protocol might provide that there is a consensus when a majority of the network agrees. The protocol may include other requirements, but at the very least the other nodes run a computation to determine whether the hash in the new block is valid. If all the nodes use SHA 256, all their hashes should yield the same 256 bit string.

---Once the consensus protocol has been satisfied, the second block is added to the chain. When subsequent blocks are proposed, the steps are repeated. All the local versions of the blockchain are consistent; each version will include the blocks in chronological order with time stamps indicating when the block was added to the chain. In each version, every block is chained back to the previous block by cryptographic hashing.

---Chaining is critical to understanding why there is a strong inference of the integrity of each block in the chain. If a hacker were to make even the slightest change in one block—for example, the insertion or deletion of a comma—it will change the hash for that block and all other subsequent blocks. This is the so-called Avalanche Effect. It is sometimes asserted that the blockchain is tamper-proof because the chain is immutable and incorruptible. That assertion is overstated. It is not that the chain is absolutely tamper-proof; rather, the chain is tamper-resistant because the tampering will be evident. If a hacker succeeds in tampering with a block at one node, the next time another node attempts to add a block, the hashes will not match. Once the tampering is discovered, the hashes will enable the other nodes to trace the tampering to the tampered with block. It is theoretically possible for the hacker to recalculate the hashes at all the other nodes before the discovery of the tampering, but as a practical matter, it is virtually impossible to access

and rewrite all the blocks that quickly. The very difficulty of revising all the hashes deters hacking.

Although blockchain technology is relatively new, if the company or agency is a regularly conducted domestic or foreign entity, a certificate satisfying Rule 902(11) and (12) arguably should render the print-out self-authenticating. The Advisory Committee Note to Rule 902(14) specifically states that hashing is "a process of digital identification" within the meaning of 902(14).

Perhaps out of an excess of caution, in 2019 the Vermont legislature adopted the following statute:

> (A) Authentication, admissibility, and presumptions.
>
> (1) A digital record electronically registered in a blockchain shall be self-authenticating pursuant to Vermont Rule of Evidence 902, if it is accompanied by a written declaration of a qualified person, made under oath, stating the qualification of the person to make the certification and:
>
> (A) the date and time the record entered the blockchain;
>
> (B) the date and time the record was received from the blockchain;
>
> (C) that the record was maintained in the blockchain as a regularly conducted activity; and
>
> (D) that the record was made by the regularly conducted activity as a regular practice.
>
> VT. STAT. ANN. tit. 12 § 1913 (2018).

A parallel evidentiary rule codifies virtually identical language into the self-authentication portion of the Vermont Rules of Evidence. VT. R. EVID. 902(13) (2018). A separate provision states that such records qualify for admission under the hearsay exception codified in Rule 803(6). VT. STAT. ANN. tit. 12 § 1913 (b)(2)(2018).

Chapter 10: Specialized Aspects of Logical Relevance: Identification of Physical Evidence

Page 214. After Comment, add:

The Comment observes at the outset that readily identifiable objects are more easily authenticated than fungible items, which are delicate and malleable. Current case law confirms these points. *See United States v. Durham*, 902 F.3d 1180 (10th Cir. 2018) (in the case of evidence which is unique, readily identifiable, and resistant to change, foundation can consist of testimony that simply establishes that the evidence is what the proponent claims). This contrasts with malleable articles, like blood samples, which require a chain of custody in order to be sufficiently authenticated. *United States v. Blanchard*, 867 F.3d 1 (1st Cir. 2017) (with evidence which is not readily identifiable or which is susceptible to alteration, "a testimonial tracing of the chain of custody is necessary").

Chapter 11: Specialized Aspects of Logical Relevance: Identification of Speakers and Verification of Photographs and Charts

Page 230. Before Audio Recordings, add:

The type of voice identification technology discussed in the preceding paragraphs deals with the first generation of voice identification technology, in which a human being makes the ultimate decision as to authentication or identification. However, the technology has entered a second generation. Morrison & Thompson, *Assessing the Admissibility of a New Generation of Forensic Voice Comparison Testimony*, 18 COLUM. SCI. & TECH. L. REV. 326, 336-37 (2017). In the new generation, the decision is made by a computer based on an algorithm. Automated voice examination, relying on biometrics, is becoming increasingly common. Amazon Echo, Alexa, Google Home, Samsung Smart TV, and Siri accept voice commands from the device's owner. In some cases, the computer makes a one-to-one verification decision, meaning the device opens or activates only for its owner's voice, for example. In other cases, the computer makes a one-to-many identification by using a database. The computer analyzes certain features of the voice, such as its pitch, computes a similarity score, and then determines whether the score exceeds a pre-determined threshold for declaring a match or identification.

In *United States v. Ahmed*, 941 F.Supp.3d 394 (E.D.N.Y. 2015), the prosecution attempted to introduce testimony about an identification made by a second-generation device, the Batvox version 4.1. Hong, *Court to Rule on Voice Analysis*, WALL ST. J., May 12, 2015. The prosecution contemplated offering testimony to show that the defendant Yosuf was the Swedish speaker who made an online recruitment video for a Somali terrorist group. The prosecution expert used the Batvox device to compare the voice on the video with several recordings of Yosuf's voice. Although the court held a pretrial hearing on the admissibility of the testimony, the issue became moot when the defendant accepted a plea agreement.

Morrison and Thompson, *supra*, contend that if the judge had reached the merits and applied the *Daubert* validation test (discussed in the next chapter), the judge should have excluded the testimony. They cite several reasons: The only validation studies investigating the reliability of Batvox were conducted by employees of its manufacturer or persons linked to the company; there were no accepted standards for conducting the test; and Somali-Swedish speakers represented fewer than half of the 45 voice recordings the expert used as a sample of the relevant population. However, Morrison and Thompson opine that such testimony might be admissible if the expert had a high-quality recording of the voice in question and if the demographics of the persons whose voices were included in the device's database more closely matched the characteristics of the suspected speaker.

Page 239. At the end of note 2, add:

The controversy over whether pictorial evidence is unduly prejudicial regularly rages in current criminal case trials. *Compare United States v. Bailey*, 840 F.3d 90 (3d Cir. 2016) (video of brutal drive-by murder was deemed to be unduly prejudicial) *with Favors v. State*, 825 S.E.2d 164 (Ga. 2019) (photographs were admissible which depicted wounds suffered by a gunshot victim; photographs introduced by the state properly showed the nature and location of the victim's injuries).

Chapter 12: Specialized Aspects of Logical Relevance: Assessing the Validity of Scientific Evidence

Page 274. At the end of note 3, add:

The test stated in the last full sentence on page 273 is the standard for determining whether the methodology has sufficient foundational validity. But, as Chapter 3 of the 2016 report of the President's Council of Advisors on Science and Technology emphasizes, there is a fundamental distinction between two aspects of a scientific methodology's validity: foundational validity and validity as applied. EXEC. OFFICE OF THE PRESIDENT, PRESIDENT'S COUNCIL OF ADVISORS ON SCIENCE AND TECHNOLOGY, REPORT TO THE PRESIDENT, FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016). In Chapter 23, we will discuss recent developments related to the second facet of validity: validity as applied.

Chapter 13: The Discretion of the Court to Exclude Logically Relevant Evidence

Page 299. After the first full paragraph, add:

Courts have long recognized that the admission of evidence of a defendant's gang membership can exert an improper influence on the jury; such evidence poses a risk of guilt by association and the risk is heightened when the evidence takes the form of testimony about violent conduct. *United States v. Brown,* 929 F.3d 1030, 1040-41 (8th Cir. 2019). Today one of the hottest battlegrounds in trial courts is the admission of testimony about rap lyrics and videos. The typical lay juror has little understanding of the history of rap and the role of hyperbole and wordplay in rap. NIELSON & DENNIS, RAP ON TRIAL: RACE, LYRICS, AND GUILT IN AMERICA (2019); Note, *Rapp Snitch Knishes: The Danger of Using Gangster Rap Lyrics to Prove Defendants' Character,* 48 SW. L. REV. 173 (2019). Several appellate courts have reversed convictions on the ground that the trial judge erred in admitting testimony about rap songs and videos that had marginal probative value but extreme potential for prejudice. *E.g., People v. Coneal,* 41 Cal. App. 5th 951, 254 Cal. Rptr. 3d 653 (Cal. Ct. App. 2019).

There is an excellent survey of the case law in *Montague v. State,* 2019 Md. App. LEXIS 1087, 2019 WL 7045959 (Md. Ct. Spec. App., Dec. 23, 2019). Courts tend to admit the evidence when the lyrics can be tied to the historical facts in dispute in the case. For example, the lyrics might contain autobiographical details about the artist which relate to the disputed facts. Courts are inclined to exclude the evidence, however, when the lyrics state abstract beliefs or recite obviously fictitious events. In that situation, the danger of misdecision trumps the probative worth of the evidence.

Chapter 14: Evidence of Character, Habit, and Other Acts and Transactions

Page 344. After the second full paragraph, add:

The prosecution relied on the plan theory in the trials of both Harvey Weinstein and Bill Cosby. Friedman, NPR, *How the "Molineux Rule" Permits Certain Witnesses in the Harvey Weinstein*

Trial, https://www.npr.org/2020/01/29/800938076. In the Cosby case, the convenient availability of drugs such as "the little blue pill" in every incident strongly suggested forethought and might have supported the inference of the existence of a "template" plan. However, in describing the plan theory in its opinion affirming Cosby's conviction, the court seemed to confuse the plan and modus operandi theories. Citing earlier Pennsylvania precedent, the court required the defendant's pattern of conduct to be "distinctive and so nearly identical as to become the signature of the same perpetrator." *Commonwealth v. Cosby*, 2019 Pa. Super. 354, 2019 Pa. Super. LEXIS 1209, 2019 WL 6711477, at *16 (Pa. Super. Ct. 2019). In principle, proof of a template plan does not necessitate proof that the charged and uncharged crimes share a truly unique modus operandi.

Page 347. At the end of note 1, add:

Perhaps the best way to drive home the point is to consider two hypotheticals, one involving Jeffrey Dahmer (the notorious serial killer known as the "Milwaukee Cannibal") and a second involving Mother Teresa. Imwinkelried, *A Brief Essay Defending the Doctrine of Objective Chances as a Valid Theory for Introducing Evidence of An Accused's Uncharged Misconduct,* 50 N.M. L. REV. 1 (2020). Suppose that Dahmer was involved in a number of suspicious incidents of a particular nature but the frequency of his involvements did not exceed the baseline frequency for innocent persons in the general population. Dahmer's sinister, bad character would not be a sufficient condition for triggering the doctrine of objective chances. Simply stated, the foundation would be inadequate.

Alternatively, assume that Mother Teresa was involved in a number of incidents and that the frequency of her involvement exceeded the baseline frequency. Her saintly character would not preclude the application of the doctrine; the evidence still would be admissible against her (but she would almost certainly be acquitted after she introduced the type of good character evidence admissible under Rule 404-05). The upshot is that an assumption about the defendant's personal, subjective character is neither a necessary nor a sufficient condition for invoking the doctrine; it is the direct numerical comparison of the two frequencies which puts the objectivity in the doctrine of objective chances.

Page 341. After the end of the second full paragraph, add:

To enable the defense to better prepare to object to or meet such evidence, effective December 1, 2020, the notice provision in Rule 404(b) will be amended. The prior version of the provision required the defense to request that the prosecution disclose its intent to proffer 404(b) evidence. The amended version will require the prosecution to give notice on its own motion. In addition, the prior version required the prosecution to disclose only "the general nature of any such evidence." The amended version will require that the prosecution also specify the non-character theory that it intends to rely on to satisfy Rule 404(b).

Chapter 16: Credibility: Impeachment Techniques

Page 427. After note 5, add:

There is no bright line recency requirement under Rule 608 (b), unlike Rule 609. Some courts exercise their discretion to allow former misdeeds which occurred years prior to the litigated incident. *State v. Frey*, 427 P.3d 80 (Mont. 2018) (false reporting incident from 24 years ago allowed). Other courts have imposed a timeliness requirement. *United State v. Miller*, 738 F.3d 361 (D.C. Cir. 2013) (precluding cross-examination where the prior act was over 30 years old).

Chapter 18: The Rule Against Hearsay: The Admissibility of Out-of-Court Statements

Page 476. At the end of section on "By a Human Declarant" – Hearsay Issues versus Scientific Validity Problems, add:

Federal Rule of Evidence 902(13) provides an example of computer-generated assertions. As of December 1, 2017, Rule 902, the self-authentication provision, now explicitly applies to:

> (13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic process or system that produces an accurate result . . . .

The Evidence Advisory Committee's May 7, 2016 report to the Judicial Conference Committee on Rules of Practice and Procedure sets out several examples of the scope of the provision. One illustration concerns USB devices. The proponent wants to prove that a USB device was connected or plugged in to a particular computer, in order to show that a person used his or her USB thumb drive to access files stored on that computer. The computer uses the Windows operating system that includes the Windows registry. The registry automatically records information about every USB device connected to the computer—the date of the connection and the manufacturer, model, and serial number of the connected device. The registry records are assertive in character, but the assertions are not made by a human declarant.

Chapter 19: **Hearsay: The Exemption for a Party's Own Statements Offered Against the Part**

Page 492. Add note.

4. Put the adoption issue in a modern context. A third party makes a posting on a social medium. A litigant then "likes" the post. Without more, is the "like" a sufficient adoption of the content of the posting? Tilly, *Adopted Statements in the Digital Age: Hearsay Responses to Social Media "Likes,"* 93 N.D. L. REV. 277 (2018). Without a categorical rule that a "like" constitutes an adoption, what factors should the judge consider in deciding whether there is a sufficiently strong inference of adoption? Is the specificity of the statement relevant? The relationship between the person who made the original post and the person posting the "like"? What else might the court consider?

Page 504. Add note.

5. Chapter 3 refers to *Bruton v. United States*, 391 U.S. 123 (1968). In *Bruton*, there was a joint trial. One codefendant (D2) made a statement implicating the other defendant (D1). D2 elected against testifying at the trial. D2's statement was not admissible against D1 because it did not fall within the scope of the co-conspirator exemption. Following the prior practice, the trial judge admitted the statement. The judge reasoned that (1) the statement was admissible against the non-testifying codefendant as a personal admission of a party-opponent and (2) although the statement was inadmissible as substantive evidence against the defendant, all the judge needed to do was give the jury a limiting instruction that they could not treat the statement as evidence against the defendant. The Supreme Court reversed.

The Court held there was an intolerable risk that the limiting instruction would prove ineffective. As Chapter 3 pointed out, the *Bruton* Court wrote that it can be "naïve" to assume that "prejudicial effects can [always] be overcome by instructions . . . ." If the jury disregarded the instruction, as a practical matter, the codefendant would become an accuser of the defendant under the Sixth Amendment. However, since the codefendant chose not to testify, there would be a violation of the defendant's Sixth Amendment confrontation right – the defendant cannot cross-examine the non-testifying codefendant accuser.

Chapter 31 discusses constitutional overrides, including *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* teaches that if a statement is "testimonial," the Sixth Amendment forbids its admission unless: (1) the defendant had a prior opportunity to question the declarant, and (2) the declarant is unavailable at the time of trial. Some courts have used *Crawford* to limit *Bruton.* More specifically, they have found that *Bruton* applies only when the codefendant's statement is "testimonial" under *Crawford.* As the court explained in *Lucero v. Holland*, 902 F.3d 979, 988-89 (9th Cir. 2018), "[B]ecause *Bruton* is . . . a byproduct of the Confrontation Clause, the Court's holding in . . . *Crawford* likewise limits *Bruton* to testimonial statements."

Chapter 20

Hearsay: Exceptions That Do Not Require Proof of Unavailability

B. Exceptions Derived from the Common Law "Res Gestae" Theory

2. Present Sense Impressions

p. 513. Add Note:

4. How should courts treat more extended utterances that might consist of a number of distinct assertions? When analyzing whether an utterance is admissible under one or more hearsay exceptions, should courts treat longer narratives as a single "statement," or should they consider each individual part of the narrative for admissibility? The Supreme Court has addressed this question in the context of FRE 804(b)(3), the exception for statements against interest, which we will consider in the next chapter. In *Williamson v. United States*, 512 U.S. 594 (1994), excerpted and discussed infra at pp. 586-91, the Court held that FRE 804(b)(3) "does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally

self-inculpatory." Rather, courts must separately consider each individual assertion within the broader narrative to ensure that it satisfies the requirements of the hearsay exception.

This raises the question whether the *Williamson* holding applies more broadly to all "statements" offered under rules 803 and 804, or whether it is more narrowly confined to statements against interest. In *United States v. Lovato*, 950 F. 1337 (10th Cir. 2020), the Court of Appeals for the Tenth Circuit considered whether the district court had abused its discretion in analyzing an extended 911 conversation as a whole for purposes of deciding its admissibility as an excited utterance under Rule 803(1). The court held that the district court's treatment of the call as a whole was not an abuse of discretion, though the court pointed out that "some circumstances may require a court to conduct a more particularized analysis" and that "we are certainly not saying that the district court would have abused its discretion had it done so here." The court distinguished *Williamson* based on credibility concerns raised by the type of statements at issue in that case that, according to the court, were not present in Lovato, where "the 911 caller . . . was a non-party observer, detached from any allegation of wrongdoing." *Id.* at 1342. However, as the concurring judge in *Lovato* pointed out, other courts have applied the *Williamson* holding to consider each individual statement's admissibility under the present sense impression exception. *See Lovato*, 950 F.3d at 1349 (Bacharach, J., concurring) (citing cases). Which approach do you think is sounder? Which approach is better supported by the statutory text?

3. Excited or Startled Utterances

p. 517. At the end of Problem 20-4, add:

Mitchell v. Target Corp., 110 Fed. R. Evid. Serv. 1044 (D. Md. 2019) ("The fact that the declarant is not just unavailable but *unidentified* further militates against admitting the statements as excited utterances. Fed. R. Evid. 803(2) does not categorically exclude statements by unidentified declarants . . . [h]owever, where the declarant is both unavailable and unidentified, the 'party seeking to introduce such a statement carries a burden heavier than where the declarant is identified to demonstrate the statement's circumstantial trustworthiness.'")(emphasis in original) (citations omitted).

C. Business Records and Public Records

2. Business Records

p. 546. At the end of Note 1, add:

For a recent application of this principle in a slightly different context, see *Hill v. City of Montgomery*, 2020 WL 819225 (N.D.N.Y. 2020) (holding that food-related grievances filed by inmates at a county jail were not admissible under FRE 803(6) because the inmates were not under any business duty to report the information).

p. 549. At the end of Problem 20-22, add:

For a recent discussion and application of the incorporation doctrine, see *United States. v. Harvic Internat'l, Ltd*., 427 F.Supp.3d 1349 (Ct. Int'l. Trade 2020). In *Harvic*, the United States Court of International Trade considered bills of lading that were gathered, maintained, and reviewed by the U.S. Office of Customs and Border Patrol (CPB) and then offered as business records without testimony or certification by a witness from the companies that originally issued them. Applying FRE 803(6) to hold that the records were incorporated into the records of the CPB, the court explained:

> The incorporation doctrine allows documents generated by a third-party to be admitted if: (a) the proffering entity incorporated the records of another entity into its own; (b) the proffering entity relied upon those records in its day-to-day operations; (c) there are other circumstances indicating the trustworthiness of the document; (d) the sponsoring witness from the proffering entity is familiar with the relevant procedures used by the entity that prepared the records in question; and other requirements of the business records exception are satisfied . . . . (citing *Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338, 1343-44 (Fed. Cir. 1999)).

p. 550. At the end of Note 5, add:

In *Harvic*, discussed in connection with Problem 20-22 above, the court also considered whether the records should be excluded under *Palmer v. Hoffman* for lack of trustworthiness. The court noted that the bills of lading were created "in a routine, non-adversarial setting," were "requested by Customs as part of its investigation," were not created in anticipation nor in the context of "a targeted investigation" aimed at a specific defendant, and are precisely the sort of "documents that are inherent to the nature of the business of shipping, not litigation." Thus, the records were not subject to exclusion under Rule 803(6) for lack of trustworthiness. *Harvic*, 427 F.Supp.3d at 1360.

Chapter 22

The Future of the Rule against Hearsay: The Residual Exception

p. 598. Replace the text of Rule 807 with the following:

Rule 807 was recently amended. Effective December 1, 2019, the Rule now provides:

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) it is more probative on the point for which it is offered than any other evidence that the proponent could obtain through reasonable efforts.

(b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

p. 607. After the paragraph that continues from p. 606 at the top of the page, add:

In light of this controversy, the Advisory Committee decided to retain the categorical scheme but revise Rule 807. As previously stated, the original versions of both the residual exceptions in 803 and 804 and Rule 807 required the proponent to show that the proffered hearsay possessed circumstantial guarantees of trustworthiness "equivalent" to those of an enumerated exception. The 2019 amendment, set out in Section A of this chapter, deleted that language and substituted "sufficient guarantees of trustworthiness." The amendment directs the trial judge to "consider[] the totality of circumstances under which [the statement] was made and evidence, if any, corroborating the statement."

The September 2018 report of the Committee on Rules of Practice and Procedure that accompanied the Supreme Court letter transmitting the amendment to Congress states that the judge "may consider whether the statement is a 'near miss' of one of the Rules 803 or 804 exceptions. If the court employs a 'near miss' analysis, it should . . . take into account the reasons that the hearsay misses the admissibility requirements of the standard exception." However, the May 24, 2018 report of the Evidence Advisory Committee interprets the amendment's "sufficient guarantees of trustworthiness" language as meaning that "a statement that nearly misses a standard exception can be admissible under Rule 807 so long as the court finds that there are sufficient guarantees of trustworthiness."

Chapter 23: Opinion Evidence: Lay and Expert

Page 621. After the first full paragraph, add:

Professor Graham admonishes that an expert cannot escape the procedural restrictions attendant upon expert testimony by the simple expedient of calling it "lay opinion." Professor Imwinkelried identifies some common scenarios that require the application of expert witness procedures in Imwinkelried, *Distinguishing Lay from Expert Opinion*, 68 S.M.U.L. REV. 73 (2015).

Page 625. Add a note.

5. Controversy has swirled around the issue of lay identification of a defendant when a perpetrator's image is captured on a surveillance video. Can a witness who recognizes the defendant affirm that it is him or her on the videotape? An increasing number of cases say yes. *United States v. Knowles*, 889 F.3d 1251 (11th Cir. 2018); *United States v. Odere Razak Suleitopa*, 719 Fed. Appx. 233 (4th Cir. 2018); CARLSON, FOUNDATIONS FOR EVIDENCE AND TRIAL PRACTICE 163 (2019).

Page 630. At the end of note 1, add:

Objections to the qualifications of an expert witness take many forms. One novel approach was taken in *Baugh v. Caprum S.A.*, 845 F.3d 838 (7th Cir. 2017). A plaintiff who fell off a ladder incurred a serious brain injury and sued the ladder manufacturer. The plaintiff called an expert to support the plaintiff's claim that the ladder was defectively designed. The expert had authored numerous articles in engineering journals relating to aluminum step ladders. The defense attacked the qualifications of the plaintiff's ladder expert based on his advanced age (Dr. Vinson received his bachelor's degree in 1952). The appellate court found the defense failed to show how Dr. Vinson's age disqualified him. *Baugh v. Caprum S.A.*, 845 F.3d 838 (7th Cir. 2017).

Page 635. <u>At the end of (4) Proof That the Proper Test Procedures Were Used, add:</u>

As Chapter 12 noted, the 2016 report of the President's Council of Advisors on Science and Technology (PCAST) emphasized the distinction between foundational validity and validity as applied. Chapter 12 focused on the former concept: foundational validity. However, the proponent must also show validity as applied. It is not enough to show that in a mechanical sense, the expert followed the proper procedures—for example, pushing the buttons in the right sequence and allowing the instrument to warm up for the required time. In a more fundamental sense, the expert must apply the methodology to a fact situation falling within the established range of validation for the methodology.

For instance, the PCAST report surveyed the validation for probabilistic genotyping software used to analyze complex DNA mixtures. PCAST found that the available empirical data validate the use of that methodology only when the DNA sample is of a certain minimum size, there are no more than three contributors, and the minor contributor represents at least 20% of the sample. In *United States v. Gissantaner*, 417 F.Supp.3d 857 (W.D. Mich. 2019), Judge Neff was presented evidence indicating that the sample size of the mixture in question was below the minimum threshold, there were plausibly four contributors, and the minor contributor accounted for only 7% of the sample. Citing the PCAST report and relying on the concept of validity as applied, she excluded the evidence. In *Gissantaner*, the application of the methodology to that fact situation exceeded the range of validation established by the available empirical studies. The methodology may not be applied to a fact situation beyond the parameters of the validation studies.

Page 645. At the end of the paragraph beginning on page 644 and ending on page 645, add:

This issue is sometimes referred to as the "G2i" problem – the problem of going from general research studies to inferences about the individual case. Faigman, Monahan & Slobogin, *Group to Individual (G2i) Inference in Scientific Expert Testimony*, 81 U. CHI. L. REV. 417 (2014). Assume that the educational or teaching witness has satisfied *Daubert* by marshalling enough empirical data to establish the validity of both an underlying theory (for example: with the exception of twins, every person's DNA sequence is unique) and a technique implementing the theory (the ability of STR DNA-typing to identify rare DNA sequences). Even having met that threshold, the evaluating witness's opinion will be unreliable unless they use a valid interpretive standard, such as the 1.8% match window mentioned on page 644. Professors Faigman, Monahan, and Slobogin argue persuasively that like the underlying theory and the implementing technique, the validity of the interpretive standard is an hypothesis that must run the gauntlet of the *Daubert* standard too.

Chapter 25: Privilege: A General Analytical Approach

Page 676. After the first full paragraph on page 676, add:

In *State v. Gutierrez*, 2019 N.M. LEXIS 33, 2019 WL 4167270 (N.M. 2019), a majority of the members of the New Mexico Supreme Court took the dramatic step of prospectively abolishing the privilege for spousal communications. The court rigorously applied Wigmore's utilitarian or instrumental approach, reasoning that many spouses are unaware of the existence of the formal privilege and that in any event, most spouses do not rely on that privilege in confiding in each other. Although the majority also acknowledged that some commentators favor an alternative humanistic rationale, the majority dismissed that rationale as "soaring rhetoric and legally irrelevant sentimentality." While she concurred in part, Justice Vigil vigorously dissented from the manner in which the majority dismissed the humanistic concerns implicated by the spousal relationship.

Chapter 26: Privilege: Specialized Aspects

Page 734. At the end of the paragraph beginning on page 733 and ending on page 734, add:

As Chapter 25 of this supplement noted, in a 2019 case, *State v. Gutierrez*, the New Mexico Supreme Court prospectively abolished the spousal communications privilege in that jurisdiction. However, that is a distinct minority view. 1 MCCORMICK ON EVIDENCE § 78 (8th ed. 2020).

----------Chapter 31: Constitutional Overrides: Confrontation, Compulsory Process, and Due Process

p. 879. At the end of Note 7, add:

Recently, the Supreme Court denied cert in a case that presented an opportunity to clarify these issues. In *Stuart v. Alabama*, the state offered the results of the defendant's blood alcohol test into evidence without calling the analyst who conducted the test. Instead, the state called another analyst who relied on the test results to estimate the defendant's blood alcohol level at the time of the accident, which occurred hours before the test was performed. In a dissent from the denial of cert in the case, Justice Gorsuch, joined by Justice Sotomayor, wrote:

> Through these steps, the State effectively denied Ms. Stuart the chance to confront the witness who supplied a foundational piece of evidence in her conviction. The engine of cross-examination was left unengaged, and the Sixth Amendment was violated.
>
> To be fair, the problem appears to be largely of our creation. This Court's most recent foray in this field, Williams v. Illinois . . . , yielded no majority and its various opinions have sown confusion in courts across the country [citing numerous examples] . . . . Respectfully, I believe we owe lower courts struggling to abide our holdings more clarity than we have afforded them in this area.

Stuart v. Alabama, 586 U.S. ___, 139 S.Ct. 36 (2018) (Gorsuch, J., dissenting). See also Kilpatrick. *The Admissibility of Forensic Reports in the Post-Justice Scalia Supreme*

Court, U. CHI. L. REV. ONLINE, *available at* https://lawreviewblog.uchicago.edu/2019/08/27/the-admissibility-of-forensic-reports-in-the-post-justice-scalia-supreme-court-by-laird-kirkpatrick/ (Aug. 27, 2019).