Principles of Evidence

Seventh Edition

2021 Supplement

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Chapter 2 · Methods of Proof

A. JUDICIAL NOTICE

RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

Robinson v. Liberty Mutual Ins., Co., 958 F.3d 1137 (11th Cir. 2020). Plaintiffs sued Liberty Mutual Insurance for breach of contract when they refused to pay for loss caused by an infestation in their home of the brown recluse spider. Among other things, their homeowner's policy excluded coverage for loss caused by vermin or insects. Plaintiffs alleged that spiders were neither "vermin" nor "insects." The district court dismissed their complaint, ruling that spiders are both insects and vermin within the meaning of the policy. On appeal, Plaintiffs argued that the court could not take judicial notice of the dictionary definitions of vermin or insect without affording them a hearing, as required by Rule 201. The court held Rule 201 did not control because the definitions were legislative facts, not adjudicative facts. The court distinguished the two, noting that "'adjudicative facts are those developed in a particular case," while 'legislative facts are established truths, facts or pronouncements that do not change from case to case but apply universally.'" "Dictionary definitions are legislative facts when used to answer a question of law, such as how to interpret contractual terms."

E. ADMISSIONS

FEDERAL RULE OF CIVIL PROCEDURE 36. REQUESTS FOR ADMISSION

Gurzi v. Penn Credit Corp., No. 6:19-cv-823-Orl-31EJK, 2019 WL 8273647 (M.D. Fla. 2019). Plaintiff brought class action against Defendant, a debt collections agency, for violating the Telephone Consumer Protection Act by placing automated calls to calls member's cell phones using its predicative dialer and prerecorded voice message without the consent of the party called. Plaintiff made several requests for admissions:

> **Request for Admission No. 4.** Admit that, since April 30, 2015, Penn Credit has caused messages that had been recorded ahead of time to be left on the voicemail for more than forty consumers' cell phone numbers, despite a flag or other indication in its records that the consumer's phone number had been skip-traced.
>
> **Request for Admission No. 5**. Admit that, since April 30, 2015, Penn Credit has caused messages that had been recorded ahead of time to be left on the voicemail for more than forty consumers' cell phone numbers, despite a flag or other indication in its records that it was calling the wrong number.
>
> **Request for Admission No. 6.** Admit that, since April 30, 2015, Penn Credit has caused messages that had been recorded ahead of time to be left on the voicemail for more than forty consumers' cell phone numbers, despite a flag or other indication in its records that the recipient had previously requested to not be called.

> **Request for Admission No. 7.** Admit that, since April 30, 2015, Penn Credit has caused messages that had been recorded ahead of time to be left on the voicemail for more than forty consumers' cell phone numbers, despite a flag or other indication in its records that it did not have the recipient's consent or permission to call his or her phone number.
> **Request for Admission No. 8.** Admit that the dialing system used to call Plaintiff was an "automatic telephone dialing system" for purposes of the TCPA.

Defendant objected, claiming the admissions called for a legal conclusion and attempted to seek an admission as to Plaintiff's burden of proof. In overruling Defendant's objections, the court explained the requests concerned permissible questions of the application of law to fact.

> This sort of request is explicitly allowed by Rule 36. As the comments to Rule 36 make clear, the responding party should answer a request for admission as to matters that the party regards as "in dispute." Fed. R. Civ. P. 36 advisory committee's note to 1970 amendment. "The very purpose of the request is to ascertain whether the answering party is prepared to admit or regards the matter as presenting a genuine issue for trial." Id. "The party runs no risk of sanctions if the matter is genuinely in issue, since Rule 37(c) provides a sanction of costs only when there are no good reasons for a failure to admit." Id.

I. EXHIBITS

Shaneyfelt v. Byram, No. 2019-CA-9, 2020 WL 1814854 (Ohio Ct. App. 2020). After a jury verdict for Defendant, the trial court sustained Plaintiff's motion for a new trial based on the Defendant's use of three reconstructive diagrams of the crash scene presented during trial. The court held the demonstrative evidence materially prejudiced the Plaintiff because it was "speculative and void of case-specific facts." Defendant appealed and the court reversed the trial court's judgment. It held that the evidence was not sufficiently prejudicial to warrant a new trial. First, the court noted that the expert made clear that the images he was using were "computer-generated images based on crash-scene facts and data he collected through his investigation" and that he did *not* testify that the exhibits were *actual images* from the scene. Moreover, the demonstrative exhibits were visual aids to assist the jury in understanding the defense's theory of the case, which was that Byram was making a lawful maneuver in a tractor-trailer that was marked with legally-required lights and reflective tape and that reasonably should have been seen by Shaneyfelt in time to stop."

K. PRESUMPTIONS

RULE 301. PRESUMPTIONS IN CIVIL CASES GENERALLY
RULE 302. APPLYING STATE LAW TO PRESUMPTIONS IN CIVIL CASES

In re Estate of Gaaskjolen, 941 N.W.2d 808 (S.D. 2020). In her will, Mrs. Gaaskjolen left everything to her daughter Audrey and disinherited her other daughter Vicki. Vicki contested the will on undue influence grounds. The circuit court found that given the facts, a presumption of undue influence arose and that Audrey failed to rebut it. On

appeal, Audrey challenged both findings. The Supreme Court, affirming the finding that a presumption arose, expounded on the issue:

> The beneficiary's burden arising from the presumption is referred to as "the burden of going forward with the evidence." This burden differs from the ultimate burden of persuasion. The burden to rebut a presumption "disappears when evidence is introduced from which facts may be found." A presumption is not evidence of anything, and only relates to a rule of law as to which party shall first go forward and produce evidence sustaining a matter in issue. A presumption will serve as and in the place of evidence in favor of one party or the other until prima facie evidence has been adduced by the opposite party; but the presumption should never be placed in the scale to be weighed as evidence. The presumption, when the opposite party has produced prima facie evidence, has spent its force and served its purpose, and the party then, in whose favor the presumption operated, must meet his opponent's prima facie evidence with evidence, and not presumptions.

(Internal quotations and citations omitted).

Accordingly, Audrey had the burden to show "more than '[m]ere assertions, implausible contentions, and frivolous avowals ... to defeat a presumption.'" "When substantial, credible evidence has been introduced to rebut the presumption, it shall disappear from the action or proceeding, and the jury shall not be instructed thereon." SDCL 19-19-301. The Supreme Court found that Audrey presented sufficient evidence, in the form of various testimonies from Mrs. Gaaskjolen's housekeeper and her attorneys, to meet this standard and rebut the presumption.

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State v. Kwong, 149 Haw. 106: Defendant Kwong was charged with Operating a Vehicle Under the Influence of an Intoxicant. The officer testified that he originally pulled over the defendant for an unsafe lane change - the defendant allegedly crossed from the far right lane, through the middle lane, and into the far left lane; cutting off the officer and forcing him to slam on his breaks. The officer alleged this took place at 30 mph and within 30 feet. Kwong's counsel moved for a judgment of acquittal and asked the judge to take judicial notice of the fact that "30 mph is equivalent to 44 feet per second" as a result of which the events as described by the officer's testimony were physically impossible to have taken place. The judge denied to take judicial notice of this fact and instead insisted that an expert was necessary. The Hawaii Supreme Court found that the district court erred and was required to take judicial notice that 30 mph is equivalent to 44 feet per second. "[If a fact is generally known or a matter of common knowledge, a party need not provide additional information to justify judicial notice," and in this case "the facts needed to infer 44 feet per second from 30 mph … are common knowledge, and the math to convert mph to feet per second is straightforward. Thus, judicial notice of this fact was mandatory." [However, the Supreme Court found that the error was harmless and Kwong's conviction is affirmed.]

Capers v. State, 2020 Md. App. LEXIS 849: Defendant Edward Capers was convicted by a jury of first-degree assault and carrying a dangerous weapon openly with intent to injure. This came after Capers, with his cousin and her friend, attacked then chased down and killed David Daye, whom they accused of cheating in a card game. In this attack Capers allegedly struck Daye with a chair several times. During testimony the state asked the medical examiner "the injury that we're looking at [referring to lacerations to the face and broken teeth], would that be consistent or inconsistent with being struck with a chair?" to which the medical examiner replied that "it would be consistent." Capers objected to this as a leading question but was denied. Capers appealed the conviction, arguing the court erred in overruling his objection that a question asked to the medical examiner was impermissibly leading. The appellate court found that the trial court did not err, as the question asked was not a leading question. According to the court, a leading question is one "that suggests the answer to the person being interrogated." With regard to the question, "the injury that we're looking at, would that be consistent or inconsistent with being struck by a chair," there is no indication that it suggested a specific answer to the examiner.

Medical Recovery Servs., LLC v. Eddins, 2021 Ida. LEXIS 126: Michael Eddins was rendered emergency medical services at Eastern Idaho Regional Medical Center (EIRMC) in which, among other services, he had his appendix removed. This treatment came from Intermountain Emergency Physicians (IEP) and Intermountain Anesthesia (IA). Eddins did not pay IEP nor IA, and both providers allegedly assigned the accounts to Medical Recovery Services, LLC, (MRS). MRS then sued Eddins to collect the debts. During the bench trial, MRS sought to introduce two exhibits which purported to show the assignments of Eddins' debts to MRS from IEP (Exhibit 2) and IA (Exhibit 6). Exhibit 2 was signed by Kerrie Finuf, who later testified she had the authority to do so. Exhibit 6 was signed by Jennifer Waddell, who never testified as to her authority to assign the debt. At the end of the bench trial the magistrate dismissed MRS claims against Eddins for lack of standing, ruling that neither exhibit was admissible due to no showing of authority by IEP or IA to assign the debts. This ruling was appealed and then again to the Idaho Supreme Court. The supreme court held that Exhibit 2 was authenticated by Ms. Finuf and was admissible for all purposes, while Exhibit 6 was never authenticated and was thus inadmissible. For the Exhibits MRS needed "only make a prima facie showing of authenticity so that a reasonable [fact-finder] could find in favor of authenticity or identification. . . . Once the prima facie case for authenticity is met, the probative value of the evidence is a matter for the [fact-finder]. In the case of Exhibit 2, this prima facie authentication was Ms. Finuf's testimony regarding her status as IEP's agent, and thus was admissible. Exhibit 6 was never authenticated by IA's agent (allegedly Ms. Wendall), and thus was inadmissible.

Chapter 3 · Objections and Evidence Decision-Making

A. THE PROCESS FOR ADDRESSING EVIDENTIARY CONCERNS

RULE 103. RULINGS ON EVIDENCE

United States v. Williams, 930 F.3d 44 (2nd Cir. 2019). A jury convicted Williams of being a felon in possession of a firearm. On appeal, he argued the district court improperly admitted images from his Facebook that should have been excluded on impermissible propensity grounds. The court held that Williams waived this argument by intentionally declining to raise it during trial. The court pointed to the colloquy held at side bar during trial:

> THE COURT: All right. As I understand, your only standing objection that you've made to this was based on the delay that the government exhibited in seeking the search for it. Is there another basis ...? Because you said my general objection.
>
> MR. PADDEN: I meant my previous objection, my previous motion.
>
> THE COURT: So you don't have a relevance objection or anything like that. It was simply the objection that was lodged in your papers?
>
> MR. PADDEN: Yes.
>
> THE COURT: Only that?
>
> MR. PADDEN: Yes.
>
> THE COURT: All right. Then [if] that's the only objection, then the objection is overruled.

Because Williams did not make an objection clearly stating the impermissible-propensity evidence grounds asserted on appeal, the objection was not preserved at trial.

B. THE DECISION-MAKING PROCESS

2. CONDITIONAL RELEVANCE

RULE 104

United States v. Vázquez-Soto, 939 F.3d 365 (1st Cir. 2019). After a workplace injury at USPS, Vázquez-Soto claimed disability and received benefits for over a decade. In 2012, an investigation for possible fraud began which led to him being charged with making false statements in violation of 18 U.S.C. § 1001 and of theft of government property. After a jury trial, he was convicted of both. On appeal, he challenged the admission of photographs taken from his ex-wife's Facebook that depicted him on a motorcycle trip. He argued the government failed to show that the photos were taken while he was accepting disability benefits, a fact required to establish their relevance. To establish this conditional fact, "the government was not required to produce conclusive evidence that the photographs were taken after Vázquez-Soto claimed to be disabled. Rather the

question is whether the evidence permitted such an inference." The government showed when the pictures were uploaded to Facebook and that they were time stamped. Additionally, the court noted that "the jury could judge for itself from the photographs and Vázquez-Soto's appearance in the courtroom approximately how much time had passed between when the photographs were taken and the time of the trial." Accordingly, the court found that the government met this threshold.

C. LIMITED ADMISSIBILITY

RULE 105. LIMITING EVIDENCE THAT IS NOT ADMISSIBLE AGAINST OTHER PARTIES OR FOR OTHER PURPOSES

Lawson v. State, 292 So.3d 266 (Miss. Ct. App. 2019). A jury convicted Lawson of fondling and statutory rape; on appeal he argued the court gave an improper limiting instruction regarding his prior bad acts. At trial, the State called a witness who testified to previous sexual abuse incidents between herself and the Defendant. The judge gave the following limiting instruction:

> This Defendant, Phillip Lawson, is on trial for crimes against [Sarah], specifically two counts of fondling and one count of statutory rape. This particular witness [who is] on the stand now, her testimony is being admitted under a specific rule of court that allows testimony from another person to support the alleged victim's testimony.
>
> Mr. Lawson, the Defendant, has not been convicted nor is he being tried for any allegations made by this witness. You must give whatever weight to this witness'[s] testimony that you assign based on your judgment of her credibility, and you must determine whether or not this witness'[s] testimony supports the alleged victim in this case ..., which is [Sarah]'s own testimony.

Additionally, the court gave the following Jury Instruction:

> [T]estimony from any witness in this trial pertaining to any previous sexual misconduct of the [D]efendant, ... Lawson, was offered in an effort to show motive, intent, or absence of mistake or accident, regarding the actions of this [D]efendant in the statutory rape and fondling of [Sarah]. You may give this testimony such weight and credibility as you deem proper under the circumstances. However, you must not consider this testimony as proof of guilt of the charge[s] for which he is presently on trial.

Defendant argued the limiting instruction did not properly restrict the scope of the witness' testimony. The court found that regardless of the initial limiting instruction, the jury instructions "as a whole" properly limited the admissible purpose of the testimony.

> When read as a whole, the instructions informed the jurors that Lawson was not on trial for any alleged prior bad acts; that Jane's testimony was admissible only for the limited purpose of showing Lawson's motive, intent, and absence of

mistake or accident in sexually abusing Sarah; and that the jury could not consider Jane's testimony as proof that Lawson had committed the crimes for which he was presently on trial.

Chapter 4 · The Law of Relevance

A. The Law of Relevance

RULE 401. TEST FOR RELEVANT EVIDENCE

RULE 402. GENERAL ADMISSIBILITY OF RELEVANT EVIDENCE

Boudreaux v. State, NO. 14-18-00891-CR, 2020 WL 2214447 (Tex. App. 2020). Defendant was involved in two car accidents, one after the other, on the same day. Defendant fled the scene after the first accident. Each accident resulted in the death of someone in the other vehicle. Defendant was convicted, after a jury trial, of felony murder. At trial, a witness to the second accident testified that after the accident, he saw the defendant take white medicine bottles out of his truck and push them through holes in the fence over the highway. On appeal, Defendant argued the evidence of the pill bottles was irrelevant and should have been excluded. The State argued that since Defendant had incriminating evidence at the time of the second accident, it showed that he did not dispose of them after the first which tended to show that he was still in flight from the first accident. The Court of Appeals disagreed. The court held the evidence of the pill bottles was irrelevant. "[T]here was no evidence that the pill bottles contained incriminating evidence, that they even contained pills, or that the discarding of the bottles showed evidence of flight."

C. Relevance, Statistics, and Probabilities

People v. Wells, No. 342663, 2019 WL 575408 (Mich. Ct. App. 2019). Defendant was convicted of first-degree felony murder, armed robbery, and possession of a firearm during the commission of a felony. On appeal, Defendant challenged the testimony of forensic analyst Mikehl Hafner. Hafner testified that the statistical probability that the DNA (from blood found on the defendant's boots) would match another person's DNA profile was one in 66.16 quadrillion in the Caucasian population, one in 366.3 quadrillion in the African-American population, and one in 1.168 quadrillion in the Hispanic population. Defendant claims Hafner's testimony was irrelevant because the victim is of Asian descent and Hafner did not have the statistical probability of a DNA match in the Asian population. The court held Hafner's testimony was necessary to the jury's consideration of the DNA evidence and therefore, relevant.

> Contrary to what defendant argues, the fact that Shin did not belong to one of these population groups did not render the statistical evidence for those groups irrelevant. The issue that the jury had to decide was whether the DNA in the blood sample, although consistent with Shin's DNA profile, could have come from some other person. The fact that Shin was Asian did not mean that the relevant population group of other possible contributors was limited to Asians. If the sample was not left by Shin, it could have come from a member of any of several other population groups. In this regard, statistical data of the likelihood of a random probability match among Caucasians, African-Americas, and Hispanics, three of the major population groups in the United States, was highly relevant to assist the jury in determining the likelihood that the blood on defendant's boot may have come from some other unknown contributor.

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United States v. Hamzeh, 966 F.3d 1048 (7th Circ. 2020)

After acquiring two machineguns and a silencer from undercover FBI agents, Defendant was arrested and charged with illegal possession of said weapons. Defendant subsequently moved to present an entrapment defense and to exclude recordings in which he could be heard describing his need for weapons to commit acts of terrorism, as irrelevant under Fed. R. Evid. 401. The district court granted Defendant's motions, stating that because motive was not an element of the offense he was charged with, it was irrelevant. The Government subsequently filed an interlocutory appeal. In reversing the district court's holding, the 7th Circuit Court of Appeals focused on the elements of the Defendant's entrapment defense. Specifically, the Court found that because the Government needed to prove that Defendant "was predisposed to commit the crime," that Defendant's statement of his "intention a long time ago" to martyr himself, resultant desire to acquire multiple weapons and a silencer, and inability to "[g]et the whole idea out of [his] head," was relevant because it made a fact "of consequence," namely whether he was induced to illegally possess weapons, less likely. *Id.* at 1053.

Montague v. State, 243 A.3d 546 (Md. 2020)

Montague was convicted of second-degree murder, first-degree assault, use of a firearm in a crime of violence, use of a firearm in the commission of a felony, and wearing, carrying, or transporting a handgun. On appeal, he challenged the admission of the rap lyrics from his detention center telephone call, which he asked a friend to post on Instagram Live three weeks before his trial. The lyrics used not only bore a close nexus to the details of the alleged murder but mentioned that Montague and his gang, "YSK," would "pop [the] top" of any "snitch." Montague argued that these lyrics were "complete fiction," "artistic expression," and that there were "too many possible explanations to the lyrics" to make it more or less probable that he committed the murder. The Court disagreed and affirmed the circuit court's decision to admit the lyrics. In its opinion, the Court stated that while the lyrics did not recount every detail of the murder, they were relevant because they bore a "close factual and temporal nexus to the details" of the murder. Namely, the lyrics identify the correct gun used, location, and way in which the murder occurred. The Court found that the nexus was strengthened by the fact that the lyrics included "stop snitching" references that, when recorded and uploaded onto Instagram, served to intimidate witnesses.

United States v. Hazelwood, 979 F.3d 398 (6th Cit. 2020)

Hazelwood, the president of a gas company, was convicted of conspiracy to commit wire and mail fraud, along with several of his employees. At trial, the Government presented an audio recording in which Hazelwood could be heard using deeply racist and misogynistic language. On appeal, he challenged the admission of this recording as irrelevant. Specifically, he contested the district

court's finding that this recording was admissible under Fed. R. Evid. 401 to rebut the testimony that Hazelwood was "too good a businessman to risk the company's reputation by committing wire and mail fraud." The 6th Circuit Court of Appeals agreed, clarifying that the test for relevancy requires the proffered evidence to make a material fact "more or less probable than it would be without the evidence." The court relied, in part, on the district court's own jury instructions regarding the audio recording, in which it stated that the recording "[did] not go to any of the elements of the offenses with which Mr. Hazelwood is charged in the indictment." Further, the Court emphasized that regardless of whether Hazelwood had "a bad set of personal beliefs," it did not make it more or less likely that he was a good businessman, that he would risk his company's reputation, or that he would commit fraud. In finding reversible error, the Court held that his remarks did not make it more likely that he would commit fraud but did make it more likely that the jury would convict.

State v. Thomas, 476 P.3d 26 (Mont. 2020)

Thomas was convicted of Aggravated Promotion of Prostitution. Prior to trial, the district court granted the State's motion to exclude testimony relating to the prior sexual conduct of one of the women with whom Thomas promoted, as irrelevant. On appeal, Thomas challenged the court's decision, claiming that because the woman had previously been a prostitute before he began promoting her, that her prior sexual conduct was relevant to mount a defense and prove that he did not "encourage[], induce[], or otherwise purposely cause[] another to become or remain a prostitute." The Montana Supreme Court disagreed, finding that regardless of what the woman did years before, that Defendant's actions and admissions clearly established that he "helped set up photo shoots, posted a Backpage ad, and gave rides," to her dates. In affirming the exclusion of this evidence, the Court held that Thomas had not demonstrated that the woman's prior involvement in prostitution, years before, tended to make any fact of consequence regarding whether he encouraged the woman to become or remain a prostitute, more or less likely.

Chapter 5 · Character as Relevant Substantive Evidence

A. Character Evidence Fundamentals

Rule 404. Character Evidence; Crimes or Other Acts

Reighley v. State, 585 S.W.3d 98 (Tex. App. 2019). Defendant was convicted of one count of online solicitation of a minor and two counts of criminal solicitation of a minor. On appeal, he challenged the trial court's exclusion of the testimony of three "good character" witnesses. The first witness' testimony was that he "had not seen or heard appellant behave inappropriately toward young girls," that appellant did not exhibit "traits of being a pedophile," and that he would trust appellant around his daughters. The second witness' testimony was that "she had never seen appellant act inappropriately toward young girls and that he had never expressed a desire to be sexual with young girls." The last witness' testimony was that appellant had not acted inappropriately with her when she was a young girl. The court upheld the exclusion of their testimonies. The court explained that under Rule 401, "a defendant charged with sexual assault of a child is entitled to offer evidence of his good character for "moral and safe relations with small children or young girls." However, "the status of being…a pedophile is not a "character trait." "[T]estimony of a defendant's character that is derived from specific instances of conduct is inadmissible to show an inference that the defendant did not commit the offense for which he is charged." Thus, the three good character witness' testimony was improper character evidence derived from specific instances of appellant's prior conduct.

Chapter 6 · Restrictions on Relevant Evidence

A. Rule 403 fundamentals

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

United States v. Kilmartin, 944 F.3d 315 (1st Cir. 2019). Kilmartin went to trial on several charges that arose from Kilmartin's "scheme to defraud suicidal people and to obtain money by false pretenses, specifically, by pretending to sell cyanide but sending Epsom salt instead." At trial, the government presented various exhibits containing email correspondence between the defendant and persons who replied to his cyanide advertisement, which included purchasers and potential purchasers. The emails contained statements that could "evoke an emotional response in even the most hardened individuals," such as:

- "[I[have been suffering an infection since birth…[I] don[']t want to continue my life…[I] need some potassium cyanide…tell me the price."
- "I am ready to die and this seemed like the best method."
- "I don't know what to expect from this email but the darkness has overtaken me and my friend."

The government also called some of Kilmartin's victims who testified about their emotional states:

- On direct examination, Cottle testified that he was so overwhelmed that he "didn't want to see [his] wife" and "didn't want to see [his] child." He "was crying probably twenty, twenty-five times a day for no reason."
- Williams testified about a myriad of factors that rendered her suicidal (including going through a "terrible" second divorce, experiencing great financial pressure, watching her neighbor shoot her dog, and undergoing a horrible car accident). She also described why she was looking for cyanide: "I knew that I didn't have the courage to shoot myself, and ... I knew I didn't have the courage to cut myself."
- Roland testified that "severe distress" led her to look for cyanide after she was diagnosed with schizophrenia, was unable to work, and found herself homeless. She was also having "side effects from psychological medications that were affecting [her] motor skills to the point where it became excruciatingly hard just to turn over in bed."

Defendant objected to all this evidence (the court referred to the evidence collectively as "anecdotal background evidence") on 403 grounds, which the district court overruled. The First Circuit characterized the evidence as "emotionally charged" and held that the district court abused its discretion in admitting the anecdotal background evidence. The evidence "unfairly prejudiced the defendant because it dwelled upon the desperation of severely depressed individuals in what amounted to a blatant attempt to engage and inflame the jurors' passions."

B. 403 – Beyond "unfair prejudice"

United States v. Ayala, 917 F.3d 752 (3rd Cir. 2019). Ayala was convicted of robbery and conspiracy to commit robbery. While on trial, Ayala raised the affirmative defense of duress. She claimed that two men, "B" and "W," told her to participate in the robbery and that she feared for her life. The District Court limited Ayala's ability to cross examine the

government's witnesses about B's and W's reputations for violence on 403 grounds. On appeal, she challenged this decision, arguing that her ability to cross examine the witnesses about B's and W's reputation for violence was relevant to her duress defense. Her position was that, based on B's and W's violent reputation, she only committed the crime because she feared for her family's safety. The Third Circuit affirmed the district court's ruling. "It is clear from the record that admitting evidence about B's and W's crimes and reputations would pose a danger of confusing the jury. Ayala's duress defense did not depend on B's and W's past crimes or reputations. B and W were not on trial, and exploring through testimony how dangerous they were could also have been prejudicial." The trial court had permitted testimony from two witnesses that they, too, feared "B" and "W."

C. 403 – NOT "ALL OR NOTHING"

United States v. McGregor, 960 F.3d 1319 (11th Cir. 2020). McGregor was charged with being a felon in possession of a firearm, identity theft, and possession of unauthorized access devices. He pled guilty to the firearm charge and the jury convicted him of the remaining counts. On appeal, he challenged the district court's admission of the firearm evidence arguing that it should have been excluded because its probative value was substantially outweighed by undue prejudice. He argued that since he pled guilty to the firearm charge, the trial was about the fraud and the firearm evidence was "designed to inflame the jury." The government argued the evidence was relevant to establishing defendant's knowing possession of "personal identifying information." The Eleventh Circuit affirmed the district court's decision. After determining the firearm evidence's probative value, it held:

> The government limited any unfair prejudicial effect by neither telling the jury that McGregor's possession of the firearm was unlawful, nor indicating to the jury that McGregor had prior felony convictions that would make possession unlawful. Moreover, we agree with the district court that the possession of a firearm today is not so inherently prejudicial as to necessarily outweigh its probative value.

D. RULE 105 – A PARTIAL "FIX"

RULE 105. LIMITING EVIDENCE THAT IS NOT ADMISSIBLE AGAINST OTHER PARTIES OR FOR OTHER PURPOSES

United States v. Young, 916 F.3d 368 (4th Cir. 2019). Young was charged and convicted of attempting to provide material support to the Islamic State of Iraq and the Levant and attempting to obstruct justice. At trial, the government introduced Nazi and white supremacist paraphernalia that was seized from Young's home to prove his disposition. On appeal, Young argued the district court improperly admitted this evidence on 403 grounds. The Fourth Circuit held that any prejudicial effect was "blunted" by the court's limiting instruction to the jury:

> So I want you to understand that he is not being charged and you cannot find him guilty for possessing Nazi or anti-Semitic literature. He's not being charged with that, he cannot be convicted for that, but the evidence is being allowed in [to consider] ... whether or not it helps or doesn't help to establish the predisposition issue, all right?

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United States v. Heatherly, 982 F.3d 871 (3rd Cir. 2020)

Defendants were convicted of receiving or distributing child pornography, in a Zoom room, and conspiring to do the same. At trial, the Government explained how, on one occasion, an undercover agent had infiltrated the room and had recorded both the videos shown and comments made by Defendants. Over Defendants' objections, the district court admitted the videos, all of which included sexual acts with prepubescent children. On appeal, Defendants argued that these videos were inadmissible under Fed. R. Evid. 403 because the probative value was outweighed by an unfair danger of prejudice. However, in affirming the district court's decision, the 3rd Circuit Court of Appeals first emphasized that the videos were relevant and highly probative to proving the Government's case. Further, in finding that the probative value of showing the videos was not outweighed by an *unfair* danger of prejudice, the court focused on the fact that the Government needed to prove that this was not the first time that Defendants had met on Zoom. Having only collected evidence from one occasion, the Government therefore needed to rely on the horrific nature of the sexual acts, the coded language used by participants in the Zoom, and the Defendants' comfortability in requesting pornographic material from one another, to establish conspiracy. Finally, because both Defendants claimed that they were only in the room to watch other men masturbate, the Court reasoned that the probative value in showing the videos was not substantially outweighed by unfair prejudice, because it rebutted their defenses.

United States v. De Andrew Smith, 967 F.3d 1196 (11th Cir. 2020)

De Andre Smith was convicted of three counts of Hobbs Act robbery, one count of carjacking, and four counts of brandishing a firearm in furtherance of those crimes. At trial, and over Smith's objection, the Government played one of his music videos in which he wore the same jacket and used a "similar" pistol in committing one of the robberies. On appeal, Smith argued that the admission of the music video violated Fed. R. Evid. 403. The Government disagreed, stating that the video was relevant to establish Smith's identity, motive, and intent, and that this was not substantially outweighed by the risk that it would unfairly prejudice him. On appeal, the Court affirmed the admission of the music video, finding that the music video not only had "significant" probative value in settling contested issues of identity, but corroborated a victim's testimony that the individual who robbed and assaulted her was an "amateur rapper and videographer." Further, the Court held that showing the video was essential to allow the jury to compare the firearm in the video with that seen in the security footage of the other robberies.

Gerlach v. Cove Apts., 471 P.3d 181 (Wash. 2020)

After the decayed railing of her boyfriend's apartment balcony snapped, causing her to fall to the ground, Gerlach brought suit against Cove Apartments for negligently causing her injuries. Cove

Apartments subsequently raised an affirmative defense, claiming that Gerlach: 1) was intoxicated, 2) proximately caused her injury by being intoxicated, and 3) was more than 50% at fault. At trial, the court excluded testimony regarding Gerlach's BAC of .219 and expert testimony that purported to establish that Gerlach's was therefore 50% at fault. Because Gerlach had previously admitted that she was intoxicated, the court found that any further testimony was inadmissible under Fed. R. Evid. 403. After the Court of Appeals reversed the lower court and remanded the case for a new trial, the Washington State Court reversed the Court of Appeals and affirmed the lower court. In its opinion, the Court held that evidence about Gerlach's intoxicated state was minimally probative and posed a significant risk of unfair prejudice because Gerlach had previously stipulated to being intoxicated. Further, because Cove's expert would only be able to testify about the effects of alcohol as it related to on "population averages," and not Gerlach specifically, the court found that his testimony was necessary speculative and could only serve to unfairly prejudice Gerlach.

Chapter 7 · 404(b) Acts as Relevant Evidence

A. 404(B) FUNDAMENTALS

RULE 404. CHARACTER EVIDENCE; CRIMES OR OTHER ACTS

United States v. Coleman, 802 Fed.Appx. 59 (3rd Cir. 2020). A confidential informant ("CI") informed law enforcement that Coleman sold firearms. The CI then arranged a meeting to purchase a firearm from Coleman. The CI wore a recording device and their entire conversation was recorded. Coleman was charged with being a felon in possession of a firearm and the recording was admitted at trial. Coleman objected to portions of the recorded conversation that took place after the CI had purchased the firearm. These portions included discussions about Coleman's various sexual encounters and about conflicts Coleman had with others in the area. On appeal, he argued that based on 403 and 404(b) grounds, the court improperly admitted those portions of the conversation. The Third Circuit affirmed the District Court and discussed how the evidence met the four elements required to be admitted under 404(b). First, the court noted the non-propensity purpose of the statements was to show proof of plan, motive, and access. "The recording demonstrated that Coleman had regular access to various firearms and sold them for profit, which corroborated Coleman's motive for meeting the CI." Second, the evidence was relevant because "discussions about other firearms Coleman sold and had available made more probable that Coleman provided the 9-millimeter firearm to the CI, and made less probable that the CI planted the gun, which was the backbone of Coleman's defense." Therefore, it was relevant to motive, access, and intent to possess. Third, the recording's high probative value outweighed risk of unfair prejudice. Lastly, the court provided an appropriate limiting instruction which mitigated the danger of unfair prejudice.

B. IS THERE A *BONA FIDE* NON-PROPENSITY PURPOSE?

United States v. Tony, 948 F.3d 1259 (10th Cir. 2020). Tony was convicted of first-degree murder for fatally stabbing Pat Garcia during a fight. At trial, Tony asserted self-defense. He sought to introduce evidence that Garcia had used methamphetamine before they fought and was acting violently and erratically. However, the district court excluded the evidence on 404(b) grounds, stating that Tony had not asserted a non-propensity purpose to introduce the evidence. On appeal, the Tenth Circuit reversed the District Court's decision. The court noted the non-propensity purpose that Tony had provided when responding to the motion in limine. Tony stated "in writing and in court that the was offering the methamphetamine evidence to show why Mr.Garcia was acting erratically and violently. This purpose would have been permissible under Rule 404(b)." Tony argued:

> When viewed through a neutral lens, the very evidence produced by the Government suggests the victim was the first aggressor in this case. The evidence will support that the alleged victim was intoxicated on methamphetamine and from the electrolytes in his system, that he had been under the influence of methamphetamine at the time of the incident. The Defense will introduce evidence regarding the effects of methamphetamine on human behavior. Such evidence will not be offered for the purpose of proving the alleged victim acted in

> conformity with his violent character; rather, pursuant to Rule 404(b), it will be offered for another purpose. There is no question that the alleged victim was not only habitually armed with a large sheath knife, he used that very knife to inflict a potentially mortal wound on the Defendant.

This was sufficient to "identity a permissible purpose" for the proof.

D. Typical and Atypical 404(b) Non-Propensity Purposes

MENTAL STATE

United States v. Garner, 961 F.3d 264 (3rd Cir. 2020). Garner was convicted of conspiracy to possess with intent to distribute heroin and cocaine and possession with intent to distribute heroin and cocaine. On appeal, Garner challenged the admission of his 2007 New York City cocaine trafficking conviction on Rule 404(b) grounds. He argued the 2007 conviction dealt with different facts than those on appeal and that the cocaine conviction could not prove he knew what heroin looked like or how it was sold. The Third Circuit held that the 2007 conviction was admissible to prove knowledge and intent.

> Garner's 2007 conviction showed that he had personal knowledge about how to identify cocaine, how to traffic it, and how to package, price, and purchase it in New York. If Garner had that knowledge, he could purchase and package drugs in New York, before transporting them to Hagerstown for sale. So his prior conviction showed that Garner had the intent and knowledge to sell packaged cocaine in his possession.

Moreover, to counter Garner's argument, the court noted the prior conviction was used to prove knowledge of cocaine and not to prove intent and knowledge of packaging heroin.

IDENTITY

Mckinney v. State, 834 S.E.2d 741 (Ga. 2019). McKinney was convicted of malice murder for killing his former girlfriend Deborah Thigpen. On appeal, he challenged the admission of evidence of his attack on another former girlfriend that occurred 15 years earlier. The former girlfriend testified concerning details of the assault. The Georgia Supreme Court held that the evidence was used to prove identity, a non-propensity purpose under Rule 404(b), and affirmed the admission of her testimony. In order for the previous attack to be used to prove identity, "[t]he physical similarit[ies] must be such that it marks the offenses as the handiwork of the accused." As such, the court noted the similarities between the attacks:

> Here, the prior conduct and the charged offenses share several significant similarities. In both incidents, the assailant dragged a female victim off a walkway into nearby bushes, pulling her backward and to the ground; choked her with his hand; and removed or tried to remove her clothes. Appellant argues that these similarities are characteristic of many attacks on women, rather than being indicative of his handiwork. But even if he were right, his argument overlooks a crucial similarity – both victims were Appellant's former girlfriends. And although the charged crimes and the prior attack occurred 15 years apart, each attack was committed after the victim's relationship with Appellant ended… Comparison of the two incidents indicates that "the possibility is quite remote" that a person other than Appellant committed the charged crimes of attacking one

of Appellant's ex-girlfriends in a very similar way as his 1999 attack on another ex-girlfriend.

MOTIVE

United States v. Olivera, 797 Fed.Appx. 40 (2nd Cir. 2019). Olivera and Lopez were convicted of conspiracy to commit Hobbs Act robbery and Hobbs Act robbery. On appeal, Lopez challenged the admission of testimony from a confidential informant, Fernandez, on Rule 404(b) grounds. Fernandez testified that before the robbery in question took place, he had sold drugs to Lopez for resale in the summer of 2012. Lopez argued the evidence was irrelevant but the government argued, and the court agreed, that Fernandez's testimony spoke to a possible motive for the robbery. Fernandez's testimony provided for Lopez's previous admission that the money that he used to pay Fernandez for the drugs in 2012 consisted of proceeds from a robbery. Thus, the fact that Lopez had an outstanding drug debt, would lead to a possible motive for the robbery. Accordingly, the Second Circuit affirmed the District Court's decision.

PLAN

Commonwealth v. Cosby, 224 A.3d 372 (Pa. Super. Ct. 2019). Cosby was convicted of aggravated indecent assault. On appeal, he challenged the admission of prior bad acts evidence in the form of testimony of 5 witnesses that testified that he had drugged and sexually assaulted them in a similar way the victim described her assault. The trial court admitted the evidence under the common plan/scheme/design exception and the Superior Court affirmed. The court stated the evidence "established Appellant's unique sexual assault playbook." The assault of the victim followed a "predictable pattern" based on the witness's testimonies:

> [E]ach woman was substantially younger than the married [Appellant]; each woman met [Appellant] through her employment or career; most of the women believed he truly wanted to mentor them; [Appellant] was legitimately in each victim's presence because each had accepted an invitation to get together with him socially; each incident occurred in a setting controlled by [Appellant], where he would be without interruption and undiscovered by a third party; [Appellant] had the opportunity to perpetrate each crime because he instilled trust in his victims due to his position of authority, his status in the entertainment industry, and his social and communication skills; he administered intoxicants to each victim; the intoxicant incapacitated each victim; [Appellant] was aware of each victim's compromised state because he was the one who put each victim into that compromised state; he had access to sedating drugs and knew their effects on his victims; he sexually assaulted each victim—or in the case of one of his victims, engaged in, at minimum, untoward sexual conduct—while she was not fully conscious and, thus, unable to resist his unwelcomed sexual contact; and, none of the victims consented to any sexual contact with [Appellant].

ABSENCE OF MISTAKE OR ACCIDENT

Fairbanks v. State, 119 N.E.3d 564 (Ind. 2019). Fairbanks was charged with murder and felony neglect of a dependent resulting in death. He had been left with his three-month-old daughter when the baby's mother left for work. At some point during that day, Fairbanks left the house with the baby but returned home alone. He told the baby's mother that the baby had died and he had buried her in a cornfield. When he was questioned by officers, he told them "during an early morning diaper change, he had

placed a pillow over the baby to 'muffle her'—but that he took the pillow off 'right away' and that they both eventually went back to sleep. He claimed that he later woke up, realized Janna was 'already gone,' and panicked." On appeal, he challenged the admission of testimony from the baby's half-sisters who testified concerning previous "pillow incidents." The court held, that the sister's testimonies that they had seen Fairbanks put a pillow on the baby's face before was admissible to show "lack of accident." On those grounds, the Supreme Court affirmed the admission of the evidence.

G. When is an Act Not an "Other" Act?

State v. Santamaria, 200 A.3d 375 (N.J. 2019). Santamaria was convicted of aggravated sexual assault and official misconduct for having a sexual relationship with a student, H.B., at his school from the time she was fourteen. At trial, sexually graphic photographs of H.B. and the defendant were admitted. H.B. had already turned 18 when the photos were taken. On appeal, defendant challenged the admission of the photographs and the Appellate Division "determined the photos were too attenuated from the allegation of underage sex because they were taken 'at least several weeks, if not years, after the alleged crimes occurred.'" Because the photos could not prove defendant had sex with H.B. while she was underage, the court concluded the photos should have been excluded on 404(b) grounds, and reversed defendant's conviction. The State petitioned for certification which the Supreme Court granted. The Supreme Court found the photographs to be "intrinsic evidence:"

> [T]he State used the photographs to demonstrate that the consensual relationship admitted to by both parties logically must have preceded H.B.'s majority based on the highly intimate nature of the photographs taken shortly after H.B. turned eighteen. That use of the photographs made the evidence intrinsic to the charged crime as proof of the ongoing relationship between H.B. and defendant. The photographs served to demonstrate the control defendant had over H.B., and suggested defendant groomed her over their years-long sexual relationship beginning shortly after H.B.'s fourteenth birthday. The photographs were intrinsic, not evidence of "other crimes, wrongs, or acts…

H. Balancing and 404(b)

State v. Gallagher, 463 P.3d 1119 (Haw. 2020). Gallagher was convicted of criminal property damage in the second degree for damaging complainants' vehicle. At trial, the State presented evidence concerning "four prior incidents of aggressive and erratic behavior by the defendant directed at the complaining witnesses and their home." On appeal, he challenged the admission of this evidence. The court held that the probative value of the evidence was substantially outweighed by unfair prejudice.

> [S]imilarity as to location of all the prior incidents and as involving the same complainants, and the closeness in time of the prior incidents to the underlying offense, exacerbated the unfair prejudice as it increased the likelihood that the jury would conclude that Gallagher had a propensity for committing such acts while adding virtually no probative value as to the issue of Gallagher's intent to cause the amount of damage caused.
>
> …

> [A]ny need to provide context as to Gallagher's intent did not make it necessary to introduce evidence of the details of each of the four prior incidents, the Normans' [complainants'] extreme fear, or the extensive countermeasures taken. Nor was the admission of such evidence needed to establish that the charged incident was not a "random" event or to show intent as to the monetary amount of the damage caused…

2021 Cases

United States v. McArdle, 2021 U.S. Dist. LEXIS 8422: "Court finds that the COVID-19 pandemic will potentially hinder defense counsel's ability to contact witnesses … the Government is ORDERED to provide notice under Federal Rule of Evidence 404(b)(3) three weeks before trial. This notice shall be in writing and shall include "the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose" as required by Rule 404(b)(3)(B)-(C)."

United States v. Crawford, 2021 U.S. Dist. LEXIS 103389: Joe Crawford was set to be charged with selling firearms to a convicted felon. There are two incidents: one from March 20th, 2018, for the sale of four firearms, and one from June 14th, 2018, for the sale of seven firearms. The government attempted to introduce "video, evidence, or testimony regarding gun sales outside of the two counts alleged", referring to two other uncharged instances with the same purchaser. Crawford sought to exclude this from trial, arguing it was inadmissible under Federal Rule of Evidence 404(b). To determine the admissibility of the uncharged acts as evidence, a court must first determine whether the evidence is "intrinsic" or "extrinsic" to the charged crime. This is because while extrinsic evidence implicates Rule 404(b), intrinsic evidence does not. This court found that the preceding uncharged acts *were* intrinsic to the charged acts. Arguing that "because the earlier sales were discussed during the charged sales and because Crawford's history with the [buyer] goes directly to whether Crawford knew the [buyer] was a felon, the Court concludes that the evidence of the uncharged buys are inextricably intertwined with the charged offenses such that the evidence may be deemed intrinsic." Therefore, Rule 404 does not apply to the evidence, and is thus admissible.

United States v. Harris, 2020 U.S. Dist. LEXIS 205809: On July 24th, 2019, D.C. police responded to a report of gunshots. The Government alleges Defendant Demontra Harris was caught on video and identified by a witness as the individual who fired the gun. They charged Harris with unlawful possession of a firearm as a person previously convicted of a felony, assault with a dangerous weapon, and possession of a firearm during a crime of violence. About six weeks later D.C. police recovered a Glock firearm from Harris' girlfriend's home, and they intended to use ballistic and DNA evidence to support the unlawful firearm possession charge against Harris. The Government also sought to introduce evidence of Harris' past conviction of unlawful possession of a firearm

(also a Glock) under Rule 404(b). They argue this past conviction helps establish the required mental state for the possession charge in the instant case. Harris opposed the motion, arguing the evidence is inadmissible propensity evidence. The court held for the Government, saying the prior conviction is both relevant and not propensity evidence. “The law is well established that the Government can introduce evidence of a defendant's past crimes to show the required knowledge or intent element for a firearm possession charge … knowledge of firearms is a permissible purpose under Rule 404(b). Prior use and familiarity with firearms is relevant to satisfying the scienter requirement to … charged offenses.” Given that Harris’ previous conviction showed his familiarity with the firearm in question, there stood a purpose other than proving propensity, and thus Rule 404(b) did not bar the evidence.

United States v. Brizuela, 962 F.3d 784: Dr. Felix Brizuela operated a medical practice in West Virginia. The DEA investigated him over his opioid prescription-writing practices and he was convicted of 15 counts of unlawfully distributing controlled substances. Brizuela appeals his conviction on the argument that the district court improperly allowed evidence in violation of Rule 404(b). The evidence is question was testimony from four of Brizuela’s patients whose prescriptions were not the basis for any of the charges in the indictment. The Government submitted this testimony because it was "necessary to complete the story of the crime on trial." They argued that this testimony provides "[e]vidence that [Brizuela] consistently failed to follow generally recognized procedures," which "tends to show that in prescribing drugs he was not acting as a healer but a seller of wares." The court found for Brizuela, holding that the district court erred in admitting the testimony under Rule 404(b) and that this error was not harmless. Saying “for evidence of uncharged conduct to be admissible to "complete the story" of a charged offense, the evidence must be probative of an integral component of the crime on trial or provide information without which the factfinder would have an incomplete or inaccurate view of other evidence or of the story of the crime itself.” In the case of the testimonies from patients not based for any of the charges, “their testimony was not necessary to "complete the story" of the charged offenses and, therefore, described conduct that was extrinsic to the offenses for which Brizuela was charged.”

Chapter 8 · Special Categories of Evidence

A. HABIT

RULE 406. HABIT; ROUTINE PRACTICE

Howlett v. Chiropractic Center, P.C., 460 P.3d 942 (Mont. 2020). Howlett brought a negligence suit against Morris, a chiropractor, claiming he had herniated her cervical disc. A jury found that Morris was not negligent in his care for Howlett and she appealed. On appeal, she argued the District Court abused its discretion when it denied her motion in limine to exclude evidence of Morris's habits or routine practices. At trial, Morris testified as follows:

> Morris testified to his routine practices and habits during patient visits, explaining that he had seen over 1000 patients and that he always inputs patient history and findings into patients' files through the Chiropractic Center's electronic record system. Additionally, Morris testified that he always provides extensive testing to first time patients prior to administering treatment and that he always discusses findings with patients and encourages questions before moving to a treatment room.

The court affirmed the District Court's ruling and noted, "it was relevant for the jury to understand Morris's routine practices for treating patients to determine whether he departed from his normal routine in his treatment of Howlett."

B. SUBSEQUENT REMEDIAL MEASURES

RULE 407. SUBSEQUENT REMEDIAL MEASURES

L.E. v. Lakeland Joint School District #272, 403 F.Supp.3d 888 (D.C. Idaho 2019). L.E., a former student of Timberlake Junior High, filed suit against the school district for failure to implement safeguards to protect him during the school year following a sexual assault by other students at summer camp. L.E. was sexually assaulted by some teammates while at a summer running camp. After the attack, L.E. told their coach, Coach Lawler, about what happened but Coach Lawler never filed a report about the assault with the school. When L.E.'s mother found out about the assault, she reported it to a district employee. Subsequently, the District issued two letters regarding Coach Lawler's failure to report the assault:

> The first letter officially reprimanded Coach Lawler, and the second letter alerted the Idaho Department of Education's Professional Standards Commission of his failure to report the assault. Id. The letters said Coach Lawler failed to fulfill his "professional obligation to follow School Board Policy #5260 regarding Abused and Neglected Child Reporting, Idaho Code 16-1605, and Principle IX(b) of the Code of Ethics for Idaho Professional Educators." Id.

The District moved to strike these two letters from evidence on Rule 407 grounds. The District argued the letters were subsequent remedial measures and would be used to show culpable conduct. However, L.E. argued the letters would be used to show control, a permissible exception under the rule. Since the District disputed its control, the court denied their motion to strike and deemed the letters admissible.

C. Offer to Settle A Case

RULE 408. COMPROMISE OFFERS AND NEGOTIATIONS

Park v. Ahn, 778 Fed.Appx. 129 (3rd Cir. 2019). Park brought suit against Ahn for breach of contract. Park had given Ahn $300,000 to open a restaurant which Park claimed was a loan and which Ahn claimed was an investment in the restaurant, not a loan. A jury returned a verdict for Park and Ahn appealed. Ahn argued that the District Court abused its discretion when it admitted parts of an email that contained statements that Ahn made in connection with a settlement offer. Initially, Ahn filed a motion in limine to exclude the email. The court granted the motion in part and redacted parts of the email that contained the offers of repayment in exchange for dismissing the suit. However, the court left unredacted paragraphs which "contained only factual statements and not offers of repayment." The Third Circuit agreed that the unredacted parts should not have been admitted. "[U]sing a party's statements, made in connection with negotiations, to show the validity of a claim is precisely what Rule 408 prohibits. The District Court erred when it admitted the redacted email."

E. Using a Guilty Plea or Plea Discussions

RULE 410. PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS

United States v. Villa-Guillén, 394 F.Supp.3d 196 (D.C. P.R. 2019). Villa-Guillén was indicted on one count of conspiring to possess with intent to distribute at least five kilograms of cocaine. On Rule 410 grounds, he moved to exclude the following handwritten letter he sent to the court:

> I am writing to you this letter because I am going through a bad time with a lot of frustration amidst the legal proceedings I am facing. I respectfully and heartily request the notification of the decision made regarding the Suppression Hearing [in Case No. 17-608]. On many occasions, I have expressed to my legal representation my desire to reach an agreement with the Government. I am in the best disposition to make a fair, reasonably and intelligent agreement once I know the Suppression of Evidence to agree and take the best decision regarding the same.

Villa-Guillén argued that the letter was inadmissible because it concerned plea discussions with the United States. The court denied his motion because it held that the letter fell "beyond the purview of Rule 410." "Rule 410(a) applies exclusively to 'a statement made during plea discussions with an attorney for the prosecuting authority.' Fed. R. Evid. 410(a)(4). Villa addressed and mailed the letter to the Court, not to "an attorney for the prosecuting authority."

2021 Cases

Guido v. Fielding, 134 N.Y.S.3d 34 (N.Y. App. Div. 2020)

After suffering a perforation of her bowel during a LAP-Band procedure, Plaintiff sued her treating physician and claimed that he should have discovered the perforation earlier than he did. Defendant

moved for summary judgment and relied, in part, on his expert's report, which stated that Defendant "generally" performed a visual inspection of a patient's bowels during a LAP-Band procedure. Plaintiff challenged this assertion, claiming that not only should the testimony regarding Defendant's alleged custom and practice during LAP-Band be excluded, but any of the expert's opinion that relied on such evidence should as well. The Court first explained that for habit evidence to be admissible, the proponent must show that the practice is "deliberative and repetitive," that was "routinely done by him" during these types of surgeries. However, Defendant neither established numerosity or conformity, and therefore, the expert's opinion did not rely on a proper evidentiary foundation to establish habit or routine.

Holmes v. Pomeroy, 952 N.W.2d 894 (Iowa App. 2020)

Holmes, while riding his bike, collided with Pomeroy's car. He subsequently brought a negligence action against her and attempted to argue that because Pomeroy had subsequently used her phone over twenty times while driving, that it was her habit to do so. At trial, the court limited the purpose for which the jury could consider Pomeroy's post-accident cell phone usage while driving, stating that it was not admissible habit or routine evidence. Holmes appealed, and Pomeroy argued, in party, that habit could only be proven through an examination of conduct occurring *prior* to the accident. The court agreed in part and disagreed in part. Stating that both state and federal law was "silent on how habit . . . can be proved," the court did not believe that Pomeroy's distinction between conduct that occurred "prior" or "after" the accident was dispositive. However, the Court still held that the there was insufficient evidence to establish the requisite elements of habit or routine. While Homes pointed to twenty examples in which Pomeroy used a phone while driving, he was unable to show that Pomeroy did so "always[,] or in most instances," as required. Further stating arguendo, the Court held that twenty occasions would not be "numerous enough" to show that Pomeroy had a habit of using her phone every time she drove.

Thomas v. Univ. Med. Ctr., Inc., 620 S.W.3d 576 (Ky. 2020)

Following a surgical procedure on her neck, Thomas' condition became progressively worse and she later died from a lack of blood flow to her brain. Her husband initiated a medical negligence lawsuit against the hospital and subsequently acquired a document, through discovery, which stated that issues with the medical management of Thomas' airway were "relevant" to her death. Further, this document included a recommendation that "100% of individuals involved in incident will have inservice education . . . to recognize signs and symptoms of mechanical airway obstruction." The hospital moved *in limine* to exclude this document as a subsequent remedial measure and the trial court sustained the motion. The Court of Appeals later affirmed this exclusion, stating that "As a general matter, 'formulating a plan to require additional training' qualifies as a 'subsequent measure' within the plaint meaning of Kent. R. Evid. 407."

Thomas subsequently appealed to the Supreme Court of Kentucky and argued that a recommendation to change a behavior or condition, absent action, was not contemplated by 407.

Citing Tenth Circuit Court of Appeals caselaw, the Court agreed, and held that post-event tests or reports were generally not measures, as considered by the rule, but were rather created to determine "what might have gone wrong." Further, the court noted that "the policy considerations that underlie [Kent. R. Evid. 407, and Fed. R. Evid. 407] . . . were not as vigorously implicated where investigative tests and reports are concerned." While acknowledging that under some circumstances, the policy considerations of the rule may be outweighed by "the danger of depriving 'injured claimants of one of the best and most accurate sources of evidence and information,'" the court found that the error was harmless and refrained from reversing.

McGill Restoration, Inc. v. Lion Place Condo. Ass'n, 309 Neb. 202 (2021)

In an appeal from a judgment in favor of McGill, a contractor, the homeowners' association, Lion, argued that the court erred in excluding a letter and conversation referenced therein as compromise negotiations. At trial, the court found that the letter in which a McGill representative stated "[p]er our meeting, I submit the following information in an attempt to resolve the issues between McGill . . . and Lion . . ." was facially an inadmissible compromise negotiation. On appeal, Lion argued that this letter should have been admitted as either an admission against interest that the work was done in an unworkmanlike manner, or for impeachment.

In affirming the trial court's exclusion of this evidence, the Court emphasized the public policy consideration favoring comprise of disputes and stated that evidence of negotiations is generally irrelevant because the transaction is motivated by a desire for peace, rather than from the strength or weakness of the claim. The court further found that whether a particular writing, conduct, or statement is a product of compromise, is largely a question of fact. Here, the Court found that the McGill representative's statements concerning the condition of the building, its possible causes, and an offer to conduct warranty repairs, were statements made during, or a product of, compromise negotiations. The court found no merit to Lion's argument that the evidence did not fall under rule 408 because it was "admissible for 'another purpose,'" because the statements at issue directly concerned elements of McGill's cause of action and of its defense to Lion's counterclaims.

Chapter 9 · Evidence in Cases of Sexual Assault, Sexual Misconduct and Child Molestation

A. Rape Shield Protection

RULE 412. SEX-OFFENSE CASES: THE VICTIM

United States v. Brown, 810 Fed.Appx. 105 (3rd Cir. 2020). Brown was convicted of sex trafficking by means of force, fraud, or coercion and trafficking a minor. Brown was a pimp, and at trial, his defense was that his victims were "prostitutes by choice, not victims of abuse." On appeal, he argued that his constitutional rights to confront witnesses and to present his defense were violated when the District Court granted in part the Government's motion to exclude the victim's histories of prostitution on Rule 412 grounds. The court only allowed Brown to question the victims about their prostitution histories during the years in which he ran the prostitution ring. The Third Circuit affirmed the District Court.

> The limitations that the District Court imposed here were neither arbitrary nor disproportionate. On the contrary, they focused the trial on the relevant time while still giving Brown substantial freedom to put on his defense. The court let him cross-examine the victims about any prostitution during the three-year period charged in the indictment, even if Brown was not involved. That was more than enough to preserve his constitutional rights.

B. Behavior and Propensity of the Accused

RULE 414. SIMILAR CRIMES IN CHILD MOLESTATION CASES

United States v. Hanson, 936 F.3d 876 (9th Cir. 2019). Hanson was convicted of being in receipt of child pornography and on appeal, he argued the District Court abused its discretion in admitting evidence of Hanson's previous guilty-plea conviction for possession of child pornography. The Ninth Circuit held that the lower court had properly applied Rule 414 and Rule 403. In determining that the evidence was admissible under Rule 414, the court considered that the earlier conviction and the current charges were similar and relatively close in time and that the purpose of the evidence was to help prove that Hanson "knowingly received" and "knowingly possessed" child pornography (the *mens rea* of the charged crimes). Lastly, the court found that the evidence was also admissible under Rule 403. The jury saw a redacted copy of the earlier judgment and when the government introduced evidence of Hanson's admission concerning where he downloaded the images, a limiting instruction was immediately given and again later, before the jury deliberated.

2021 Cases

Westley v. State, 2021 Md. App. LEXIS 536: Darrelled Westley was convicted of multiple counts of sexual abuse of a minor, other sex offenses, and assault against his wife's niece ("Victim"), who

was 12 years old at the time of the relevant events. Victim, as well as two of her siblings, stayed with their aunt and uncle (Mrs. and Mr. Westley). During this two week stay, the Victim and other witnesses testified that Westley sexual assaulted and abused Victim over ten times. After the mother of the Victim and her siblings retrieved them from the Westley's, she was informed of what had occurred and contacted the Child Advocacy Center (CAC). Westley was then arrested and charged. Before trial, the State moved to preclude Mr. Westley from presenting evidence about prior sexual abuse of Victim by a different uncle, Charles Darnell Quails. Westley argued this evidence "was admissible under traditional evidentiary rules and was essential to his defense. He contended that based on the similar allegations against the two men, the evidence would establish that Victim had an independent basis of sexual knowledge on which she could have relied to formulate the graphic allegations against Mr. Westley, making it more likely that she fabricated her present accusations." Both parties agreed that the Maryland Rape Shield Statute did not apply to nonconsensual acts, and thus did not apply in this context. Despite this, the court agreed with the State and concluded that the proffered evidence was not relevant and even if it were, that the danger of unfair prejudice substantially outweighed any probative value. Westley was convicted, and then appealed. He challenged the court's grant of the State's motion to exclude evidence about Victim's prior abuse. This Court of Special Appeals held for the State, holding that Maryland's Rape Shield Statute "applies to a victim's prior sexual conduct regardless of whether such conduct was willing" and thus applies in this case. Therefore, the evidence of prior sexual abuse of Victim was rightfully precluded.

State v. Cox, 17 Wn. App. 2d 178: The complaining witness, J.R., threw herself a birthday party with about forty guests at her home, including defendant Jacob Cox and his fiancée. J.R. drank heavily that night and during the early morning her friend helped her go to bed. J.R. testified that when they entered her bedroom, Mr. Cox's fiancée was already asleep on the bed. Mr. Cox testified that he was also asleep on the bed. According to J.R. she woke up some time later and Cox was digitally raping her. According to Cox he fell asleep with his fiancée in the bed the night before, then was awoken by J.R. laying next to him and touching him around his hips and fondling him over his clothing. Cox then told J.R. to stop, which resulted in her getting angry, getting dressed, and then storming out of the room. Cox was charged with second degree rape after the crime lab found J.R. and Cox's DNA on J.R.'s undergarments. Before trial, the State moved to exclude any evidence of past sexual behavior under the Rape Shield Act. This includes evidence Cox intended to introduce from the night of the party, such as J.R. being drunk and flirtatious with other people and kissing other women. During trial, Cox proffered testimony that in addition to being flirtatious with other people at the party, J.R. was flirting with him as well. Saying "If I were into dudes, you would be my number one pick." Cox also testified that J.R. at on his lap in a party dress and leaned her head on his shoulder. Cox argued that this evidence was relevant for two reasons. "First, it provided an innocent explanation for how his DNA was found on J.R.'s underwear. In addition, since J.R. did not remember the incident but it was corroborated by other witnesses, it was evidence that J.R. was so intoxicated that she was acting out of character and could not recall her actions the night of the party." The court excluding this evidence under the Rape Shield Statute, the jury found Cox guilty, and Cox appealed. The Appeals Court found that the trial court erred in

excluding the evidence of flirtatious behavior and lap-sitting under the Rape Shield Statute. “The excluded evidence in this case was not past behavior; it was contemporaneous with the alleged rape. Nor was it being introduced to show consent. And while it was being introduced to discredit the victim's credibility, the focus was on her level of intoxication, not on allegations of promiscuity. Thus, application of the Rape Shield Statute in these circumstances was untenable.”

C. The Privilege Against Self-Incrimination

State v. Heard, 934 N.W.2d 433 (Iowa 2019). Heard was convicted of first-degree murder but after a successful postconviction relief petition for ineffective assistance of counsel, he was granted a new trial. At the second trial, Brown, a witness that testified in the first trial, decided to assert his Fifth Amendment privilege. Heard filed a motion to compel Brown to testify. Heard wanted Brown to "take the Fifth" in front of the jury so that they would infer he was guilty (Heard's defense at this trial was that Brown was the actual murderer). The court denied Heard's motion and he was again convicted. He appealed and the court of appeals reversed his conviction. It held that "[t]he district court's failure to determine the extent and validity of Brown's reported assertion of his Fifth Amendment privilege on his second round of testimony resulted in a violation of Heard's right to compulsory process." However, the State appealed and the Supreme Court of Iowa vacated the decision of the court of appeals and affirmed the district court. First, the court held that Brown was entitled to assert the privilege because Heard was going to ask questions "aimed at…implicating Brown in the murder by placing him in the group and at the scene of the murder, which would incriminate Brown and classically support his assertion of the Fifth Amendment privilege." Then, the court held that Heard could not compel Brown to take the Fifth in front of the jury "[b]ecause the witness who takes the Fifth does not testify, the defendant has no valid Sixth Amendment Confrontation Clause claim." Moreover, Brown's waiver of his privilege from the first trial could not preclude him from asserting it at the second trial because they were separate proceedings. The court further noted: "Heard's stratagem would curtail joint criminal trials because each defendant would demand a separate trial to call accomplices to the stand to take the Fifth in the presence of the jury, hoping the resulting inference of the witnesses' guilt would create reasonable doubt as to the defendant's."

D. Attorney-Client Privilege

United States v. Ivers, 2020 WL 4212161 (8th Cir. 2020). After an unsuccessful lawsuit against an insurance company before Judge Wright, Ivers sent letters to Judge Wright, the Chief Judge and the Magistrate Judge asserting that Judge Wright had acted with bias against him and demanding a new trial. In the letters, he stated: "I was cheated by one of your federal judges and I demand redress." He was then visited by Deputy Marshals who instructed him to call them instead of the court if he was angry. Subsequently, Ivers filed another lawsuit against the insurance company and was set up with attorneys Tavernier and Friedemann through Minnesota's Pro Se project. The attorneys called Ivers to explain to him that he did not have a claim against the life insurance company. During this call he made the following statements:

> "This… judge stole my life from me."; "I had overwhelming evidence."; "Judge 'stacked the deck' to make sure I lost this case."; "Didn't read the fine print and missed the 30 days to seek a new trial—and 'she is lucky.' I was 'going to throw some chairs.' "; and "You don't know the 50 different ways I planned to kill her."

He was later indicted on one count of threatening to murder a federal judge and one count of interstate transmission of a threat to injure the person of another. He moved to exclude the statements he made about the Judge to the attorneys on grounds that they were subject

to the attorney client privilege. The district court denied his motion and he was convicted. He appealed again arguing the statements were privileged. The Eight Circuit affirmed the district court's ruling. The court held that Iver's threatening statements did not fall within the scope of the attorney client privilege.

> [W]hile the communications made in the first part of the call were indisputably for the purpose of obtaining legal services, as they concerned the merits of Ivers's lawsuit and the attorneys' opinions as to Ivers's prospects for success, Ivers made the threat statements towards the end of the call and only after the attorneys had finished discussing his case with him. Indeed, at the end of the call, Ivers became angry and began ranting about Judge Wright for approximately ten minutes. The attorneys did not engage with him or speak at any time during his tirade, and when he was finished, they simply ended the call.

Iver's statements were not made "for the purpose of facilitating the rendering of legal services" and thus were not covered by the privilege.

E. Spouses and Communication

In re Subpoena, 2020 WL 3424310 (La. 2020). Mrs.Opperman, the wife of a grand jury target, was subpoenaed to appear before the grand jury. Her husband, the target of the grand jury investigation, had been charged with one count of molestation of a juvenile. Mrs.Opperman asserted her "privilege to refuse to give evidence in any criminal proceeding against her husband." The district court ruled the privilege applied and the state appealed. The state argued the privilege only applied in a "criminal case" and that a grand jury proceeding was not yet a criminal case. The Louisiana Supreme court held that according to their Code of Evidence, the privilege applies to "all stages of any case or proceeding where there is the power to subpoena, including grand jury proceedings." However, the spousal privilege was also abrogated by statute. La. R.S. 14:403(B) stated in relevant part: "In any proceeding concerning the abuse or neglect or sexual abuse of a child or the cause of such condition, evidence may not be excluded on any ground of privilege…" Therefore, since her husband had been indicted for molestation of a juvenile, she was not entitled to assert her spousal privilege.

F. Psychiatrist/Psychologist Patient Communications

In re: Grand Jury Investigation, 405 F.Supp.3d 643 (W.D. Va. 2019). Law enforcement officials searched a psychiatrist's office for evidence of unlawful distribution of controlled substances and conspiracy to unlawfully distribute controlled substances, and executing or attempting to execute a scheme to defraud any health care benefit program. They seized patient records as a part of the search and had a "taint team" review the records to see what if any parts were protected by psychotherapist-patient privilege. This team redacted certain information from the records as potentially privileged. As part of their investigation, the government then requested the court to determine that the information that was redacted was not protected by the privilege. The government argued the information redacted was "not the type of confidential communications the Supreme Court intended to protect by recognizing the psychotherapist-patient privilege" and the court agreed. It noted:

> [T]he subset of seized records provided in this matter for the court's review make no mention of any counseling or intervention, other than medication, being

> offered to these patients by this psychiatrist. The electronic patient records reviewed contain absolutely no evidence that this psychiatrist provided any supportive statements, insights or suggestions to these patients or made any effort to persuade, reeducate or reassure them. In fact, these records show no communication from the psychiatrist to these patients.

Since the redacted information did not contain privileged communication, the court permitted the government to use the information to continue their criminal investigation into the psychiatrist. Specifically, "to determine if the psychiatrist prescribed medication for legitimate medical purposes and within the scope of medical practice."

G. Privileges and Mandatory Reporting laws

State v. Judd, 457 P.3d 316 (Or. Ct. App. 2019). Defendant disclosed to a social worker during a counseling session that she had smothered her grandmother with a pillow after the grandmother began receiving hospice care. As a mandatory reporter of elder abuse under Oregon law, the social worker reported the incident to law enforcement. Defendant was charged with one count of murder. She moved to exclude the conversation on grounds that it was protected by psychotherapist-patient privilege. The court denied her motion and she entered a conditional guilty plea to second degree manslaughter. She reserved the court's ruling denying her motion and then properly appealed. The court of appeals held that the exception for psychiatrists and psychologists to the mandatory reporting statute did not apply to the social worker. However, the mandatory reporting statute abrogated the psychotherapist-patient privilege "only insofar as to allow for a report of elder abuse." The court emphasized that "notably absent" from the statute was a provision that would allow for the disclosure of otherwise privileged statements beyond the initial report and allow for the introduction of the statements into judicial proceedings. Therefore, the trial court erred in denying the defendant's motion to exclude her statements.

2021 Cases

Heaphy v. Metcalf, 468 P.3d 763 (Ariz. App. 2020)

After her husband died, Heaphy filed a wrongful death action, grounded in medical malpractice. Defendants sought discovery of the husband's beneficiaries medical records, claiming that because the beneficiaries had claimed an ongoing loss of companionship by the decedent, their life expectancies were at issue. The judge ordered disclosure of the medical records and Heaphy subsequently sought special-action relief from the court's order. Specifically, Heaphy claimed that the requested documents were protected by physician=patient privilege, and therefore not discoverable. The Court of Appeals of Arizona, Division Two, agreed, holding that an individual does not waive, or implicitly waive physician-patient privilege merely by seeking certain types of damages. The court differentiated between a party "placing a condition 'at issue,'" which would warrant implicit waiver, and the existence of a "possibility [that] the condition could be relevant." In granting relief, the court emphasized that merely raising a claim or defense "does not necessarily

place privileged communications at issue in the litigation." Further, the "fact that privileged communications would be relevant to the issues before the court is of no consequence to the issue of waiver."

Vaughn v. State, 608 S.W.3d 569 (Ark. 2020)

Vaughn was convicted of second-degree sexual assault. On appeal to the Arkansas Supreme Court, Vaughn alleged that the psychotherapist-patient privilege protecting the victim's therapy records were waived as a result of the State's voluntary disclosure of privileged information. Specifically, Vaughn claimed that because prosecutors referenced statements made by the victim to her therapist, they had waived any privilege protecting the rest of the victim's records. The Court disagreed, holding that the State could neither waive the victim's privilege by referencing protected information nor waive privilege by merely having her testify. While the victim, on cross, mentioned that she was assaulted, that she subsequently attended therapy, and made reference to how many times she discussed the sexual assault with her therapist, she did not reveal any confidential communication. The court therefore held that her records were "absolutely" confidential.

Wilson v. State, 478 P.3d 1217 (Alas. 2021)

Wilson, a corrections officer, filed a wrongful termination lawsuit against the Department of Corrections, claiming that it violated his right against self-incrimination by firing him for refusing to answer questions without having adequately assure him his answers could not be used against him criminally. After the lower court granted summary judgment in favor of the State, Wilson appealed to the Alaska Supreme Court. The Court, in affirming summary judgement, relied on the fact that the State twice advised Wilson of his ability to assert privilege and that refusing to answer its questions would be grounds for termination. While Wilson claimed that the State should have advised his attorney as well, Wilson admitted that he was aware that his statements to investigators would not be used in any future criminal proceeding. Therefore, the court found that there was no violation of his right against self-incrimination

Chapter 11 · Witnesses – Part I

A. Competence – The Minimal Precondition for Testifying

Rule 601. Competency to Testify in General

United States v. Stops, 2020 WL 4336265 (D.C. Mont. 2020). Stops filed a motion contesting the competency of his five year old daughter as a witness. The Government intended to have the daughter testify to what she saw the night her father, Stops, allegedly assaulted her mother. Stops argued that she would not be competent due to her age and due to "the possible influence of her mother's, the alleged victim, recitation of the night's events to law enforcement." The court denied Stops' motion and held that the witness was able to distinguish between true and false statements. The court relied on results from exercises done with the witness by a forensic interviewer.

> [T]he interviewer tested Jane Doe's ability to distinguish falsehoods by showing her flashcards depicting a pizza and other cards with an individual stating the pizza was pizza and an individual stating the pizza was ice cream. The interviewer asked Jane Doe which individual was telling the truth. She successfully identified the one stating the pizza was pizza. The interviewer repeated the exercise twice more with flashcards showing a bear and an apple. Jane Doe successfully identified the lie all three times.
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> …
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> The interviewer also discussed the importance of telling the truth with Jane Doe and the need to correct people when they are incorrect. Jane Doe practiced this by successfully correcting the interviewer when he intentionally mispronounced her name and asked her to clarify several of her answers.

Accordingly, the court was satisfied that the witness was competent and noted that any possible influence from the mother would go to reliability and not competence.

D. The Scope of Direct Examination – Bolstering

United States v. Williams, 787 Fed. Appx. 8 (2nd Cir. 2019). Williams was convicted of conspiracy to distribute, or possess with the intent to distribute, cocaine and heroin. On appeal, he argued the prosecution improperly bolstered the credibility of three of the Government's cooperating witnesses. Each of the witnesses pled guilty to charges relating to their respective roles in the conspiracy. Williams claimed the prosecution improperly bolstered their credibility when, on direct examination, it asked the witnesses about the "truth-telling provisions" of their cooperation agreements. These agreements required each to testify truthfully in order for the government to write letters for them, recommending reduced sentences in each of their respective prosecutions. The Second Circuit affirmed the District Court's judgment. It found that, in regards to one witness, Edwards, the defense had attacked his credibility during opening statements. "Williams's defense counsel attacked Edwards's credibility in his opening statement, declaring, among other things, that Edwards's forthcoming testimony would be 'riddled with inconsistencies' and would 'not make sense in terms of what is normal ... in the [drug dealing] industry.'" Thus, there was no improper bolstering of Edwards' credibility because it had already been attacked and the government was entitled to introduce rehabilitative evidence. However, the other two witnesses' credibility had not been

attacked. The court found that the prosecution erred in introducing the evidence concerning the truth-telling provisions in regards to them. Ultimately, their "testimony had little bearing on Williams' conviction," and the court found that the error did not "seriously affect the fairness, integrity or public reputation of [the] judicial proceeding."

G. SEQUESTRATION

RULE 615. EXCLUDING WITNESSES

State v. Hamilton, 2020 WL 3456674 (Ariz. Ct. App. 2020). Hamilton was convicted of sexual conduct with a minor and molestation of a child. On appeal he challenged the court's decision to allow three Rule 404© [uncharged acts] witnesses, who were also victims, to remain in the courtroom during trial even though he invoked the rule of exclusion of witnesses under Rule 615. The State argued that A.R.S. § 13-4420 gave victims the right to be present throughout all criminal proceedings in which the defendant has the right to be present and therefore, the victims had a statutory right to be in the courtroom. The Court of Appeals did not agree with the trial court. It found that A.R.S. § 13-4420 did not give victims from *previous* proceedings a right to be present.

> Unlike victims M.C. and A.C., who are the subject of the charges in the present case and had the right to be present throughout the trial proceedings, see A.R.S. § 13-4420, the 404© witnesses' right to be present at trial extended only to when they were testifying…But granting victims from prior cases an exception from Rule 615 at the trial proceedings in a subsequent case…fails to adequately preserve a defendant's right to invoke Rule 615 when facing the unrelated charges against him.

Although the trial court erred in allowing the 404© witnesses to be present, the Court of Appeals held the error did not cause Hamilton prejudice. The court noted that the purpose behind Rule 615 was to "prevent a witness from being influenced to change his or her testimony base upon the testimony of another witness." This purpose was not frustrated by having the 404© witnesses present because the record showed that their testimony was consistent with their prior statements made to the police in relation to the other acts committed by Hamilton.

C. The Proof of Inconsistent Statements

Rule 613. Prior Statements of Witnesses

United States v. Villa-Guillén, 2020 WL 1536599 (D.C. P.R. 2020). Villa-Guillén was convicted of conspiracy to possess with intent to distribute at least five kilograms of cocaine. The indictment and subsequent conviction arose from a drug trafficking organization that brought cocaine from Puerto Rico to New York. Within the organization, Villa-Guillén was considered an "investor" and he purchased the materials that would become cocaine. After Villa-Guillén was convicted, he moved for a new trial arguing that, among other errors, the court had erred in denying him the ability to impeach a witness during cross-examination. Villa-Guillén attempted to impeach Dominguez, a taxi driver who was hired to retrieve the mules when they arrived at JFK with the cocaine, with an alleged omission in his grand jury testimony. While before the Grand Jury, Dominguez was asked how he knew the defendant. Dominguez responded: "[Villa-Guillén] was sent as a mule to get some money…approximately only once." At trial, defense counsel asked Dominguez, "[Y]ou did not say that [Villa-Guillén] was – that you saw him with narcotics. You didn't right?" At sidebar, defense counsel explained that Dominguez said Villa-Guillén "was a mule to get money" and not that "he's a mule to get kilos." The court responded, "You cannot ask him whether that means that he didn't bring any drugs, because that's impeachment by omission…You can ask him 'Did [Villa-Guillén] bring drugs?' But you can't say 'You didn't say that in the Grand Jury.'" The court held that there was no abuse of discretion in precluding Villa-Guillén from attempting to impeach Dominguez. The court noted that Rule 613 is applicable "when two statements, one made at trial and one made previously, are irreconcilably at odds" and that "prior statements that omit 'details in a witness's trial testimony are inconsistent if it would have been 'natural' for the witness to include the details in the earlier statement.'" Accordingly, Dominiguez did not make inconsistent statements because the question "how do you know [Villa-Guillén]?" did not call for "an exhaustive account of every encounter between Dominguez and Villa-Guillén."

E. The Second Type of Case-Specific Impeachment – Relationship of Witness to Parties or Case Outcome

State v. Shepherd, 2020 WL 3832933 (Or. Ct. App. 2020). Defendant was convicted of delivery of methamphetamine. Lewis, an informant for the Union County Drug Task Force, identified the defendant as someone from whom he could purchase methamphetamine. At the direction of the task force, Lewis arranged via text message to purchase methamphetamine from the defendant. After Lewis purchased the drugs from him, the defendant was arrested and eventually convicted. On appeal he argued the trial court erred when it refused to admit evidence that would have shown that Lewis, the state's key witness, was biased against him. Defendant claimed Lewis had a sexual interest in his wife, R.

> Defendant specifically offered evidence of messages exchanged between Lewis's and R's Facebook accounts approximately seven months after the controlled buy. In those messages, Lewis expressed a sexual interest in R and professed to have

> had such an interest in her " 'for years.' " The messages referenced a planned affair and the exchange of explicit photographs. What Lewis did not initially know, however, was that defendant had been impersonating R the entire time; after defendant disclosed that fact to Lewis, the exchange of Facebook messages stopped…[D]efendant contended that the messages showed that Lewis was biased against him and had a motive to lie at the time of the alleged drug transaction, which, he argued, was evidenced by Lewis's professed interest in R "for years." Defendant argued that the evidence showed "Lewis's motive for going to the police in the first place *** and suggesting the buy."
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> The court held that given this evidence, the jury could have drawn the inference that "Lewis was motivated to implicate the defendant in criminal activity and perhaps distance him from R, and that Lewis was therefore biased against defendant." Thus, the trial court erred in precluding the admission of the evidence. Moreover, the error was not harmless since Lewis' credibility was central to both parties' arguments at trial.

2021 Cases

Augé v. Stryker Corp., 2021 U.S. Dist. LEXIS 144442: A civil judgment was entered against Wayne Auge after a bench trial in the First Judicial District Court of New Mexico. The trial court concluded that Plaintiff "made knowing misrepresentations," "committed securities fraud," "fraudulently induced" his colleagues, "committed a continuing fraud and breached his fiduciary and other duties" by "knowingly overcompensating himself," and "breached his shareholder employment agreement and shareholder agreement." Auge appealed, challenging the use of evidence of his prior fraud judgement during trial. Defendants argue this evidence is admissible under Federal Rule of Evidence 608(b) and is probative of Plaintiff's character for untruthfulness. The Court held for the Defendants, affirming the district court's decision to permit cross-examination under Rule 608(b) on witness's previous "false tax return and credit card applications." The Court also found the evidence is not so "remote in time" as to preclude it under Rule 608(b). Under Rule 608(b) the previous "judgment is not too remote to overly dilute the probative value of the evidence."

State v. Swift, 955 N.W.2d 876: Defendant Derris Swift was charged and convicted with intimidation with a dangerous weapon, willful injury resulting in serious injury, and attempted murder. These charges arise out of an altercation between Swift and his girlfriend Ashanti Dixon that resulted in Dixon being shot. During trial the state called Ashanti, Ameshia (Ashanti's mother), and Watson (Ashanti's brother's girlfriend) to testify. All three made statements to the police before the trial, but while testifying all three could not recall the statements they previously made. In response the state attempted to bring up their pre-trial statements to help refresh their memories. Such statements included statements by Ashanti and Ameshia saying "[Swift] shot me." On appeal Swift argued the trial court violated Iowa's Rule of Evidence 607 by allowing the state to call and impeach their own witnesses. The Supreme Court of Iowa overruled this objection, arguing that Iowa's Rule of Evidence 607 permits a party to attack the credibility of its own

witness. While the prosecution may not "place a witness on the stand who is expected to give unfavorable testimony and then, in the guise of impeachment, offer evidence which is otherwise inadmissible," they hold this is not what occurred here. Each witness in their testimony responded that they forgot or don't remember the events that transpired or the previous statements they had made, and as such there was nothing to contradict/ impeach. Even further the jury was instructed that the State's questions were not evidence, so the statement Ashanti made to her mother that "[Swift] shot me" had no impact on the jury.

Compton v. State, 485 P.3d 56: Con Lysle Compton was convicted of fourth-degree assault against Emily Markkanen following a jury trial. Markkanen lived with and was in a consensual sexual relationship with Compton and his wife Jessica. On one occasion there was an argument in which the Alaska State Troopers were called. Trooper Kay interviewed Markkanen, who said that during the argument, Con Compton hit her in the head and face. Kay then interviewed Compton, who admitted that he argued with and threatened Markkanen but denied physically assaulting her. Compton was then subsequently charged with fourth-degree assault, and shortly before trial the State charged Compton with a second count of fourth-degree assault, alleging that Compton recklessly placed Markkanen in fear of imminent physical injury. During the trial Compton's attorney sought to play a portion of the recording of the interview, but the trial court ruled that the attorney could not play the recording unless he first asked Markkanen whether she made that specific statement. Specifically, the court ruled that if Markkanen denied making the statement, Compton's attorney would be permitted to play the recording. But if Markkanen responded that she did not remember whether she made the statement, then Compton's attorney would be limited to attempting to refresh Markkanen's memory by playing the recording for her outside the presence of the jury. Compton's attorney acquiesced to this, refreshing Markkanen's memory of her conversation with Trooper Kay. Compton argued on appeal that the trial court improperly precluded him from introducing recordings of Markkanen's statements to Kay, showing inconsistent statements. The Court of Appeals agrees with Compton that the trial court erred in their procedure for admitting extrinsic evidence of a prior inconsistent statement, however they did not reverse his conviction. The Court held that under Alaska Evidence Rules 613, "extrinsic evidence of a prior inconsistent statement may be admitted when the witness does not remember making the statement, and the proponent of the evidence is not required to present the statement to the witness outside the presence of the jury." Compton argued that the exclusion of this evidence was a constitutional error because it denied him his constitutional right to cross-examine witnesses and to present a defense. The Court disagrees. Compton's lawyer was still able to successfully bring up these inconsistent statements during his cross-examination and was able to argue Markkanen provided "multiple versions" of the events and, as a result, the jury should doubt the accuracy of her testimony.

Chapter 13 · Character Impeachment

B. Impeaching with Specific Dishonest Acts

RULE 608. A WITNESS'S CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS

Moore v. Granlund, 2020 WL 1285329 (D.C.Pa. 2020). Moore filed a civil rights complaint alleging his rights were violated while incarcerated at the Pennsylvania State Correctional Instruction Rockview. Defendants filed a motion in limine to admit evidence of specific instances of conduct which implicated Moore's character for truthfulness. First, Defendants requested to present evidence that Moore had previously used multiple names and dates of birth. The court granted their motion stating that past use of multiple names and dates of birth is probative of truthfulness or untruthfulness. Next, Defendants sought to admit evidence of Moore's failure to file income tax returns. The court conditionally denied this request explaining:

> [T]he failure to file an income tax return does not implicate one's credibility or honesty where one is not required to file such a return. Because there is no evidence that Moore was required to file income tax returns or that he owed the federal government money, the Court concludes that his failure to file income tax returns does not reflect upon his truthfulness or untruthfulness.

However, ff Defendants could show that Moore was required to file such returns and didn't, then this would be probative of truthfulness or untruthfulness.

C. Impeachment Using aPrior Conviction to Show Dishonest Character

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

United States v. Cavanaugh, 2020 WL 4514770 (D.C.N.D. 2020). Cavanaugh was charged with sexual abuse of an incapacitated victim and aggravated sexual abuse by force. The Government moved in limine to admit Cavanaugh's prior convictions as impeachment evidence in case he chose to testify. First, the Government sought to introduce three prior misdemeanor convictions, one for Forgery in 1997, and two for False Information to Law Enforcement in 1999 and 2006. The District Court denied the introduction of these convictions. Although the misdemeanors "plainly qualify as crimes that required proof of a dishonest act or false statement," they occurred more than 10 years prior and their probative value was low. They held low probative value because they involved conduct that did "not approach the gravity of the Government's theory…that Cavanaugh lied to federal agents in two separate interviews when confronted with sexual assault allegations." Next, the Government sought to introduce evidence of Cavanaugh's Escape conviction from 2011. The Government argued that although the Escape statute contained no "facial element of dishonesty or false statement," the "facts underlying Cavanaugh's escape conviction demonstrate deception." However, the Court held that in pleading guilty to this offense, Cavanaugh would not have been required to admit to lying. Thus, "the Class A Misdemeanor Escape offense did not require Cavanaugh to admit a dishonest act or false statement when pleading guilty. The conviction is therefore not admissible under Rule 609(a)(2)."

D. Rule 806 and Attacking the Credibility of Hearsay Testimony

Rule 806. Attacking and Supporting the Declarant

United States v. Bailey, 762 Fed.Appx. 698 (11th Cir. 2019). Bailey was convicted for possessing a firearm as a previously convicted felon. On appeal, he argued the District Court erred in allowing the prosecution to impeach him as a hearsay declarant with evidence of his previous convictions and failed to conduct the proper balancing test under Rule 609 in admitting evidence. At trial, Bailey's ex-girlfriend testified for the prosecution concerning a phone call she had with Bailey in which he stated that he had totaled his car. On cross, Bailey asked her about another phone call in which he said that someone else was driving his car and had fled from the police. Then the prosecution requested and the court allowed, the introduction of his previous convictions as impeachment evidence. The Eleventh Circuit affirmed the District Court's ruling. It held that "a criminal defendant's hearsay statements elicited through a defense witness fall within the purview of Rules 806 and 609." The court also held the prejudicial value of the evidence was properly balanced against its probative value:

> The felonies admitted by the district court constituted only a subset of defendant's overall criminal record, were close in time to the criminal activity charged in the indictment, and did not constitute evidence that touched upon impermissible matters involving character, moral turpitude, or similar crimes governed by Rule 404. In sum, the evidence was properly balanced to provide the United States with grounds for impeachment while not substantially prejudicing Bailey's right to a fair trial.

Moreover, the court noted that the District Court gave a limiting instruction to remind the jurors that the previous convictions were to be used only as impeachment evidence and not proof of guilt. This further cured any potential prejudice.

Chapter 14 · Lay Opinion

Rule 701. Opinion Testimony by Lay Witnesses

THE VARYING RATIONALES
Asplundh Mfg. Div. v. Benton Harbor Eng'g (3d Cir. 1995)

OPINIONS AS "SHORTHAND"
State v. Norris, 833 S.E.2d 255 (N.C. Ct. App. 2019) – Defendant was convicted for robbery with a dangerous weapon and second-degree kidnapping. She appealed her conviction, raising several arguments regarding the trial evidence and jury instructions. The court held that "the trial court properly admitted testimony by a law enforcement officer who explained that he believed a NASCAR sweatshirt and camouflage mask he found while searching Norris's home were "identical" to those worn by the robbery suspect in surveillance video."

> "Under Rule 702, "a witness may state the instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time. Such statements are usually referred to as shorthand statements of fact." *State v. Spaulding*, 288 N.C. 397, 411, 219 S.E.2d 178, 187 (1975). These shorthand statements "are admissible even though the witness must also state a conclusion or opinion in rendering them." *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981)."
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> "Because Officer Ferguson's testimony was based on his personal observations during the investigation of the robbery, because he was in a better position than the jury to draw inferences based on what he saw, and because his statement that the items were "identical" to those in the video was a shorthand statement summarizing a variety of collective observations occurring in the moment, the trial court did not err by permitting this testimony. *Buie*, 194 N.C. App. at 733, 671 S.E.2d at 356."

OPINIONS AND LEGAL TERMINOLOGY
United States v. Bowling, 952 F.3d 861 (7th Cir. 2020) – Bowling purchased over $1.3 million worth of computer equipment on the City of Gary, Indiana's vendor accounts and then sold the devices for cash which left the city to pick up the tab. A jury convicted Bowling of theft from a government that received federal funds. Bowling appealed, arguing that the trial court abused its discretion in admitting testimony. The Court of Appeals affirmed her conviction and sentence. The testimony in question was from Ms. Krug, where she described her reaction to an email using the word "fraud" in her recollection. The court states that the "question posed to Ms. Krug was carefully worded to elicit Ms. Krug's personal thoughts at the time she received the subject email, and the responsive "fraud" testimony concerned only her own thoughts upon receipt of that email. She was not drawing an inference from the evidence or offering a legal opinion or conclusion that Bowling had in fact committed fraud regarding the computer orders. Instead, Ms. Krug testified as to her reaction at the time based on her own perception. Although Ms. Krug used the word "fraud," a legal term in certain circumstances, the clear import of the testimony was that Ms. Krug used the term in the colloquial sense. See United States v. Locke, 643 F.3d 235, 242 (7th Cir. 2011) (holding witnesses' use of the word "fraud" in the colloquial sense, "employing the vernacular of their financial professions," was not improper lay testimony). A witness's informal use of a term

that may also be legal in character does not inexorably turn that testimony into improper lay testimony."

IS THE OPINION "HELPFUL"

United States v. Diaz, 951 F.3d 148 (3d. Cir. 2020) – Defendant convicted of conspiracy to distribute and possess with intent to distribute heroin and cocaine. Court of Appeals holds that two parts of DEA agent's testimony was inadmissible lay opinion testimony because it was not helpful to the jury. Defense counsel did not object at trial, so the court applies the "plain error" standard of review and determines that there was no plain error warranting reversal.

> "The "purpose of the foundation requirements" of Rule 701 "is to ensure that such testimony does not ... usurp the fact-finding function of the jury." Fulton, 837 F.3d at 291–92 (citation omitted). Therefore, the helpfulness requirement in 701(b) requires courts to exclude "testimony where the witness is no better suited than the jury to make the judgment at issue." Jackson, 849 F.3d at 554 (quoting Fulton, 837 F.3d at 293). Here, the jury was perfectly well suited to determine, based on the evidence before them, whether Diaz worked as a part of Guzman's conspiracy. Indeed, that was the primary question facing them. Gula's comments articulated precisely the conclusion the government asked the jury to infer from the evidence presented at trial, removing the jury's need to personally review the evidence. See United States v. Grinage, 390 F.3d 746, 750 (2d Cir. 2004). Rather than offering insight the jury could not itself have gleaned from the evidence, Gula's testimony served to provide the conclusion the government wanted the jury to reach." *United States v. Diaz*, 951 F.3d 148, 156 (3d. Cir. 2020)

IS IT "LAY" OR "EXPERT" TESTIMONY?

State v. Wickham, 938 N.W.2d 141 (N.D. 2020) – Defendant convicted of gross sexual imposition and appealed, arguing that the testimony of two specific witnesses was improper lay opinion testimony and therefore erroneously admitted. The Supreme Court of North Dakota held:

- Testimony of registered nurse describing her job activities and her observations during her examination of victim was fact evidence, not expert opinion testimony; and
- Trial court did not commit obvious error in admitting testimony of registered nurse regarding victim trauma, victim reporting, and that injury in victim's case was not consistent with normal sexual encounter without qualifying nurse as expert witness.

Since there was no timely objection, the court applied "plain error" and found that there was no obvious error warranting reversal.

Webasto Thermo & Comfort North America, Inc. v. Bestop, Inc., 2019 WL 3334566 (E.D. Mich. July 25, 2019) – Patent infringement case; Plaintiff filed motion in limine to preclude BesTop from providing opinion testimony regarding the validity of the patent-in-suit. BesTop argues that they intend to call lay witnesses to provide fact testimony about their "personal involvement in the development and marketing of the alleged infringing device." Court holds that "Mr. Griewski's testimony concerning the Sarns 9000—to the extent that it is premised on his personal knowledge regarding the machine and the way that it operates—is admissible. However, Mr. Griewski may not offer opinion testimony comparing the Sarns 9000 to the 131 Patent."

> "BesTop cannot offer lay opinion testimony under Rule 701 related to invalidity, obviousness, or secondary considerations of obviousness and its motion is GRANTED to that extent. But BesTop is correct that the Court cannot rule on testimony that has not yet

> been offered and BesTop is permitted to offer lay opinion testimony that falls within a witness's personal knowledge and is not based on scientific, technical, or other specialized training, as discussed in these cases, subject of course to relevance and other evidentiary objections."
> "Lay opinion testimony is "not to provide specialized explanations or interpretations that an untrained layman could not make if perceiving the same acts or events." U.S. v. Conn, 297 F.3d 548, 554 (7th Cir. 2002). As stated by the district court in Gart v. Logitech, Inc., 254 F.Supp.2d 1119, 1123 (C.D. Cal. 2003), when "declarants compare [prior art] to the [ ] Patent, they provide testimony that ... require [s] specialized knowledge." Id. "This they are not permitted to do as laypersons.""

Leon v. TransAm Trucking, Inc., 2020 WL 728785 (S.D.N.Y. 2020) – Plaintiff brought suit after her vehicle was allegedly struck by one of defendant's truck drivers and she sustained permanent injuries. Defendant moved in limine to preclude expert testimony from lay witness, Maritza DeJesus, that the turn she observed Tobie make in the truck was illegal and opinion testimony from Officer Ayala (who arrived on the scene after the accident) as to the cause of the collision. Plaintiff did not oppose the preclusion of DeJesus' testimony, so the court only analyzes the admissibility of Officer Ayala's testimony. Since the Plaintiff was the proponent of the opinion testimony, she bore the burden of proving that the opinion is: (a) rationally based on the witness' perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." The court held that Plaintiff did not meet her burden of proof, failing to satisfy at least two of the prerequisites.

"First, Plaintiff has failed to show that the testimony is rationally based on Officer Ayala's perception. Indeed, the evidence demonstrates that it is not. Officer Ayala arrived at the scene of the crash only after it occurred and has no firsthand knowledge of its cause. … Second, the proposed testimony is independently inadmissible because it depends, at least in part, "on his specialized training and experience." Id. at 216. The Second Circuit has made clear that "[i]f the opinion rests 'in any way' upon scientific, technical, or other specialized knowledge, its admissibility must be determined by reference to Rule 702, not Rule 701." The court also held that the testimony was not helpful because it was a conclusory statement that usurps the factfinding function of the jury. Court held that Officer Ayala could testify to what he did and did not observe at the scene, granting Defendant's motion. The testimony would have to be admitted under Rule 702, which was impossible at this point in time because the parties were past the deadline for expert disclosures.

Chapter 15 – Expert Opinions

WHO MAY BE AN EXPERT?

Pearson v. Wal-Mart Stores, Inc., 2019 WL 2373201 (S.D. Miss. 2019) – Plaintiff slipped and fell in parking lot of Sam's Club. She alleges that drainpipes on the side of the store deposited rainwater and algae from the roof onto a walkway outside the store, collecting in the parking lot in front of the store's exit. Plaintiff argues that Defendant knew or should have known of the hazardous condition. Plaintiff offers Mark Williams as an expert witness to "testify at trial that the pavement where Pearson slipped and fell was not properly sloped to drain. He believes that it was foreseeable to Sam's Club that water contaminated with organic matter from the roof would flow down the rainwater leaders, across the concrete walkway, accumulate in the pavement depression, and remain stagnant each time it rained." Williams has a degree in architecture and worked in a standard architecture practice for over a decade before joining Robson Forensic. At Robson, Williams serves as a "forensic architect," providing expert testimony in litigation. He has designed several buildings similar to the one in question and is a registered architect in 11 states. Defendant filed a motion to exclude the testimony of Plaintiff's expert. Defendant argues that Williams (expert witness) is not qualified to provide expert testimony regarding the growth, movement, or slipperiness of algae. The court holds that Williams is qualified to give the proposed opinion, denying the defendant's motion.

> "A proposed expert does not have to be "highly qualified in order to testify about a given issue. Differences in expertise bear chiefly on the weight to be assigned to the testimony by the trier of fact, not its admissibility." *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009). Likewise, "[a] lack of personal experience ... should not ordinarily disqualify an expert, so long as the expert is qualified based on some other factor provided by Rule 702...." *United States v. Wen Chyu Liu*, 716 F.3d 159, 168 (5th Cir. 2013). However, regardless of its source, "the witness's ... specialized knowledge," must be "sufficiently related to the issues and evidence before the trier of fact that the witness's proposed testimony will help the trier of fact." *Id*. at 167."

In re Corporate Resource Services, Inc., 603 B.R. 888 (Bankr. S.D.N.Y. 2019) – In proceeding challenging Chapter 11 debtor's prepetition transfer of one of its businesses, Chapter 11 trustee filed motion in limine to prevent valuation expert Gardner from testifying to his criticism of the "Goldin Report," which was a valuation report of the company in question. The trustee argued that because Gardner did not have experience in valuing staffing companies specifically, he was not qualified to serve as an expert witness in the case at hand. Gardner testified to his extensive experience in asset valuation generally. The court held that the expert was not disqualified from giving expert opinion on value of business because he did not have expertise specifically with regard to valuation of staffing companies. They reason that "Gardner should not be disqualified because he does not have the expertise of valuing staffing companies or the narrow disputes in this lawsuit. The lack of industry-specific experience is not disqualifying."

EXPERTS — THE PROCESS FOR DETERMINING WHETHER THE WITNESS IS QUALIFIED

United States v. Ruvalcaba-Garcia, 923 F.3d 1183 (9th Cir. 2019) – Defendant was convicted of illegally reentering the United States after being removed. His defense at trial

was that he not the same person who was removed in 2015. The government called a fingerprint analyst to provide expert testimony that a fingerprint taken during the 2015 removal process belonged to defendant. Defendant argues that the district court abused its discretion by admitting the expert's testimony without first finding it "relevant" and "reliable" under *Daubert*. The court agreed that the court abused its discretion but held that the error was harmless and did not warrant reversal.

> "At trial, the government introduced into evidence a copy of the 2015 Verification of Removal, but the quality of the copy was quite poor, and the photograph and fingerprint were nearly indiscernible. The government then called Beers to testify about his fingerprint analysis. The parties questioned Beers about his qualifications and methodology, with Ruvalcaba noting at the outset that he was "doing this with an eye towards Daubert." Beers testified that he had worked as an FBI fingerprint technician and instructor for 33 years, reviewing more than 300,000 fingerprints and testifying as an expert more than 200 times. He had never "not been qualified [in any proceeding] as an expert in fingerprints." He uses "the Henry system of classification and identification," which he described as the prevailing fingerprinting methodology that analyzes fingerprints according to unique points of identification. On cross-examination, Beers testified that he had not taken continuing education courses in fingerprint analysis, and he confirmed that was he not a member of the International Association for Identification ("IAI") or the Scientific Working Group on Friction Ridge Analysis, Study, and Technology ("SWGFAST"). He also acknowledged that he did not strictly follow the "ACE-V" method of fingerprint analysis, which is endorsed by SWGFAST and stands for analysis, comparison, evaluation, and verification. See United States v. Herrera, 704 F.3d 480, 484–85 (7th Cir. 2013) (describing the ACE-V method). Although Beers followed the "ACE" part of the method, he did not have another fingerprint technician independently verify his conclusions. Nor did he know how many points of identification he used to match Ruvalcaba's fingerprint."

State v. Stroman, 2019 WL 3714941 (S.C. Ct. App. 2019) – Defendant appealed his convictions of two counts of criminal sexual conduct with a minor in the first degree, arguing that the trial court erred in qualifying expert witness before making "preliminary findings as to the admission of the expert pursuant to Rule 702." He alleges that the court erred by "(1) failing to make specific findings that delayed disclosure was beyond the ordinary knowledge of the jury and required an expert opinion; (2) failing to make specific findings that the proffered expert had the requisite knowledge and skill to qualify as an expert; and (3) failing to make specific findings as to the reliability of the testimony." The court affirmed, holding that the trial court conducted the threshold inquiry required pursuant to Rule 702 and that their decision to qualify is supported by the record. There was no abuse of discretion by the trial court warranting reversal.

Nikoghosyan v. AAA Cooper Transportation, Inc., 2019 WL 4956158 (N.D. Okla. 2019) – Personal injury suit arising from injuries plaintiff sustained in a collision between two tractor-trailers in 2016. Plaintiff filed a Motion to Exclude expert witness testimony, arguing that the expert is unqualified, the testimony is not based on sufficient facts or data,

and the testimony is not the product of reliable principles. The court held that the witness was qualified to give proposed expert testimony at trial and denied plaintiff's motion.

> "When an objection to an expert's testimony is raised, the court must perform Daubert gatekeeper duties before the jury is permitted to hear the evidence. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592-93 (1993); *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 149 (1999). These gatekeeper duties require the Court to determine both (1) that the expert witness is qualified to offer the opinions he or she is espousing and (2) that the proponent of the expert witness has proved by a preponderance of the evidence that expert's opinions are both relevant and reliable. *Kumho Tire*, 526 U.S. at 141, 152. When the testimony of an expert is challenged, the proponent of the testimony bears the burden of establishing its admissibility. *United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009) (en banc); FED. R. EVID. 104(a)."

HELPFULNESS — A NECESSARY CONDITION FOR PERMITTING EXPERT TESTIMONY

Jordan v. Elmer Enrique Ventura, 2019 WL 1089430 (W.D. Ark. 2019) – Jordan brought suit alleging that he suffered injuries as a result of an automobile accident between two tractor trailers. Jordan claimed that Ventura entered into his travel lane and pushed his tractor-trailer into another disabled tractor-trailer parked on the shoulder. Jordan and Ventura gave differing statements to the police as to how the accident occurred and there were no other eyewitnesses identified. Jordan sought to offer expert testimony of Ben Railsback and David Dorrity. Ventura moved to exclude the testimony of these experts, arguing that the experts' opinions will not be helpful to the jury.

> Railsback testimony – Accident at issue encompasses two separate collisions: one between Jordan and Ventura and one between Ventura and the driver of the disabled vehicle. There is no dispute as to whether the first collision occurred or the facts of the second collision. The court holds that the Railsback testimony is not helpful and therefore inadmissible because it pertains only to the second collision, which is not a fact at issue.

United States v. Lundergan, 2019 WL 3804239 (C.D. Ky. 2019) – Defendants allegedly participated in a scheme to funnel hundreds of thousands of dollars in corporate funds into the 2014 US Senate race, violating multiple provisions of the Federal Election Campaign Act (FECA). Defendant gave notice of his intent to call expert witnesses Michael Toner and Peter Nichols, who are former officials of the Federal Election Commission. The experts would testify to the relevant rules and regulations of the FECA.

> The court applied the Sixth Circuit two-part test for determining admissibility of expert opinions: "First, is the expert qualified and the testimony reliable? And second, is the evidence relevant and helpful to the trier of fact?" Courts generally do not admit expert testimony that "'states a legal standard or draws a legal conclusion by applying law to the facts' because it 'supplies the jury with no information other than the witness's view of how the verdict should read.'" *United States v. Offill*, 666 F.3d 168, 175 (4th Cir. 2011) (citing *Weinstein's Federal Evidence* § 704.04[2][a] (2d ed. 2003)). However, district courts may admit such expert testimony "when the legal regime is complex, and the judge determines that the witness' testimony would be helpful in explaining it to the jury[.]" *Id*. In these

> narrow circumstances, expert testimony on legal issues is permissible "where [it] would assist in explaining legal concepts, and where such opinions are not inconsistent with the instructions to be given by the Court." *United States v. Gallion*, 257 F.R.D. 141 (E.D. Ky. March 30, 2009)."

The court held that the proposed experts satisfy the Sixth Circuit's test, however, "the Court only allowed testimony that serves to clarify "the complex regulatory scheme that is at the heart of this case."

Cameron v. Lowes Home Centers, Inc., 2109 WL 2710019 (D. Ariz. 2019) – Plaintiff moved to preclude testimony from defense expert, arguing that the testimony is irrelevant because there is no issue raised about Plaintiff's earning capacity and she continues to work in the same field. The court held that the expert testimony is relevant because the plaintiff's ability to work in the same capacity as before the alleged accident goes to damages.

Roohbakhsh v. Board of Trustees of Nebraska State Colleges, 2019 WL 5653448 (D. Neb. 2019) – Case is an action for discrimination on the basis of sex in a federally funded educational program pursuant to Title IX. Defendant moved to exclude the testimony of Plaintiff expert Saundra K. Schuster, J.D., arguing that the expected testimony improperly invades the province of the jury by expressing opinions on legal standards. The Court grants motion, holding that Shuster's opinions on whether Chadron State's conduct amounted to deliberate indifference is a question for the jury to determine and must be excluded.

RELIABILITY UNDER RULE 702

Grayiel v. AIO Holdings, LLC, 2109 WL 2372901 (W.D. Ky. 2019) – Case arises out of a series of allegedly fraudulent financial transactions by Defendants and now deceased Martin Twist. Plaintiff alleges that Defendants conspired with Mr. Twist to transfer his assets to shield them from creditors, including Plaintiff. Both parties proffered expert witnesses to speak to the value of the assets in question. Defendants move to strike testimony of Plaintiff expert Christopher Meadors, arguing that his valuation methods were unreliable. The court denied this motion, holding that mere criticism of an expert witness's methodology does not render his opinion unreliable.

> "This Court has held that "any criticism of the expert appraiser's chosen approach 'goes to the weight of [his] testimony and not admissibility,' and thus 'is a proper matter for cross-examination but does not render [the expert's] opinions unreliable.'" *Powell v. Tosh*, 942 F. Supp.2d 678, 690 (W.D. Ky. 2013) (quoting *Smith v. Carbide & Chems. Corp.*, 2009 WL 5184342 (W.D. Ky. Dec. 22, 2009)). While the discounted cash flow analysis method may not be the perfect method of valuation, its use does not render the testimony inadmissible. The role of the factfinder is to weigh testimony and apply it to the facts. If the defendants wish to challenge the testimony, they may do so via cross-examination, not through exclusion."
>
> "This is not 'junk science,' it is a difference of opinion"

DAUBERT HEARINGS AND A JUDGE'S GATEKEEPING FUNCTION

R.D. v. Shohola, Inc., 2019 WL 6053223 (M.D. Pa. 2019) – Case brought for alleged negligence during a Cape Cod camping trip run by the defendant. During the trip, four minors (including the plaintiff) were "placed together in a tent without any direct adult supervision." Plaintiff alleges that as a result of being put in this situation, he was the victim of sexual assault and suffered physical and psychological injuries. The plaintiff has moved to preclude testimony from defense expert Dr. Loftus, arguing that it is "speculative, lacks scientific support, and invades the province of the jury." Dr. Loftus was expected to testify to the "inaccuracy and vagaries of human recollection." The court conducted a *Daubert* hearing to evaluate the admissibility of Loftus's testimony and determined that the testimony is not reliable and therefore inadmissible at trial.

> Dr. Loftus possesses the professional qualifications to serves as an expert witness in certain fields of psychology, particularly as it pertains to the science of human recollection. The court lists several factors that undermine the reliability of the expert testimony. First, Loftus has never examined, tested, or even met the plaintiff (the other experts had), so opinion based on selected materials provided by counsel. Loftus's report presents opinions in speculative and equivocal manner and does not express view to a reasonable degree of medical certainty. "Expert testimony cast in terms of "mays" and "mights" is inherently less reliable than opinions stated with a reasonable degree of scientific certainty." Lastly, the court mentions that some of the conclusions Loftus was to testify to were within the common understanding of lay jurors.

Lefebre v. Remington Arms Company, LLC, 415 F.Supp.3d 748 (W.D. Mich. 2019), *appeal dismissed*, No. 19-2455, 2020 WL 1320644 (6th Cir. Jan. 31, 2020) – This case arose from the accidental shooting death of Plaintiff's daughter, Shellsea. Plaintiff alleged that defects in the rifle caused it to unexpectedly discharge while driving, killing his daughter. "Plaintiff's experts opine that excess uncured Loctite 660 in the trigger mechanism caused the rifle to fire without a trigger pull when the safety was in the "OFF" position." The experts were both experienced gunsmiths but had no experience with Loctite 660, which was central to the question of causation. The court held that the experts were not qualified to testify and granted summary judgment in favor of defendants because there was not sufficient evidence to overcome plaintiff's burden of proof.

> "'The issue with regard to expert testimony is not the qualifications of a witness in the abstract, but whether those qualifications provide a foundation for a witness to answer a specific question.' *Berry v. City of Detroit*, 25 F.3d 1342, 1351 (6th Cir. 1994). The specific question in this case is whether 'sticky,' uncured Loctite 660 caused the subject rifle to fire without a trigger pull, and neither of Plaintiff's experts is qualified to answer that question."

EXPERT OPINION ON THE ULTIMATE ISSUE

Grayiel v. AIO Holdings, LLC, 2109 WL 2372901 (W.D. Ky. 2019) – Case arises out of a series of allegedly fraudulent financial transactions by Defendants and now deceased Martin Twist. Plaintiff alleges that Defendants conspired with Mr. Twist to transfer his assets to shield them from creditors, including Plaintiff. Both parties proffered expert

witnesses to speak to the value of the assets in question among other opinions. Defendants move to strike testimony of Plaintiff expert Christopher Meadors, arguing that the "opinions contain clear expressions of the ultimate issue for the jury to decide and are therefore inadmissible under Rule 704. Plaintiff disagrees with this characterization of Meadors' report: "... Meadors will explain to the jury the details of Defendants' fraud and abuse of the corporate form and contrast those details with the operations of legitimate businesses. The court holds that the testimony is admissible so long as Meadors "establishes the factual elements of fraud, not the fraud itself."

> "Defendants will be free to object at trial if Meadors' opinions veer too far off course from providing factual conclusions from which the jury may draw inferences, which are appropriate, and borders into drawing legal conclusions on the ultimate issues of fraud in this case, which are inappropriate."

CHAPTER 16: HEARSAY: AN INTRO TO THE CONCEPT

2021 Cases

People v. Neal, 150 N.E.3d 984 (Ill. App. 2020)

Neal was convicted on two counts of unlawful possession of a controlled substance with intent to deliver. On appeal, he claimed that a phone bill with his name and the address where the drugs were found, as well as an unopened envelope addressed to him at the same residence were hearsay statements used to prove that he lived there. The issue before the Court was whether mail and other documents containing implied assertions of fact are hearsay. The Court held that they were not, and that the documents were therefore properly admitted in trial. In reaching this conclusion, the Court found that the senders did not intend to assert anything by including his name and address on the documents at issue, but were rather necessary for sending through the mail. Therefore, these writings would not satisfy the intent requirement found in the Advisory Committee Notes for Fed. R. Evidence 801(a).

Hart v. Keenan Properties, 463 P.3d 824 (Cal. 2020)

After developing Mesothelioma, Hart sued Keenan for distributing asbestos-laden pipes. At trial, Keenan sought to exclude Hart's supervisor from testifying about seeing "Keenan" on company invoices and claimed that it constituted inadmissible hearsay. The trial court rejected Keenan's argument, holding that it was either a party opponent statement or merely evidence of identity. After the Court of Appeals reversed, Hart appealed to the Supreme Court of California. While acknowledging that statements not used for their truth must be relevant, the Supreme Court held that the supervisor's testimony regarding the invoices was relevant to prove that Keenan supplied the dangerous pipes. Further, the court held that testimony regarding the company's slogan, "Best Pipes On The Planet," which also appeared on the invoice, was not hearsay because it was used to further identify Keenan as the supplier and not prove whether the pipes were superlative. Therefore, the Court reversed the Court of Appeals, and affirmed the trial court's holding.

Chapter 17 – Exclusions from the Hearsay Definition

PRIOR INCONSISTENT STATEMENTS MADE UNDER OATH

Helms v. State, 271 So.3d 1030 (Fla. Dist. Ct. App. 2019), *review denied*, No. SC19-1178, 2019 WL 3729786 (Fla. Aug. 8, 2019) – Defendant was convicted of robbery with a firearm and sentenced to life in prison as a prison releasee reoffender. He appealed, arguing that the trial court erred in allowing the investigating detective to testify that defendant's girlfriend advised the detective of his cell phone number, as this was improper hearsay. Helm's girlfriend testified that she met with the detective but did not remember giving either her or Helm's cell phone number to the detective. She also testified that she did not remember Helm's cell phone number. The detective then testified that Helm's girlfriend gave her his cell phone number when they met and based on that information, obtained a search warrant for phone records associated with the number. The trial court admitted both the girlfriend's statement and the phone records for the number. The court reverses and remands for a new trial, holding that because the girlfriend's prior inconsistent statement was not made under oath, it could not be admissible as substantive evidence and was in fact hearsay. The court found that this error was not harmless, which warranted the reversal.

PRIOR CONSISTENT STATEMENTS

Bullington v. State, 2020 WL 2090199 (Fla. Dist. Ct. App. May 1, 2020) – Bullington appeals convictions and sentences for multiple sexual crimes involving his minor daughter, A.B. The trial court erroneously admitted prior consistent statements that A.B. made to two detectives describing the sexual abuse to which she was subject and identifying Mr. Bullington as her abuser. The statements A.B. made to the detectives were offered by the State as prior consistent statements to corroborate A.B.'s in-court testimony in the face of Mr. Bullington's defense that she was making up the allegations of abuse. "A prior consistent statement is not inadmissible as hearsay when (1) the declarant testifies at trial and is subject to cross-examination about the statement and (2) the statement is made to rebut a charge of improper influence, motive, or recent fabrication. *See also Chandler v. State*, 702 So. 2d 186, 197-98 (Fla. 1997)." The first requirement is satisfied because A.B. was present at trial and subject to cross-examination. The second requirement is not satisfied because "a prior consistent statement is admissible only if the statement is made before the recent fabrication by the declarant or before the improper influence or motive arose."Bullington's charge that A.B. fabricated the allegations is based on a motive that existed before she made the statements in question to the detectives. The defense alleges that A.B. was influenced by a book she read prior to the statements about a boy who "bettered his circumstances by reporting abuse," which led her to report the abuse. The statements were consistent with trial testimony but were made "after the facts giving rise to the charge of fabrication existed," making them inadmissible under Rule 801(2)(b). The court, however, affirms the conviction and sentence after finding that the error was harmless and did not warrant reversal.

Commonwealth v. Morales, 136 N.E.3d 344 (Mass. 2019) – Morales appealed his conviction by a jury of murder in the first degree arguing that the trial judge abused her discretion by allowing a State police trooper to testify to prior statements of a key witness

that were consistent with the witness's trial testimony. The court notes at the outset of the opinion that because trial counsel failed to object to any portion of the trooper's testimony, they must review the record and determine if any error in admitting the testimony created a substantial likelihood of a miscarriage of justice that would warrant relief. The court found no error in the admission of the prior consistent statement and affirmed judgment. The testimony was admissible because from the beginning, defense counsel specifically challenged Perez's credibility, raising the issue of recent contrivance and opening the door.

> "Defense counsel's references to Perez's plea agreement during the opening statement and during cross-examination served no other purpose than to establish that Perez was motivated to fabricate his testimony in exchange for a lesser sentence. We conclude that defense counsel indeed raised the issue of recent contrivance and that the judge unambiguously so found."

Kitchings v. State, 291 So.3d 181 (Fla. 4th DCA 2020) – Defendant was convicted of burglary, false imprisonment, and sexual battery and appealed. In his appeal, the defendant argued that the trial court erred in refusing to allow Kitching's initial statement to police immediately following his arrest to be admitted into evidence. The Court of Appeals reversed and remanded, holding that the trial court improperly refused to allow the defense to introduce Kitchings' initial statement to the police to rebut an implied charge of recent fabrication. Once the State implied that Kitchings' trial testimony was fabricated, the defense should have been permitted to show that Kitchings had provided an earlier, consistent statement to the police. Given the prosecutor's often misleading cross-examination about inconsistencies and omissions, introduction of the entire statement would have placed these matters in a broader context so the jury could have fully evaluated the veracity of the trial testimony. The court stated that "the importance of [the] testimony, and the reason why the error cannot be deemed to be harmless, is demonstrated by the written question the jury asked during deliberations—'Whose decision was it not to show [Kitchens'] interview?'"

> "There must be an initial attempt on cross-examination to demonstrate the improper influence, motive or recent fabrication; once such an attempt has occurred, then prior consistent statements are admissible on the redirect examination or through subsequent witnesses to show the consistency of the witness' trial testimony. The prosecutor began her cross examination with a series of questions that are a textbook example of an "implied charge ... of recent fabrication" within the meaning of section 90.801(2)(b) by suggesting that Kitchings had manufactured his testimony after fully evaluating all of the state's evidence against him.
>
> Q: You've had the opportunity to sit in the courtroom the whole time, right?
> A: Yes.
> Q: Listen to all of the testimony?
> A: Yes.
> Q: Every single witness?
> A: Sure.
> Q: You've got to look -- you've looked at every single exhibit?
> A: From a distance but yes.
> Q: You have heard all of the scientific evidence?
> A: Yes."

STATEMENTS OF IDENTIFICATION

Traynham v. State, 221 A.3d. 1144 (Md. App. 2019) – Defendant was convicted of armed robbery, robbery, theft of property, and carrying a concealed weapon. He appealed his conviction, arguing that the trial court erred in admitting into evidence hearsay statements made by the victim during a photo array "identification." Lawson was robbed at gunpoint out of her home and then positively identified the defendant during a photo array "identification" with Officer Mahan. At trial, the State introduced the photo array over Defendant's objection. Lawson testified about the photo array and then, without objection, identified Defendant in court. In his appeal, Defendant argues that the statements during the procedure were not "statements of identification of a person." Under the *Maryland Police Training and Standards Commission's Eyewitness Identification Model Policy*, "proper photo array procedures include instructing the witness that 'the procedure requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification.'" *DOJ Standards at 19*. The standards direct officers to, "[d]ocument the results of the procedure in writing, including the witness' own words regarding how certain he/she is of any identification." The array form has explicit instructions for how the administrator must respond if the witness is vague (i.e., "I think it is #3"), which includes asking what the witness meant by their statement, how certain they are, and why they are so sure. All answers must be recorded. In this case, there were no indications in the record that Mahan asked Lawson the required follow up questions to clarify her statements. The court held that the trial court erred by admitting the photo array procedure and accompanying testimony into evidence because it is hearsay and does not fall under any exception to the rule.

> "There is no bright-line test for what constitutes a positive identification when the witness's statements are less than a 'yes, that is the assailant.' An examination of photo array identifications admitted at trial, however, does reveal some significant commonalities—chief among them being that witnesses write their identifications, usually directly on the photo card."

Diggs v. State, 2019 WL 6654058 (Md. App. 2019) – Diggs was convicted of first- and second-degree murder, attempted first- and second-degree murder, first-degree assault, and related handgun offenses. The charges arose from the shooting of Amanda Duer and her husband Derik Henderson. Duer did not survive, but Henderson lived to identity the shooter as Diggs. When selecting Digg's photo as the person who shot him and his wife, Henderson told Sergeant Tanis, "that's him all day." Henderson also signed the photo he selected. Both the array and an audio recording of the identification process were admitted into evidence over defense objections. Diggs appealed his conviction, arguing that the trial court erred in admitting Henderson's photo array identification and accompanying testimony into evidence under as a "statement of identification" under Rule 802(1)(c). The Court of Appeals affirmed, holding that the trial court did not abuse its discretion in admitting the identification process and testimony into evidence under the statement of identification exception.

> "This case is easily distinguished because of its materially different facts. Each statement challenged by Diggs relates to the photo identification and falls within the hearsay exception in Md. Rule 5-802.1(c). Patently, Henderson's statements that

> '[h]e shot me and Mandy' and 'Yeah, that's him all day' are statements of identification in that they accuse Diggs of being the person who shot him. Henderson's ensuing statement, 'that he was a hundred percent sure of the suspect that shot him [,]' adds relevant information concerning Henderson's level of certainty about that identification. None of the challenged statements contained the type of information that went beyond the identification in Tyler. Moreover, Diggs had the opportunity to cross-examine Henderson about what he told Sergeant Tanis, to cross-examine Sergeant Tanis about Henderson's statements, and to recall Henderson to question him about the statements Sergeant Tanis recounted. Based on this record, the trial court did not err in admitting Sergeant Tanis's testimony recounting Henderson's statements during the photo array."

PARTY-OPPONENT STATEMENTS

Felps v. Mewbourne Oil Company, Inc., 2020 WL 254389 (D.N.M. 2020) – Plaintiff brought class action against former employer asserting violations of both the FLSA and the New Mexico Minimum Wage Act, because defendant misclassified all "Lease Operators," which precluded them from receiving any additional compensation for hours worked in excess of 40 hours a week. Plaintiff filed a motion asking the Court, *inter alia*, to prohibit class communications by Defendants. In support of this motion, Plaintiff submitted the Declaration of Jeffrey Fraley, a former employee of Defendant, which Defendants moved to strike. In his Declaration, Fraley states that he "spoke by phone with a current Lease Operator for Mewbourne," who asked to "remain anonymous" and thus is identified as "John Doe." The remainder of the paragraphs in the Declaration, namely paragraphs 4 through 11, contain "the information relayed to [Fraley] by John Doe," which detail events surrounding communications and offers of settlement by Defendant to current employees. Defendants argue that these remaining paragraphs contain inadmissible evidence and thus should be stricken from the record. The Court agreed that Fraley's statements setting forth the information relayed to him by John Doe should be stricken because they constitute inadmissible hearsay.

> Plaintiff contends that none of John Doe's statements are hearsay, because as a current employee of Mewbourne, his statements constitute non-hearsay admissions of a party-opponent. Rule 801(d)(2) of the Federal Rules of Evidence provides that a statement offered against a party-opponent is not hearsay if it was made by an employee of the party-opponent on a matter within the scope of the employment relationship, while that relationship existed. Fed. R. Evid. 801(d)(2). It "would be error" to consider John Doe's statements as admissions of a party-opponent, however, as "[u]nder [the Tenth Circuit's] controlling precedent, an employee's statements are not attributable to [his or] her employer as a party-opponent admission in an employment dispute unless the employee was 'involved in the decisionmaking process affecting the employment action' at issue." *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d, 1202 (10th Cir. 2015) (*quoting Johnson v. Weld Cty.*, 594 F.3d 1202, 1208-09 (10th Cir. 2010)). Here, Plaintiff does not argue, nor would it be convincing if he did, that John Doe was "involved in the decisionmaking process affecting Mewbourne's efforts to settle with its employees. Instead, John Doe was allegedly one of the employees on the receiving end of that

decisionmaking process. Accordingly, John Doe's statements are not admissible as statements of a party-opponent.

Abelmann v. SmartLease USA, LLC, 2020 WL 1663234 (D.N.D. 2020) – SmartLease filed a motion in limine requesting that the court rule on the admissibility of some twenty-four pages of diary entries made by the decedent, Leanne Abelmann. The Court denies the motion to admit all twenty-four pages because of the difficult evidentiary questions raised in SmartLease's motion will have to be resolved on an entry-by-entry basis. The court then commented on one of the arguments raised by those opposing the motion that none of the diary entries are admissible as an admission by a party opponent under the exclusion set forth in Rule 801(d)(2) given that Leanne Abelmann is no longer a named party and has been replaced by her personal representative. The argument was twofold: (1) the Federal Rules of Evidence do not recognize a hearsay exception for "privity-based" admissions, and (2) admissions by a decedent are privity-based admissions in an action maintained by a persona representative of a decedent's estate. The argument primarily relied on the Seventh Circuit's decision in *Huff v. White Motor Corp.*–a wrongful death case brought by the administrator of a decedent's estate, an action to which the decedent was never a named party. Here, however, the claims being asserted here are "survival claims" under North Dakota law. That is, they belonged to Leanne Abelmann prior to her death and the personal representative now is simply pursuing them on behalf of Leanne Abelmann's estate. In this situation, the reasoning of the Sixth, and Tenth Circuits is even more on the mark with respect to the decedent and the decedent's estate being essentially the same "party" for purposes of Rule 801(d)(2). The Court ultimately suggests that the decedent's journal entries may be at least partially admissible as a party opponent statement under Rule 801(2)(d). The Court believes that the fact of the declarant's death impacts on the weight of the evidence rather than admissibility. Since this issue will not be decided until trial, the court ordered that the parties may not mention the diary or the diary entries in the presence of the jury until a ruling is sought as to their admissibility out of the presence of the jury.

United States v. Santos, 947 F.3d 711 (11th Cir. 2020) – Santos was convicted of procuring naturalization unlawfully and related offenses. On appeal, Santos contends that the trial court erred in admitting into evidence the annotated version of his N-400 Nationalization Application because Officer Barrios' written statements constituted inadmissible hearsay. During his naturalization interview, Officer Barrios checked in red ink each of Santos's answers regarding his criminal history and wrote "claims no arrest[,] no offense[,] no DUI" under Santos's answers. Officer Barrios also checked in red ink each of Santos's answers regarding his history of trips outside the United States and wrote "claims no other" below the list of trips. Using red ink, Officer Barrios numbered his corrections to the application through 8 and then signed the Application. At the end of the interview, Santos again swore and certified under penalty of perjury that the contents of the Application, the eight corrections, were true and correct. Santos signed the Application in black ink, this time below that second certification. This application was then approved and ultimately relied upon for the issuance of a United States Passport to Santos. Santos failed to disclose several details regarding his criminal history and international travel, including both a murder conviction in and travel to Puerto Rico. The court holds that the annotated Form N-400 was (1) admissible non-hearsay as an adopted admission of a party-opponent under Rule

801, and, (2) alternatively, was properly admitted under the public record hearsay exception in Federal Rule of Evidence 803.

> "Under Rule 801(d)(2)(B), a statement is not hearsay if it is offered against a party and the party manifested that he adopted the statement or believed it to be true. Fed. R. Evid. 801(d)(2)(B). To be admissible as an adoptive admission under Rule 801(d)(2)(B), the statement: (1) "must be such that an innocent defendant would normally be induced to respond," and (2) "there must be sufficient foundational facts from which the jury could infer that the defendant heard, understood, and acquiesced in the statement. Here, Officer Barrios's red marks on Santos's annotated Form N-400 Application are nonhearsay under Rule 801(d)(2)(B) as an adopted statement by an opposing party. The evidence of adoption is much clearer here than in Joshi and Carter, as Santos's case did not involve either silence or arguably ambiguous conduct from which a jury must reasonably infer the defendant's knowing acquiescence in the declarant's statement. Rather, Santos expressly adopted Officer Barrios's corrections in red ink on the Form N-400 by, at the end of the interview, signing Part 13 of the application, swearing or affirming under penalty of perjury that the annotated Form N-400 with those corrections was "true and correct to the best of [his] knowledge and belief.' Notably, Santos never disputed that his signature appears on the annotated Form N-400 Application and did not raise any objection to the authenticity of that document. Further, Santos was able to read and write in English, as evidenced by his passing the reading and writing test Officer Barrios administered. Nothing in the record suggests Santos did not understand Officer Barrios's corrections in red ink when he signed the Application. Under the circumstances, Santos's adoption of Officer Barrios's corrections in red ink is unequivocal.'"

2021 Cases

State v. Steward, 159 N.E.3d 356 (Ohio App. 2020)

Steward was convicted of felonious assault and improperly discharging a firearm. On appeal, Steward argued that the court had committed reversible error by allowing out-of-court recordings, in which witnesses identified Steward as the shooter, to be used as substantive evidence, even though they were offered in trial as prior inconsistent statements. Moreover, Steward asserted that these statements did not qualify as non-hearsay under Evid. R. 801(D)(1) and should have only been admissible for the purpose of impeachment. However, the Court in addressing Steward's argument, found that these out-of-court statements qualified as non-hearsay because: (1) the declarants testified at trial and were subject to cross-examination on that statement, (2) the statement identified a person two to five minutes after perceiving them, and (3) the circumstances demonstrated the reliability of that identification. *See* Evid. R. 801(D)(1)(c). As a result, the Court affirmed the trial court and held that the statements were not only properly admitted as non-hearsay but also admissible as either an excited utterance or present sense impression. *See* Evid. R. 803(2), (3).

State v. Fontenot, 958 N.W.2d 549 (Iowa 2020)

Fontenot was convicted of two counts of indecent contact with a child. At trial, defense counsel cross-examined the victim and suggested that she had fabricated her trial testimony by emphasizing inconsistencies between her trial testimony and deposition. In response, and over Fontenot's objections, the State played a recording of the victim's forensic interview, taken prior to criminal charges being filed against Fontenot and thus prior to the deposition, where she discussed the sexual abuse. The court then instructed the jury that the video could only be used as a tool to assess the victim's credibility. On appeal, Fontenot claimed that it was error to let the jury see the interview because it constituted hearsay. The State disagreed, arguing that the video was admissible as a prior consistent statement under Iowa R. Evid 801(d)(1)(B). The Court subsequently affirmed the trial court's admission of the video, holding that defense counsel had opened the door by stating that "most of what [she] just testified to" was fabricated, and implying that her trial testimony was inconsistent with prior statements at the deposition. The court found that the video was properly admitted because of "the context of how the questions were asked and answered," and because it was recorded before the event [the deposition] defense counsel used to challenge her trial testimony as fabricated.

United States v. Bhimani, 492 F.Supp.3d 376 (M.D. Pa. 2020)

After being arrested and charged with sex trafficking by force and coercion, conspiracy to commit drug trafficking, and managing a drug premises, Defendant-Bhimani provided a statement to police. In this statement, he admitted to his participation in the charged crimes and existence of the alleged conspiracy at the hotel they all worked at. The other defendants subsequently moved *in limine* to exclude Bhimani's recorded statement, arguing that it met no exception under Fed. R. Evid. 801. The court emphasized that there was no dispute that the plain reading of Fed. R. Evid. 801(d)(2)(A) permitted the admissibility of a "confession or admission by a defendant," against the specific defendant, but further considered whether that statement was admissible against his co-conspirators. The court found that at the time of his arrest and interrogation, Bhimani was an agent and employee of the other defendants. While it alluded to a potential debate at a later stage in the proceedings about whether the statements to investigators concerned "matters within the scope of the agency," the court held that the government had sufficiently shown that Fed. R. Evid. 801(d)(2)(D) covered his statements because they were made during his employment with the co-defendants.

Chapter 18 – Exceptions to Hearsay

The Rule Allowing Present Sense Impressions

United States v. Lovato, 950 F.3d 1337 (10th Cir. 2020) – Defendant was convicted of two counts of being a felon in possession of a firearm or ammunition. He appealed, arguing that the trial court abused its discretion in admitting a 911 call under the present sense impression exception to hearsay. On March 3, 2018, a man called 911 to report that he witnessed two men in a Honda shoot at another car. The caller followed the Honda and dialed 911 within "two to three minutes" of observing the gunfire. During the approximately thirteen-minute 911 call, the caller discussed the shooting, his continuing observations of the Honda and its occupants, and his safety, often in response to the 911 operator's questions. The caller began the call by stating that occupants of the Honda "just shot at" another car. After providing his location, phone number, and name to the 911 operator, the caller again described his observations of the shooting less than one minute into the call. Specifically, the caller stated that he observed two Hispanic males in the Honda shoot at a white Durango. Less than three minutes into the call, the caller informed the 911 operator that the shooting occurred "five or six minutes ago." While the caller continued to follow the Honda, he conveyed additional information of his observations. When the caller lost sight of the Honda, he provided his address to the operator and end the call. The district court overruled Defendant's objections to the admission of the 911 call on hearsay grounds. The court concluded that "the length of the call, and the continuous discussion is not such that it destroys the contemporaneousness" required to qualify as a present sense impression. The district court based its conclusion on a finding that the call was "essentially, a continuous conversation" about "the same continuing event." Defendant argued that: (1) the district court abused its discretion by analyzing the 911 call as a whole and (2) the caller's statements were not sufficiently contemporaneous to qualify as present sense impressions. The court affirmed the trial court's decision, holding that the 911 caller's statements qualified as present sense impressions.

> "We start by addressing the manner in which the district court considered the admissibility of the 911 call. On this issue, we conclude that the district court properly analyzed the 911 call as a whole because: (1) no authority requires otherwise in this context, (2) all the statements made within the call pertain to the same temporal event without a substantial change in circumstances, and (3) other relevant factors support the reliability of the statements within the call. No authority creates a blanket requirement that a court must individually analyze each statement within a broader narrative under the present sense impression exception."

Jun Yu v. Idaho State University, 2019 WL 861484 (D. Idaho 2019) – Plaintiff alleges that Defendant Idaho State University deliberately and unlawfully discriminated against him due to his national original in violation of Title VI. Plaintiff filed a motion in limine, seeking to elicit testimony at trial from Dr. Prause, a former faculty member of ISU's Psychology Department who has personal knowledge of statements made by other ISU faculty about Plaintiff, regarding her impressions, concerns, and reactions relative to certain events associated with this lawsuit. Plaintiff contends that Dr. Prause heard Dr. Mark Roberts, the Director of Clinical Training, comment about Plaintiff's English proficiency and likelihood of graduating, and that when Dr. Prause heard the comment she

"formed a present sense impression ... that 'Dr. Roberts did not want this Asian student in his classes;' and 'There was no other reason but discrimination for Dr. Roberts' comments.' " Plaintiff also claims Dr. Prause "formed a present sense impression that Mr. Yu would encounter difficulties in achieving his goal of earning his doctorate in clinical psychology." Plaintiff further contends that "[i]mmediately upon learning of the lawsuit, Dr. Prause formed the present sense impression that she was not surprised by the lawsuit" and that her "immediate reactions were, 'This should not have happened.'; 'I felt that I had abandoned Jun.'; 'I saw it coming.' and others." The court denies Plaintiff's motion, holding that he has not established that the present sense exception to the rule against hearsay applies to Dr. Prause's testimony.

> "Thus, there are two groups of "impressions" relevant to its motion. First are the alleged present sense impressions formed when Dr. Prause heard Dr. Roberts's comments. Second are the alleged present sense impressions formed when Dr. Prause learned that Plaintiff had filed suit. The Court is not persuaded that any of the statements constitute present sense impressions excepted from the rule against hearsay. The rule against hearsay and the exception thereto for present sense impressions each applies to statements – "a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion." As to the impressions allegedly formed after hearing Dr. Roberts's comment, Plaintiff does not argue that Dr. Prause actually asserted anything at all. To the contrary, all Plaintiff argues is that she "formed present sense impression[s]" and that she "harbored concerns." The same is true for the second group of alleged present sense impressions, which Dr. Prause says she formed upon her learning of this lawsuit. Although expressed as English sentences (" 'This should not have happened.'; 'I felt that I had abandoned Jun.'; 'I saw it coming.' and others"), Plaintiff's counsel learned of such things when interviewing Dr. Prause years after the alleged events. To the extent that there were any statements, they were statements made when Dr. Prause was talking to Plaintiff's counsel, long after the events described and far from any contemporaneous connection. Further, the passage of such time – indeed the very nature of the interview done by Plaintiff's counsel with Dr. Prause – emphasizes that the statements she made to Plaintiff's counsel do not have the necessary touchstone of "closeness in time between the statement and the event" and instead, do carry "the unreliability that is introduced when declarants have the opportunity to reflect on and interpret the event." Hieng, 679 F.3d 1131, 1147 (9th Cir. 2012) (Berzon, J., concurring)."

The Rule Allowing Excited Utterances

Baity v. State, 277 So.3d 752 (Fla. 1st DCA 2019) – Defendant was convicted of aggravated stalking after court order, attempted first-degree murder, and burglary of a conveyance with person assaulted. Defendant appealed his conviction arguing that the trial court erred in admitting into evidence a voicemail for his wife, the victim, left by his mother under the excited utterance exception to hearsay. The Court of Appeals affirmed defendant's conviction and sentence, finding that the trial court did not abuse its discretion in admitting the voicemail into evidence. During Appellant's trial, the State called Maple Hamilton, his mother. She testified about an early-morning phone call from Appellant in which he told her that he might beat the victim. "Shortly after" her conversation with Appellant, Hamilton

called the victim and left the following voicemail: "Laurie, you need to talk to me. You need to pick up this phone and talk to me. Please do. I'm saving your life, sweetheart. Please pick up the phone and talk to me. Do not go to that house. Please do not go there. Please, Lord, pick up the phone and talk to me. I'm trying to save you again. Don't go to that house. Please don't go to that house. I love you. Bye." When asked why she left the voicemail, Hamilton testified that she was concerned that Appellant would violate his injunction by having contact with the victim and that she went back to sleep after leaving the voicemail. The victim described Hamilton's demeanor on the voicemail as being scared. When asked if Hamilton seemed upset, the victim replied, "Yeah. So that's when I called her back." The trial court overruled defense counsel's hearsay objection to the voicemail, finding in part that the "State has now laid a sufficient foundation for the excited utterance."

> "In support of his argument, Appellant relies upon Ms. Hamilton's testimony that she only called the victim because she was concerned that he would violate his injunction prohibiting contact with the victim and that she went back to sleep after leaving the voicemail. The problem with this reliance, however, is that the victim testified that Hamilton's demeanor was scared. It was because Hamilton seemed upset on the voicemail that the victim called her back. The voicemail itself corroborates the victim's characterization of Hamilton's demeanor. Moreover, although Appellant argues that it was not established that Hamilton left the voicemail before she had time to misrepresent or contrive, Hamilton affirmatively responded when asked if her call to the victim was made "shortly after" her call with Appellant. Based upon such, the trial court did not err in overruling Appellant's hearsay objection."

People v. Ramirez, 117 N.Y.S.3d 531 (N.Y. Crim. Ct. 2020) – Defendant was charged with driving while intoxicated, leaving the scene of an incident without reporting, and driving while ability impaired. Defendant moved to dismiss the leaving the scene of an incident charge. The People, in opposition to defendant's motion to dismiss, contend that the statement, "He hit me," made by John Estrellado as contained in the accusatory instrument is an "excited utterance" which as an exception to the hearsay rule establishes together with the other allegations in the complaint, the necessary statutory elements of the offense of Leaving the Scene of an Incident without Reporting. The court held that the misdemeanor report did not contain enough factual basis to establish that it was an excited utterance. Without a supporting deposition, this statement is hearsay and does not support the charge of Leaving the Scene of an Incident without Reporting. The court granted the defendant's motion to dismiss.

> "Here, although it is clear that a motor vehicle accident would likely be an "unexpected and startling event," the misdemeanor complaint is devoid of sufficient facts to establish that the statement of the declarant was an "excited utterance." Significantly, the misdemeanor complaint fails to indicate how much time elapsed between the alleged accident and John Estrellado's statement, "He hit me," made to P.O. Hutt when he arrived at the scene. Contrary to the People's contention, nowhere in the "four corners" of the accusatory instrument does it state that the declarant's statement was made after the accident had "just occurred." As such, it is entirely plausible that an adequate period of time expired between the accident and the arrival of P.O. Hutt to the location during which John Estrellado

had ample opportunity to reflect, deliberate and possibly deviate from the truth in his statement concerning the circumstances of the accident."

The Rule Allowing Statements of Then-Existing Personal Physical and Mental Conditions

United States v. Slatten, 395 F.Supp.3d 45 (D.C. Cir. 2019) – Defendant, a military contractor, was convicted by a jury of first-degree murder of an Iraqi civilian in Iraq. He moved for judgment of acquittal and for a new trial and his motion was denied by the D.C. Circuit. The Court, in considering Defendant's motion, revisited the trial court's decision to exclude hearsay testimony indicating that a member of Defendant's convoy, Slough, felt remorse for his role in the incident. Defendant argued that the court should have admitted this testimony as evidence of Slough's state of mind under Rule 803(3), but the court held that the exception does not apply, and the testimony was properly excluded as inadmissible hearsay.

"Although Rule 803(3) permits "a statement of the declarant's then existing state of mind," it excludes "a statement of memory or belief to prove the fact remembered or believed." In other words, it does not permit the declarant to relate what caused the state of mind. So although testimony limited just to Slough's remorse may have been admissible under Rule 803(3), the testimony Slatten planned to elicit— "Did Mr. Slough approach you shortly after the incident and apologize for what happened that day?"113—was broader, and thus inadmissible."

The Rule Allowing Statements Made When Seeking Diagnosis or Treatment

Shoda v. State, 132 N.E.3d 454 (Ind. Ct. Ap. 2019) – Defendant was convicted of multiple counts of felony child molestation and appealed. In his appeal, he argued that the victim's out of court statements to a nurse and mental health therapist were erroneously admitted into evidence as they were hearsay. The Court of Appeals held that the statements were admissible under the hearsay exception for statements made for purposes of medical diagnosis or treatment.

"There is a two-step analysis for determining whether a statement is properly admitted under Indiana Evidence Rule 803(4): '(1) whether the declarant is motivated to provide truthful information in order to promote diagnosis and treatment; and (2) whether the content of the statement is such that an expert in the field would reasonably rely upon it in rendering diagnosis or treatment.'"

'Statements made by victims of sexual ... molestation about the nature of the ... abuse—even those identifying the perpetrator—generally satisfy the second prong of the analysis because they assist medical providers in recommending potential treatment for sexually transmitted disease, pregnancy testing, psychological counseling, and discharge instructions.' *VanPatten v. State*, 986 N.E.2d 255, 260 (Ind. 2013) (citing *Palilonis*, 970 N.E.2d at 726–27). The first prong—regarding the declarant's motivation—can generally be inferred from the fact a victim sought medical treatment. *Walters v. State*, 68 N.E.3d 1097, 1100 (Ind. Ct. App. 2017) (citing *VanPatten*, 986 N.E.2d at 260–61), *trans. denied*. **However, when young children are brought to a medical provider by their parents, the inference of the child's motivation may be less than obvious, as the child may not understand the purpose of the examiner or the relationship between truthful responses and accurate medical treatment. Id. at 1100–01 (citing VanPatten,**

> **986 N.E.2d at 260–61). In such situations, "evidence must be presented to show the child understood the medical professional's role and the importance of being truthful." Id. at 1101. "Such evidence may be presented 'in the form of foundational testimony from the medical professional detailing the interaction between [her] and the declarant, how [she] explained [her] role to the declarant, and an affirmation that the declarant understood that role.'"** Id. (quoting *VanPatten*, 986 N.E.2d at 261) (alterations in *Walters*).

2021 Cases

Hurt v. State, 151 N.E.3d 809 (Ind. App. 2020)

Hurt was convicted of misdemeanor domestic battery and misdemeanor disorderly conduct. On appeal, Hurt argued that the trial court improperly admitted his wife's statement to police, which she gave while intoxicated. The statement, that Hurt elbowed her in the face, was one of three explanations she provided to police that night for her injuries. In response, the State argued that the wife's statement was admissible either under the recorded recollection, excited utterance, or present sense impression exception to hearsay. *See* Ind. Evid. R. 803. The Court subsequently addressed each of these exceptions separately. First, the Court held that this statement was not a recorded recollection because the declarant did not acknowledge that the statement was accurate when made. At trial, Hurt's wife claimed that she did not remember making any statement to police and did not vouch for its accuracy. Next, the Court considered whether the statement was an excited utterance. While the State argued that the statement was inherently reliable because Hurt's wife was too intoxicated to be able to reflect or make a coherent falsehood, the Court emphasized that her statement occurred at least fifteen minutes after she was hit. There was no evidence that she was still under the stress of the exciting incident and body cam footage actually showed her answering the police officer's questions calmly. Therefore, because of the time that had elapsed and her general demeanor, her statement could not be classified as an excited utterance or a present sense impression. The Court reversed the trial court and remanded for a new trial.

Dorsey v. State, 607 S.W.3d 485 (Ark. 2020)

Dorsey was convicted of first-degree murder. On appeal, he argued that the circuit court improperly allowed witnesses to testify to statements made by his business partner about her intent to buy Dorsey out of their business, on the day she was killed. Dorsey claimed that the fell outside of Ark. R. Evid. 803(3) because they reflected a then-existing financial condition, rather than a then-existing mental, emotion, or physical condition. The Court disagreed, holding that the victim's statements indicated an "intent to do something in the future." Regardless of whether her plan was financially motivated, these statements squarely fit under the ambit of Rule 803(3).

Command Ctr., Inc. v. Kluver, 956 N.W.2d 755 (N.D. 2021)

Command Center sued for breach of contract, quantum meruit, and unjust enrichment in an attempt to recover approximately $14,000 in unpaid fees for services rendered. The district court entered judgment for Command Center and Kluver subsequently appealed. On appeal, Kluver argued that the district court erred by admitting Command Center's invoices which allegedly contained hearsay. Specifically, Kluver claimed that no "records custodian" laid the requisite foundation to show that the records were kept in the course of regularly conducted business. The Court disagreed, holding that a records custodian was not necessary so long as Command Center offered a "qualified witness," someone who can "explain the record keeping system of the business," to lay the proper foundation. Here, the Court found that testimony from a Command Center branch manager was sufficient to establish the company's business practices as well as how and when the invoices were completed by employees. The Court concluded that the district court did not err in admitting the exhibits under the business records exception and affirmed.

Chapter 19 – Hearsay Exceptions for Primarily Written Statements

OUT OF COURT ASSERTIONS WHEN MEMORY FAILS

State v. Little, 2020 WL 2298770 (N.M. Ct. App. May 6, 2020) – Defendant was convicted of multiple counts of sexual penetration of a minor under 13 years of age and appealed. In his appeal, Defendant argued that the admission of child victim's refreshed recollection testimony that the first degree CSPM had first occurred when she was 12 years of age was improper. The Court of Appeals agreed, reversing the Defendant's conviction for one count of first-degree CPSM.

At trial, the State possessed a police report that apparently indicated S.G. had told investigators that Defendant had penetrated her when she was twelve. On direct and cross-examination, however, S.G. unequivocally testified—on five occasions—that Defendant had not abused her in this particular manner until after she turned thirteen.

The trial court permitted use of the police report to "refresh" the child's recollection. Finding this error, the appellate court explained that

> Admitting S.G.'s "refreshed" testimony regarding her age was error because the State failed to make any showing that the police report would be "the key to refreshing [S.G.'s] independent recollection[,]" rather than "a source of direct testimony." *United States v. Weller*, 238 F.3d 1215, 1221 (10th Cir. 2001). S.G. had not given any indication that her memory was failing on this critical topic. Nor had S.G. demonstrated "uncertain[ty or] hesitan[cy]," in her testimony regarding the issue. And S.G. never testified that seeing the police report would aid her memory before it was handed to her. The State's belief that the prior statements described in the police report were correct was no basis for permitting it to use the report to refresh S.G.'s contrary memory

In re Estate of Frakes, 146 N.E.3d 801 (Ill. App. 3d. January 29, 2020) – Petitioner filed to have a conformed copy of decedent's will admitted into probate. Respondents filed a motion for summary judgment, asking that the will be denied admission to probate. Petitioner then filed a cross-motion for summary judgment, which was granted. Decedent executed the currently disputed version of his last will and testament on October 31, 2011. Attorney Jack Boos prepared the will and witnessed its execution along with his employee, Laurie Rollet, at decedent's place of business. Boos and Rollet then departed from decedent's office, leaving the original will behind. Boos created a conformed copy of the October 2011 will for his records once he returned to his office, but no copies of the executed will were made. Per the terms of the conformed copy, the October 2011 will revoked all prior wills. In May 2013, decedent reported a burglary at his home to the local police department. Officer Sean Kozak of the Washington Police Department responded. Decedent informed Kozak that multiple items had been stolen from his safe. Among the contents reported stolen were $50,000 in cash, the deed to decedent's home, the title to his vehicle, three gold bracelets, two gold necklaces, and "his will." Decedent later contacted Kozak to amend the dollar amount of cash stolen to $80,000. Kozak believed that when the decedent told him that "his will" was stolen, he was referring to his current will. Kozak

submitted to an evidence deposition in relation to this case. Kozak stated that in preparation for the deposition, he reviewed the report of the incident that he recorded the day of the incident. Kozak did not have any independent recollection of the incident prior to reviewing the report he had prepared. In their appeal, respondents argue that Kozak's evidence deposition testimony, where his memory was refreshed with the report he prepared, is inadmissible hearsay.

> Respondents argue (1) since a police report refreshed Kozak's recollection, his statements are inadmissible hearsay, and (2) after reading the police report Kozak had no independent recollection of the incident. A witness may refer to documents to refresh his recollection prior to testifying. *People v. Cantlin*, 348 Ill. App. 3d 998, 1003, 285 Ill.Dec. 29, 811 N.E.2d 270 (2004). However, the witness must then testify from his independent recollection. Id. **The extent to which the documents actually refreshed the witness's recollection goes to the weight, not the admissibility, of his testimony.** *Corrales v. American Cab Co.*, 170 Ill. App. 3d 907, 911, 120 Ill. Dec. 741, 524 N.E.2d 923 (1988). Police reports are generally inadmissible as substantive evidence but may be used to refresh a witness's recollection so long as the report is not merely read into evidence. *Baumgartner v. Ziessow*, 169 Ill. App. 3d 647, 655-56, 120 Ill.Dec. 99, 523 N.E.2d 1010 (1988). Even if not waived, the use of the police report to refresh Kozak's memory alone does not make the testimony inadmissible. Further, Kozak reviewed the police report before the deposition and admitted that he had no independent recollection of meeting with decedent on the day of the burglary prior to reading the report. There is no indication the report was in front of Kozak during the deposition; he was not merely reading it into the record. He was testifying from his refreshed recollection, having reviewed the document prior to the deposition. Even in the absence of waiver, the testimony of Kozak as a refreshed recollection is not barred by the rules against hearsay."

RECORDS OF REGULARLY CONDUCTED ACTIVITY (FORMERLY BUSINESS RECORDS)

United States v. Aguirre-Rodriguez, 762 Fed. Appx. 956 (11th Cir. Mar. 14, 2019) – Defendant was convicted of conspiracy to possess with intent to distribute methamphetamine and similar offenses. He filed an appeal, in which he contends that the district court erred by not allowing him to present to the jury two letters and a photograph that he says would have rebutted the government's portrayal of him as a high-level drug trafficker and supported his theory that the government prosecuted the wrong "Victor." The letters were from his former employers in Nayarit, Mexico, and purported to show that he worked as a tortilla maker and hotel bellhop during the time of the alleged conspiracy; the photograph was a picture of him in a bellhop uniform. The letter from the tortilla factory owner was notarized by an attorney in Mexico, while the other letter and the photograph were not sworn to or notarized at all. The district court sustained the government's hearsay objection and rejected Aguirre-Rodriguez's argument that the letters and photograph should be admitted as foreign records of regularly conducted activity under 18 U.S.C. § 3505. The Court of Appeals affirmed, holding that the records of regularly conducted activity exception did not apply to the letter, and therefore it was inadmissible hearsay.

> Aguirre-Rodriguez asserts that the sworn letter from his former employer stating that he worked as a tortilla maker from 2009 through 2015 constituted a foreign

> record of regularly conducted activity under § 3505(a).1. According to Aguirre-Rodriguez, because notaries in Mexico are subject to more stringent requirements than are notaries in the United States, the letter "was the substantial equivalent of the certification and authentication requirements of 18 U.S.C. § 3505" and should have been admitted. We disagree. No matter the additional credentialing of the Mexican notary public, his sign off does not do away with the requirements of § 3505(a)(1) that a foreign certification attest that the record was "kept in the course of a regularly conducted business activity" and that "the business activity made such a record as a regular practice." *See* 18 U.S.C. § 3505(a)(1)(B), (C). Even if we view the letter as both a business record and a certification rolled into one, there is still nothing in the letter that certifies that it was kept in the course of a regularly conducted business activity or that such an activity made the creation of similar letters a regular practice. See *id*."

Blevins v. Gaming Entertainment (Indiana), LLC, 2019 WL 2754405 (S. D. Ind. July 1, 2019) – Defendants filed a motion *in limine* to prevent the introduction of incident reports for prior accidents. Plaintiff brought suit against Defendants after falling from a stool while gambling at Rising Star's casino and sustaining injuries. Plaintiff alleges Rising Star was negligent in failing to take steps to protect her, an invitee, from being injured due to a dangerous stool or stools on their property. Plaintiff's final exhibit list Final Exhibit List includes fourteen (14) incident reports associated with other injuries incurred at Rising Star's casino. The incident reports "detail incidents in which other guests of the Defendant casino fell while using stools provided by the casino." Defendant seeks to limit and exclude testimony and evidence related to the following matters, arguing that it is inadmissible hearsay. The court grants the Defendant's motion *in limine*, holding that because the records were made in anticipation of litigation by an employee of the defendant business, and they are not made regularly, Rising Star's incident reports do not fall under the record of a regularly conducted activity hearsay exception of Rule 803(6). Therefore, the incident reports appear to be inadmissible hearsay and as such are not admissible at trial.

Deloach Marine Services, LLC v. Marquette Transportation Company, LLC, 2019 WL 498948 (E. D. La. Feb. 8, 2019) – Case arises out of an accident that occurred between two towing vessels and their cargo on the Mississippi River. Plaintiff's vessel, the VANPORT, was pushing four barges down the river on January 26, 2016 when defendant's vessel, the JUSTIN PAUL ECKSTEIN, allegedly moved into the path of the VANPORT, causing a collision. Plaintiff filed a complaint on April 6, 2017 alleging negligence, unseaworthiness, and contribution. Defendant denies plaintiff's allegations and has counterclaimed, inter alia, that the VANPORT was unseaworthy and that plaintiff was contributorily negligent. In anticipation of trial, defendant objected to records by the marine survey firm Budwine & Associates estimating damages to the VANPORT's cargo because they are hearsay. Plaintiff contends that the records are not hearsay because they fall under the business records exception. The court holds that the documents are not within the business records exception because they were not prepared as part of regular business activity, as required by Rule 803(6). Instead, these documents appear to have been prepared in anticipation of litigation against either the owner of Deloach's cargo or the defendant. "The absence of trustworthiness is clear ... when a report is prepared in the anticipation of litigation because the document is not for the systematic conduct and operations of the enterprise but for the

primary purpose of litigating." *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 205 (4th Cir. 2000).

> "Indeed, the first page of Budwine's report certifies that the purpose of its employment by Deloach 'was to ascertain the nature and extent of damages to the subject vessels that stemmed from this incident.' The documents are not merely part of Deloach's regularly conducted business, but instead were created for the purpose of assessing damages related to this specific accident for use in litigation or settlement."

Because the Budwine documents were not created in the course of a regularly conducted business activity, they are inadmissible as business records. But during Mr. Budwine's testimony, he may use these documents to refresh his recollection

GOVERNMENT REPORTS

Cooper v. Meritor, Inc., 363 F.Supp.3d 695 (N.D. Miss. Feb. 11. 2019) – Property owners filed suit against manufacturing facility defendant alleging negligent operation of plant causing environmental contamination. Defendant moved *in limine* to exclude a site inspection report upon which Plaintiffs relied heavily on in numerous briefs. At issue was an April 2017 "Final Expanded Site Inspection Report, Revision 1" prepared by Tetra Tech, Inc. According to the report, Tetra Tech was retained by the United States Environmental Protection Agency ("EPA") "to conduct an expanded site inspection (ESI)" at the Grenada facility site, and "[t]he primary objective of an ESI is to evaluate whether a site has the potential to be included on the National Priorities List."

> There is no dispute that the Tetra Tech Report is hearsay and thus inadmissible unless the plaintiffs can show that it falls under one of Rule 803's enumerated exceptions. See *United States v. Reed*, 908 F.3d 102, 120 (5th Cir. 2018) (proponent of evidence had burden to establish hearsay exception). There is also no dispute that the only exception relevant here is Rule 803(8), the exception governing the admissibility of public records. The plaintiffs argue that the Tetra Tech Report falls under Rule 803(8)(A)(iii)'s exception for "factual findings from a legally authorized investigation." Doc. # 734 at 5–6. The Meritor Defendants submit that the exception does not apply because the Tetra Tech Report (1) was prepared by an outside consultant, (2) represents preliminary findings, and (3) lacks indicia of trustworthiness.

The court held that the Tetra Report was not admissible under hearsay exception for record of statement of a public office under Rule 803(8). A non-governmental report will be admissible under hearsay exception for a record or statement of a public office only when it has been prepared by the equivalent of government investigators, or if a public agency closely manages the relevant investigation. On the record before it, the court find inadequate Government oversight to meet the "closely manages" standard.

2021 Cases

Washington v. Ditech Fin. LLC, 2020 U.S. Dist. LEXIS 87926: Laura Washington obtained a $125,000 home loan in June 2007 from then-lender Litton Loan Servicing (Litton). Washington was required to pay $267.71 per month for Private Mortgage Insurance (PMI) as a part of her loan. In 2010 Washington became ill and was unable to work, which qualified her for a Home

Affordable Modification Agreement (HAMP Modification). After that she made several payments that did not include PMI and were accepted by Litton. The loan was transferred to Green Tree about six months after the HAMP Modification went into effect. Green Tree then began issuing statements that included PMI. Unable to afford her payments with the added cost, she initiated bankruptcy proceedings in December of 2014. Green Tree filed a proof of claim to which Washington objected. She argued that that the HAMP Modification modified the PMI requirement, and it was her understanding at the time that the modification wholly eliminated PMI. To support her understanding, she offered into evidence a statement from Litton titled "Annual Escrow Account Disclosure Statement" in which PMI is *not* listed for payment. Over Green Tree's objection, this evidence was admitted by the bankruptcy court as a recorded recollection under FRE 803(5). On appeal, Green Tree argued that the bankruptcy court should not have admitted the Litton Loan Servicing escrow statement. The district court held for Washington. Rule 803(5) provides that a court may admit evidence as a recorded recollection when that record "is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately; was made or adopted by the witness when the matter was fresh in the witness's memory; and accurately reflects the witness's knowledge." Although Washington had not prepared the document, the court found she had "adopted" it. Additionally, the District Court noted that the form in which the statement was received was in error. Rule 803(5) has a limitation that "If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party." In this case the evidence was offered by Washington and not an adverse party. While this was an error, the district court held it did not affect substantial rights and thus is not grounds for a reversal of judgement.

Russell v. Midland Credit Mgmt., 2021 U.S. Dist. LEXIS 61744: Krystina Russel opened a consumer credit card with Credit One. Russell then allegedly incurred a debt with her credit card, a debt which she could not pay for and defaulted on. Credit One then assigned Midland Funding to collect on the alleged debt. Russell challenged an affidavit used in summary judgment proceedings, the 2020 Hardwood Affidavit. That document derived from and referenced several items originating from Russel opening her card, including Bills of Sales, the Card Agreement, the Arbitration Agreement, and a transfer/ assignment provision., Russell argued that the affidavit was based on inadmissible hearsay. While the court agreed that it was hearsay, they held that the various documents were admissible under Federal Rule of Evidence 803(6). FRE 803(6) applies if an affiant meets five conditions: "(1) the record was made at or near the time by—or from information transmitted by—someone with knowledge; (2) the record was kept in the ordinary course of a regularly conducted activity of a business, organization, occupation, or calling; making the record was a regular practice of that activity; (4) all these conditions are shown by the testimony of a custodian or another qualified witness; and (5) the opponent does not show that the source of the information or the method or circumstances of preparation indicate a lack of trustworthiness." Harwood, as a qualified witness of Credit One, makes the requisite statements in his affidavit to satisfy the conditions regarding the making and keeping of Credit One's business records. Thus, the exhibits underlying the affidavit satisfy the business records exception to the hearsay rule and are admissible.

United States v. Sedillo, 2020 U.S. Dist. LEXIS 163310: On February 2, 2017, defendants Sedillo, Sabaquiae, and Gallardo robbed a Verizon Wireless store at gunpoint. During the robbery one of the men put a handgun to the head of one of the employees and forced him to the back area of the store and had him open the safe. After conviction the prosecution requested restitution for the victim, M.D., the Verizon Wireless employee forced to open the safe at gunpoint. In calculating restitution, The United States put forth evidence that M.D. never received workers compensation. This evidence was a State of New Mexico's Worker Compensation Administration letter that indicated that the entity was unable to locate records pertaining to M.D. The Court held that Federal Rules of Evidence 803(7) "allows a lack of record to demonstrate that the occurrence had not happened." In this case the letter demonstrated a lack of record of workers compensation for M.D. and was thus admissible.

City of Huntington v. Amerisourcebergen Drug Corp., 2021 U.S. Dist. LEXIS 79514: David Gustin worked for McKesson for 8 years, finally retiring in 2016. In July 2020, Gustin pleaded guilty to a one-count information charging him with knowingly failing to file suspicious order reports. Under the plea agreement, in exchange for Gustin's guilty plea to the misdemeanor, the government agreed to dismiss a 2019 indictment charging him with conspiracy to distribute controlled substances. In the current suit, McKesson asks the court to exclude "(1) Gustin's plea agreement and the information to which he pled guilty; and (2) Gustin's 2019 indictment" as inadmissible hearsay. Plaintiffs argue that the plea agreement and indictment are admissible under Federal Rule of Evidence 803(8), which provides: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . A record or statement of a public office if: . . . (A) it sets out: . . . (iii) in a civil case . . . factual findings from a legally authorized investigation." The court held with McKesson and excluded the evidence. They held that FRE 803(8) "on its face, does not apply to judicial findings of fact; it applies to "factual findings resulting from an investigation made pursuant to authority granted by law."" This rule applies to *executive* findings, not *judicial* findings. "[A] review of the advisory committee note makes it clear that judicial findings are not encompassed; not only is there not the remotest reference to judicial findings, but there is a specific focus on the findings of officials and agencies within the executive branch."

Chapter 20 – Hearsay Exceptions—Declarant Unavailable

UNAVAILABILITY—THE RULE

United States v. Burden, 934 F.3d 675 (D.C. Cir. Aug. 20, 2019) – Defendants were convicted of violating provisions of the Arms Export Control Act (AECA). In their appeal, defendants argued that the trial court erred in admitting video deposition testimony by a key witness over a Confrontation Clause objection where the government itself rendered the witness 'unavailable' at trial by deporting him shortly before trial without first making reasonable efforts to arrange his return. The court agreed, holding that the government did not make a good faith, reasonable effort to secure presence, at defendant's trial, of the removable alien witness to show that the witness was in fact unavailable.

> "Under the applicable standard, the government failed to show that Yindeear-Rom was 'unavailable' for purposes of the Confrontation Clause. The government's efforts to secure his presence at trial did not begin until after he was deported. Before his deportation, the government did not give Yindeear-Rom a subpoena, offer to permit and pay for him either to remain in the U.S. or to return here from Thailand, obtain his commitment to appear, confirm his contact information, or take any other measures. Its only efforts began once he was out of custody, out of the jurisdiction, and no longer dependent on the government's good graces for lenient treatment. Yindeear-Rom's eagerness to return to Thailand helped to persuade the district court that further efforts to persuade him to testify at trial would have been futile. But in these circumstances that eagerness cuts the other way. Given the government's duty to make good-faith, reasonable efforts before Yindeear-Rom's deportation, 'a witness's known reluctance to testify adds to the government's burden to show that it made 'reasonable, good faith efforts' to secure her appearance because it makes her failure to appear voluntarily all the more foreseeable.' *Brooks v. United States*, 39 A.3d 873, 886 (D.C. 2012). This is a case where the 'possibility, albeit remote, that affirmative measures might produce the declarant ... demand[ed] their effectuation.' *Roberts*, 448 U.S. at 74, 100 S.Ct. 2531. **Any chance the government had of securing Yindeear-Rom's appearance at trial would have been far greater had it addressed the problem as soon as it knew it would rely on his testimony. Instead, its own approach appears to have ensured the futility of the post-deportation efforts.**"

United States v. Miller, 954 F.3d 551 (2d Cir. Apr. 2. 2020) – Defendants Miller, Mack, and Lucien were convicted of conspiracy to commit witness tampering by first-degree murder and unlawful possession of a firearm by a felon. Mack appealed, arguing that the trial court erred in admitting hearsay declarations under the Rule 804(b)(3) exception for statements against interest. The assertions in question were made by codefendant Miller, who was deemed "unavailable" to testify after invoking his Fifth Amendment right against self-incrimination. The Court of Appeals affirmed the trial court's determination that Miller was properly determined unavailable for the purposes of Rule 804(a). They held that when a witness properly invokes his Fifth Amendment right against self-incrimination, he is unavailable for the purposes of Rule 804(a).

PRIOR TESTIMONY AND THE UNAVAILABLE WITNESS

Lopez v. McDermott, Inc., 2020 WL 3964989 (E.D. La. July 13, 2020) – Plaintiff sued multiple defendants in state court for asbestos exposure in June 2017. The case was removed to federal court on September 13, 2017. Plaintiff died on November 9, 2018, after filing his claim, and his surviving wife and son maintained the case on his behalf. Defendant filed a motion for summary judgment in the case, arguing that plaintiffs cannot demonstrate the causation element of their negligence claims because there is a lack of admissible evidence that a Fisher product exposed Mr. Lopez to asbestos. Fisher contends that the only evidence that Mr. Lopez was exposed to asbestos attributable to a Fisher product comes from Mr. Lopez's deposition testimony, which is inadmissible for use against Fisher under the Louisiana Code of Evidence and the Louisiana Civil Code. Fisher maintains that because neither Fisher nor a similarly situated defendant attended Mr. Lopez's deposition (which at least some other defendants participated in), his testimony is inadmissible hearsay. The court denies defendant's motion for summary judgment, and holds that the testimony from Lopez's deposition is admissible under Rule 804(B)(1), which provides an exception to hearsay for former testimony provided by an unavailable declarant.

> "Mr. Lopez is deceased and his prior testimony was given under oath; accordingly, he undisputedly qualifies as an unavailable declarant. His deposition testimony, if offered to prove that Mr. Lopez worked with products manufactured by Fisher, would undoubtedly constitute hearsay. The question is, therefore, whether "a party with a similar interest" to Fisher "had an opportunity and similar motive to develop [his] testimony by direct, cross, or redirect examination" during his deposition."
>
> "To establish "opportunity and similar motive" in cases in which the parties in the current and former proceedings are different, the Fifth Circuit has endorsed a "fact-specific" inquiry that considers whether the questioner "is on the same side of the same issue at both proceedings" and "whether the questioner had a substantially similar interest in asserting and prevailing on the issue." *Battle ex rel. Battle v. Mem'l Hosp. at Gulfport*, 228 F.3d 544, 552 (5th Cir. 2000). As another court put it, "there must be 'sufficient identity of issues to ensure that cross examination in the former case was directed to the issues presently relevant, and that the former parties were the same in motive and interest.'" *Holmquist*, 800 F. Supp. 2d at 310. "Because similar motive does not mean identical motive, the similar-motive inquiry is inherently a factual inquiry, depending in part on the similarity of the underlying issues and on the context of the questioning." *Battle*, 228 F.3d at 552."

The Court concludes that this testimony is admissible against Fisher. It is undisputed that the decedent is unavailable. While not identical, John Crane and any other gasket or packing defendants that may have been present at Mr. Lopez's deposition had a sufficiently similar motive to that Fisher would have had, had it been present at the deposition. Although Fisher is certainly correct in suggesting that all defendants in asbestos cases involving this time period are motivated by demonstrating the liability of other parties to reduce their own virile share, this is rarely a party's *only* motivation. Disproving liability is more useful a goal than merely reducing it, and other courts have found that defendants

in asbestos cases are primarily motivated by developing a plaintiff's testimony to show that he was never exposed to a particular product.

DYING DECLARATION AND THE UNAVAILABLE WITNESS

Smith v. Davis, 2020 WL 3488035 (N.D. Cal. June 26, 2020) – Petitioner was convicted by a jury of several offenses following the robbery of Lang's Jewelry Store in San Francisco. Petitioner's conviction relied primarily on fingerprint evidence from two items found at the crime scene—a newspaper found in the vacant restaurant and a poster board found in Lang's near the hole cut in the wall. Fingerprint evidence also connected George Turner, who was also convicted, to the robbery. After petitioner's first habeas application was denied, he received a declaration from George Turner, now deceased. Mr. Turner's declaration states petitioner was not involved in the robbery and that Deputy District Attorney Jerry Coleman offered Mr. Turner leniency for not testifying on petitioner's behalf. It also explains how both Mr. Turner's and petitioner's fingerprints could have ended up on the newspaper and poster board that Inspector Gardner asserted he found at the crime scene, corroborating petitioner's theory that Inspector Gardner planted evidence. Petitioner's subsequent state habeas petition and appeals were denied by the California Supreme Court. He was granted leave from the Ninth Circuit to file a second or successive federal habeas petition regarding his conviction. In his motion to proceed, petitioner argues that Mr. Turner's declaration is admissible under the dying declaration exception to hearsay. The court denies this argument, holding that the statement was in fact hearsay and therefore inadmissible.

> "The dying declaration exception to the rule against hearsay is 'based on the belief that persons making such statements are highly unlikely to lie.' *Idaho v. Wright*, 497 U.S. 805, 820 (1990). Mr. Turner's doctor allegedly gave him a prognosis of 'one year +/-.' While Mr. Turner was severely ill and did in fact die nine days after signing the declaration, he was not facing death such that the trustworthiness of his statement was guaranteed and thus qualify for the dying declaration hearsay exception. More importantly, Mr. Turner's declaration does not discuss the cause or circumstances of his death; rather, it is exclusively concerned with the circumstances of Lang's robbery. Since this goes directly against both the relevant federal and state rules of evidence regarding dying declarations, Mr. Turner's statement is not admissible under this exception to the rule against hearsay."

STATEMENTS AGAINST INTEREST OF UNAVAILABLE WITNESS

United States v. Ojudun, 915 F.3d 875 (2d Cir. Feb. 8, 2019) – Defendant appealed the revocation of supervised release, arguing that the trial court erred in admitting evidence of post-arrest statements made about Ojudun by the driver of the vehicle under Rule 804(b)(3), which provides an exception to hearsay for statements against interest. After Ojudun's arrest, Gray (driver) gave a videotaped statement to police, during which he admitted that he had known of Defendant's intentions from the beginning of the trip. Although Gray said he had never heard of Ojudun or Cesaro engaging in fraudulent banking activity before, he eventually admitted that he had known from the start of the trip that Ojudun's and Cesaro's intentions were to cash a check at the bank in Summit. The court held that that driver's statements that incriminated Ojudun without incriminating the driver were not properly ruled statements against the interest of the driver under Rule 804(b)(3).

"Here, most of Gray's statements, made to a law enforcement official, were designed to minimize his involvement in the planned fraud and to deflect responsibility onto Ojudun and Cesaro." The court thus vacated the judgment and remanded for further proceedings.

Blankenship v. Dollar Tree Stores, Inc., 2020 WL 3618595 (S.D. Ohio July 2, 2020) – Defendant Plaintiff brought wrongful death suit on behalf of decedent Diana L. Hatt, who was injured after slipping and falling while entering defendant's store with her father, Lawrence Hatt. Diana died two months after the accident as a result of her injuries. Defendant moved for summary judgment. Neither Lawrence nor Diana filed a report with the store and Diana had no visible injuries from her fall.

Plaintiff relies on the statement of an unknown employee of Defendant Dollar Tree to prove Defendant knew the door had been sticking. Lawrence testified: "She hit the floor and hit her head on the back wall or someplace. And then when this happened, a woman probably in her thirties dressed in – a white woman dressed in a white thing, probably one of the workers at Dollar Tree, I guess, came to the thing and said the door had been sticking." Though the statement is hearsay, plaintiff asserts that the statement against interest exception applies. The court holds that although the alleged statement of Dollar Tree's employee was made against Dollar Tree's interest, plaintiff has not proven that the alleged declarant is unavailable to testify, making Rule 804(b)(3) inapplicable. Since plaintiff did not prove a duty on the part of the defendant and provided no evidence that the door was defective, the court granted defendant's motion for summary judgment.

STATEMENTS BY UNAVAILABLE DECLARANTS ADMISSIBLE DUE TO FORFEITURE

United States v. Adoma, 781 Fed. Appx. 199 (4th Cir. July 30, 2019) – Three defendants were convicted of various offenses related to the racketeering activities of a confederation of individual gangs and appealed. Adoma challenges the district court's denial of his motion to suppress victim Doug London's recorded statement following the robbery of his mattress store. Adoma asserts that admission of the recorded statement violated his Confrontation Clause rights. The trial court admitted the recorded statement under the forfeiture-by-wrongdoing exception to hearsay provided in Rule 804(b)(6). On appeal, the Fourth Circuit affirmed this ruling, finding that the forfeiture-by-wrongdoing exception applied to London's recorded statement.

> "Under the forfeiture-by-wrongdoing exception, hearsay statements are admissible where the declarant is unavailable to testify because the party against whom the statements are offered wrongfully caused the declarant's unavailability and did so intending that result. 'Such wrongful conduct includes but is not limited to murdering a witness.' *United States v. Jackson*, 706 F.3d 264, 267 (4th Cir. 2013). In order for the exception to apply, the desire to keep the witness from testifying must be a reason for procuring the unavailability of the declarant, but not necessarily the only motivation. *Id*.
>
> "Here, Adoma… argues that London's murder was not reasonably foreseeable to him. However, we conclude that the district court properly found it was reasonably foreseeable to Adoma that the gang might take action to murder London, even if Adoma did not participate directly. Adoma had already murdered Clyburn on behalf of the gang for merely pretending to be a gang member. Further, many

> cooperating witnesses testified that killing for the gang was not just foreseeable, but required. The trial evidence also established that Jamell Cureton (Adoma's accomplice for the mattress store robbery) and Adoma were communicating and colluding with each other while they were in pre-trial custody. Specifically, Cureton and Adoma attempted to obstruct justice by creating a false narrative about the robbery. Thus, not only were the gang's activities reasonably foreseeable to Adoma, he likely knew that the gang was working on behalf of Cureton and himself to silence London. As such, the district court's decision to admit London's statement was not arbitrary or irrational."

2021 Cases

Williams v. United States, 2020 U.S. Dist. LEXIS 180362: On May 18, 2015, jury found Michael Williams guilty on one count of conspiracy to commit arson of a building used in interstate commerce, and one count of arson of a building used in interstate commerce. Williams appealed the conviction, arguing that he "was denied the right to confront [Sian] Green as a witness against him, as Green's testimony was entered into evidence in the form of a deposition (including the video recording of the deposition)." When he was arrested, Green confessed to federal agents and implicated both himself and Williams in the arson. Green was a Jamaican national and was in possession of a plane ticket to Jamaica at the time of his arrest. Green was deposed and served with a trial subpoena. Upon release on bail, Green returned to Jamaica and refused to come back for trial.

The court first held that Green was unavailable. In the court's view, the government did everything they reasonably could have done to procure Green for trial. They served Green with a subpoena, they confirmed that Green understood that it would pay his travel expenses to return for trial, and once in Jamaica Green was beyond the court's subpoena power.

Additionally, Williams' right to confront the witness against him was satisfied at the deposition under Federal Rule of Evidence 804(b)(1). Williams and his attorney were present at the deposition, and Williams' attorney cross-examined Green, objected on various grounds, and the court ruled on those objections. Thus, Williams did enjoy the right to confront Green, and his motions were denied.

United States v. Bowen, 2021 U.S. Dist. LEXIS 1115: Defendant James Bowen was charged with one count of being a felon in possession of a firearm. Co-Defendant James Gaines gave Defendant a gun because Defendant was having an argument with an unspecified person. Bowen and Gaines later attended a party in which Bowen was carrying the gun. At this party Bowen got into an altercation with a man that ended when Bowen fired a shot and then threated the man with the firearm. Bowen and Gaines then ran away, hid the guns, and then were apprehended by law enforcement. The codefendant was convicted first. At Bowen's trial, the Government sought

permission by motion *in limine* to introduce admissions made by the codefendant post-crime to a friend. The Government averred that the codefendant was unavailable because through his lawyer he confirmed that he would assert the privilege against self-incrimination even though he had been convicted. The trial court ruled it premature to deem the codefendant unavailable, as he might not have a privilege as to all questions that might be asked. The court held that while "a declarant is considered unavailable when he or she properly invokes his or her Fifth Amendment right against self-incrimination, [but] rather than "simply accept [a defendant's] blanket assertion of the [F]ifth [A]mendment privilege in respect to all questions asked of him," a district court must "undertake a particularized inquiry to determine whether the assertion was founded on a reasonable fear of prosecution as to each of the posed questions."" In this case the court found it was inappropriate to grant Gaines a blanket Fifth Amendment privilege.

Chapter 21 – Hearsay Within Hearsay, Impeaching the Hearsay Declarant, and the "Catch-All" Exception to Hearsay

LAYERS OF HEARSAY

United States v. Covington, 2020 WL 607572 (D. Utah Feb. 7, 2020) – Defendant was charged with three counts of hate crime acts against Luis, Jose, and Angel Lopez. During or immediately after the alleged incident, a person named T.O. made several 911 calls—one in which T.O. describes witnessing a "fight" and two in which T.O. asks for an ambulance and describes Luis Lopez's injuries. In the call at issue, T.O. makes statements that are based not only on her personal observations at or near the scene of the incident but also based on statements by others near her during the call. Defendant argues that this call should be excluded in its entirety pursuant to the rule against hearsay. The court grants in part and denies in part the defendant's motion to exclude the disputed 911 call.

> "The portions of the call in which T.O. relays information from others rather than her own observations, however, constitute "hearsay within hearsay" and accordingly are admissible only if "each part of the combined statements conforms with an exception to the rule." Fed. R. Evid. 805. While T.O.'s own statements to the 911 operator may constitute present sense impressions and excited utterances, the court agrees with Defendant that "the call does not establish a sufficient foundation for determining whether" the statements of the unidentified individuals that T.O. relayed to the 911 operator fall "under an exception to Rule 802." The call itself does not demonstrate that these statements fall within such an exception, and the Government provides no additional evidentiary support for this proposition. While it may be true that the person who told T.O., for example, "The brother is chasing the guy," was describing to T.O. what he or she had just witnessed, such speculation is insufficient to overcome the general rule against hearsay. This hearsay within hearsay is thus inadmissible."

United States v. Gordon, 2019 WL 3387050 (E.D.P.A. July 26, 2019) – Defendant filed a motion *in limine*, seeking to introduce testimony from Dr. Megan Crossman, the emergency room doctor who treated Gordon on June 26, 2018, regarding statements that police made to her about Gordon's conduct that day. Gordon proffers that Dr. Crossman will testify that police told her that (1) Gordon ran across Interstate 95 and (2) Gordon's family members told police that Gordon jumped out of a second-story window earlier that day.

> "The government does not object to the admission of testimony that Gordon ran across I-95 under Rule 803(4), agreeing that it falls within the exception to hearsay because it was given for the purposes of medical diagnosis or treatment. However, the Government argues correctly that the statement from police to Dr. Crossman that Gordon's family members told police that Gordon jumped out of a second-story window is not admissible under Rule 803(4) because it contains "hearsay within hearsay." Gordon must therefore demonstrate that all layers of hearsay are admissible. ("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[.]"). The statement contains two layers of hearsay: first, the statements from Gordon's family members to police and second, the statements from police to

> Dr. Crossman. While the latter would be admissible as information communicated for the purposes of medical diagnosis or treatment under exception 803(4), 803(4) does not apply to the statements made by Gordon's family members to police because Gordon does not argue that the family made the statement to police for the purposes of Gordon's diagnosis or treatment."

The court holds that the statements made by Gordon's family to Dr. Crossman maybe be admitted for the limited purpose of explaining why Dr. Crossman decided to commit the defendant for mental health treatment, so long as it is not offered for the truth of the matter asserted. The statement must be accompanied with an appropriate limiting jury instruction to restrict the evidence to its proper scope.

A HEARSAY "CATCH-ALL" PROVISION

United States v. Bruguier, 961 F.3d 1031 (8th Cir. June 9, 2020) – Defendant was convicted of four counts of sexual abuse, eight counts of aggravated sexual abuse of a child, and three counts of abusive sexual contact, relating to four victims. Defendant appealed, arguing that the trial court erred by excluding his late girlfriend's statement at trial. Before his trial, Bruguier filed notice under Federal Rule of Evidence 807(b) of his intent to introduce a statement his girlfriend Cindy St. Pierre made to the FBI before she died. Bruguier had lived with St. Pierre along with two foster children, M.F.H. and L.D.—both of whom the Government alleged he had sexually abused. St. Pierre's statement addressed M.F.H.'s mental health, the children's struggles in the home, their interactions with Bruguier, and his denial of the criminal allegations. Bruguier argued that although the statement was hearsay, it should be admitted under Rule 807 because it was made to the FBI and preserved in an audio recording. The district court disagreed and did not admit the statement. The Eighth Circuit affirms this decision, holding that there was no abuse of discretion by the district court.

> "Rule 807, the 'catch-all' hearsay exception, permits the admission of hearsay if (1) it has circumstantial guarantees of trustworthiness that are equivalent to those accompanying the enumerated hearsay exceptions; (2) it is offered as evidence of a material fact; (3) it is more probative on the point for which it is offered than any other reasonably available evidence; and (4) its admission would best serve the purposes of these rules and the interests of justice. Id. Congress intended this Rule to 'be used very rarely, and only in exceptional circumstances.'"
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> "We agree with the district court that St. Pierre's statement fails to meet Rule 807's first requirement—the necessary 'circumstantial guarantees of trustworthiness.' We assess trustworthiness 'under a broad totality of the circumstances test.' *United States v. Halk*, 634 F.3d 482, 489 (8th Cir. 2011). The circumstances surrounding St. Pierre's statement do not indicate that it was particularly worthy of belief. As the district court noted, it was made nine months after the episodes of abuse at issue in the case. *See Halk*, 634 F.3d at 489 (statement made a year after defendant's arrest was not credible). Also, although the statement was made to the FBI, St. Pierre was not under oath and there is good reason to doubt a person who knows her romantic partner is accused of committing a serious crime. See *Love*, 592 F.2d at 1026 (reversing admission of a transcribed statement to the FBI where declarant had no incentive to speak truthfully). Nor does the fact that St. Pierre's statement was recorded change the result. Although a recording ensures a declarant's

> statement is faithfully reproduced, it provides little assurance that the statement was truthful and reliable when spoken."

Polaris PowerLED Technologies v. Samsung Electronics America, Inc., 386 F.Supp.3d 760 (E.D. Tex. June 17, 2019) – Polaris, patentee of brightness control circuit, brought infringement suit against Samsung. Samsung asserts that the Garmin GTX327 transponder is prior art that invalidates the patent held by Polaris. Plaintiff objected to preadmission, under residual hearsay exception, of exhibit, namely maintenance log of aircraft into which transponder which allegedly constituted invalidating prior art had been installed.

Samsung's expert, Dr. Philip C.D. Hobbs, examined and tested a model of the GTX327 transponder to determine that, in his opinion, it renders the Patent invalid. Samsung seeks to establish that the particular transponder that Dr. Hobbs examined (the "Tested Device"), which was originally purchased in 2003 and sold to Dr. Hobbs in 2018, is an authentic and unaltered model of the Garmin GTX327. In support of this, Samsung seeks to preadmit DX 63, which contains pages of the maintenance records of the aircraft into which the Tested Device was installed (the "Maintenance Log"). The Maintenance Log shows the date on which the Tested Device was installed in the aircraft and the date on which it was removed, after which it was sold to Dr. Hobbs. Federal Aviation Regulations require that the Maintenance Log be accurately maintained and transferred to any subsequent purchaser of the aircraft. This particular aircraft was sold, and the Maintenance Log transferred, between the time when the Tested Device was installed and when it was removed and sold to Dr. Hobbs. The court finds that each of the factors relevant to the residual exception analysis is met:

> **(1) The statement has equivalent circumstantial guarantees of trustworthiness** – The Maintenance Log has equivalent circumstantial guarantees of trustworthiness. Such logs are required to be maintained by federal regulation. Individuals who perform maintenance on an aircraft are required to make an entry in the aircraft's maintenance record specifying the work performed, date completed, name of the person performing the work, and a signature of the person approving the work. The registered owner or operator of the aircraft is required to maintain these records and to transfer such records to a subsequent purchaser of the aircraft. Failure to comply with these regulations could result in a civil penalty of up to $50,000 assessed by the Federal Aviation Administration ("FAA"). This regulated method of creating and maintaining maintenance records enforced by the FAA constitutes equivalent, if not more substantial, circumstantial guarantees of trustworthiness as those provided by the enumerated hearsay exceptions.
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> **(2) It is offered as evidence of a material fact** – The Maintenance Log is offered as evidence of a material fact, namely whether the Tested Device was maintained in its original state since its initial purchase. The Maintenance Log is circumstantial evidence that the Tested Device was unaltered from the time of its installation shortly after purchase until the time it was removed and ultimately sold to Dr. Hobbs. Whether the Tested Device is an authentic and unmodified version of the GTX 327 is central to Samsung's argument that the GTX327 constitutes invalidating prior art.

(3) It is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts – The Maintenance Log is more probative of the issue of the Tested Device's authenticity than any other evidence Samsung can obtain through reasonable efforts. The Court previously ordered the parties to seek the depositions of William Dickenson, Chip Parker, and any other prior custodians who might have information relevant to the authenticity of the Tested Device and the Maintenance Log. The parties have been unable to do so despite reasonable efforts. Moreover, it is not clear that the memories of a custodian regarding records created up to 16 years ago would be more reliable, and thus more probative, than the contemporaneous records maintained in the Maintenance Log.

(4) Admitting it will best serve the purposes of these rules and the interests of justice – Preadmission of the Maintenance Log would best serve the purposes of the rules of evidence and the interests of justice. The residual exception "was designed to protect the integrity of the specifically enumerated [hearsay] exceptions by providing the courts with the flexibility necessary to address unanticipated situations and to facilitate the basic purpose of the Rules: ascertainment of the truth and fair adjudication of controversies." *Dartez v. Fibreboard Corp.*, 765 F.2d 456, 462 (5th Cir. 1985). Consistent with this purpose the Court does not stretch the enumerated exceptions, such as the business record or public record exceptions, of which the Maintenance Log is a close approximation. Rather, the Court finds that the Maintenance Log is probative of a material fact and contains sufficient indicia of authenticity to aid in the "ascertainment of the truth and fair adjudication of" the controversy at hand, and therefore that its admission under the residual exception is appropriate.

2021 Cases

United States v. Ross, 849 Fed. Appx. 343: Maurice Ross was charged with three counts each of Hobbs Act robbery; possessing a firearm as a felon; and brandishing a firearm in furtherance of a crime of violence. A jury convicted him on all counts, and Ross appealed. At trial, the Government offered in evidence two "Stolen Ticket Reports" generated by the Pennsylvania Lottery. These reports contain out-of-court statements by the owner of the robbed convenience store, Sukhdev Riar. Included were his estimates of the serial numbers of the stolen lottery tickets, which he provided to Lottery staff after the second and third robberies. Ross argued the District Court erred by admitting this evidence in violation of the rule against hearsay. The court agrees, saying "the statements therefore are hearsay and, under Rule 805, were inadmissible unless they conform[ed] with an exception to the rule." The court found no such exception as to allow Riar's statements within the reports, and thus constituted an error. While the court did find error in the admission of Riar's statements under Rule 805, they concluded the error was harmless.

BookXchange FL, LLC v. Book Runners, LLC, 2020 U.S. Dist. LEXIS 223611: Plaintiff and defendant "Book Runners" are merchants dealing in college textbooks. Both extensively use the Amazon marketplace for online sales. Plaintiff alleged that Book Runners had placed certain fraudulent orders for Plaintiff's books on Amazon by entering false payment information when placing the orders on Amazon. Book Runners denied these claims. Book Runners obtained the Declaration of Florin Mirica, a Litigation Paralegal in the Litigation and Regulatory group at Amazon and sought an order stating that the declaration "met the elements of" Rule 807, the residual exception to the rule against hearsay. Plaintiff objected to paragraph 8 of the declaration as admissible under Rule 807. Paragraph 8 said: "On December 22, 2018, Amazon cancelled the 266 Order (an order placed by one of Book Runner's owners for 20 copies of plaintiff's book) because of a notification that the customer's account appeared to have been compromised." Federal Rule of Evidence 807 allows for the admission of a hearsay statement when certain conditions are met: "(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 can obtain through reasonable efforts." The court found that neither condition was met as to allow the evidence under Rule 807. Firstly, paragraph 8 was not "supported by sufficient guarantees of trustworthiness." It appeared as though Amazon was not clear or consistent as to the reason for the cancellation of the 266 Order. Secondly, the Court was not persuaded that the hearsay statement was "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." For example, if a witness were called in lieu of admitting the declaration the parties would likely obtain more information about the meaning of the statement in question. Thus, paragraph 8 of the declaration is inadmissible under Rule 807.

Chapter 22 – Authentication

THE AUTHENTICATION RULE

United States v. Vazquez-Soto, 939 F.3d 365 (1st Cir. Oct. 1, 2019) – Defendant was convicted of making false statements and theft of government property, arising from a supposed workplace injury and subsequent disability while working for the United States Postal Service. He appealed, arguing that the district court abused its discretion in admitting into evidence photographs taken from a Facebook page under the name of his ex-wife. The photographs were found by investigating officer, Morales, on a Facebook page bearing the name of defendant's ex-wife. Morales testified about the photographs, including how he found the Facebook page and what the photographs depicted. The First Circuit held that there was no abuse of discretion by admitting the photographs, because although the photographs were found on Facebook, they were not subject to the evidentiary rules for authenticating social media data.

> "Vázquez-Soto argues that, because the photographs were found on a Facebook page, we must address the evidentiary rules for 'authenticating social media data,' and that, under these rules, a proponent of social media evidence 'must present a prima facie case ... that [the social media evidence] is in fact a posting on a person's Facebook page,' in this case the page of Janica, Vázquez-Soto's ex-wife. Without Janica's testimony that the photographs came from her Facebook page, or other evidence akin to it, Vázquez-Soto argues that the government failed to meet this requirement. We disagree with the premise of Vázquez-Soto's argument. The authenticity of Janica's social media account is not at issue in this case -- that is, the account's ownership is not relevant. The photographs were introduced as images of Vázquez-Soto on a motorcycle trip, not as part of a social media statement by Janica. Thus, what is at issue is only the authenticity of the photographs, not the Facebook page."

United States v. Robinson, 2019 WL 2881596 (S.D. Ga. July 3, 2019) – Defendant was charged with one count of a controlled substance. In discovery, the Government produced a video recording that purportedly captured a confidential informant (CI) purchasing drugs from Robinson on March 7, 2018. Both parties agree that the video was recorded by a body-worn camera provided to the CI by law enforcement. Robinson's principal challenge to the admissibility of the video is the undisputed fact that the internal date/time stamp on the video reads "June 3, 2013." At the hearing, the Government called Savannah Police Department Detective Eric Smith, the agent in charge of the controlled buy. Detective Smith testified that he was responsible for setting up and starting the recording device. He had been using similar equipment since 2015. He further testified that he had used the particular recording device at issue in past operations, and it had proven reliable. He further testified that, at the time the video was recorded, he was unable to set the device's time and date correctly. He had since contacted the device's manufacturer and corrected the issue. Finally, he testified that he reviewed the recording and it was consistent with the other surveillance (visual and via an open cell-phone connection) of the events. The court denied defendant's motion to exclude, finding that Detective Smith's unrebutted and fully credible testimony is adequate to admit the recording. Even assuming that the incorrect date/time

stamp creates a doubt about the video's accuracy, Detective Smith's testimony resolves the issue for admissibility purposes.

United States v. Dewitt, 943 F.3d 1092 (7th Cir. Nov. 12, 2019) – Defendant was convicted by a jury of production, distribution, and possession of child pornography. He appealed his conviction, arguing that the trial court erred in admitting defendant's cell phone into evidence because there were gaps in the government's chain of custody. The court affirmed, finding no abuse of discretion by the trial court.

> "Upon Dewitt's arrest, FBI Agent Richard Davies turned the phone off, took it to his office, and put it on his desk. While not itself locked, Agent Davies's office is part of a larger FBI office accessible to only five or six employees with the requisite personal ID card and access code. Agent Davies was the last to leave the night of Dewitt's arrest and the first to arrive the next morning. Upon returning he found the phone exactly as he had left it. At that point Agent Davies logged the phone into evidence and sent it to an FBI forensic facility. To be admissible, "the physical exhibit being offered [must be] in substantially the same condition as when the crime was committed." *United States v. Moore*, 425 F.3d 1061, 1071 (7th Cir. 2005). The chain of custody does not need to be perfect. Rather, the government needs to show that it took "reasonable precautions" to preserve the evidence—a standard that does not require excluding all possibilities of tampering. *Id*. Absent any evidence to the contrary, when property is in police custody a presumption arises that the evidence has not been tampered with. *See United States v. Tatum*, 548 F.3d 584, 587 (7th Cir. 2008). Any gaps in the chain of custody or speculative claims of tampering go to the weight of the evidence rather than its admissibility. *See United States v. Lee*, 502 F.3d 691, 697 (7th Cir. 2007). We see no abuse of discretion in the district court's admission of Dewitt's cell phone at trial. **All agree the chain of custody was imperfect, as Officer Davies left the phone on his desk overnight. But perfection is not the proper measure.** The imperfection the law tolerates here comes from the fact that, at all times, the phone remained secured within the FBI's office. In these circumstances, the law affords a presumption that the integrity of the phone remained intact, that nobody tampered with it. Dewitt offers no evidence to the contrary and any speculation could have been considered by the jury in assigning weight to the evidence.

AUTHENTICATION OF ELECTRONIC EVIDENCE (EMAILS, TEXT MESSAGES, AND SOCIAL MEDIA)

United States v. Quintana, 763 Fed.Appx. 422 (6th Cir. Feb. 12, 2019) – Defendant was convicted of conspiracy to distribute or possess with intent to distribute methamphetamine and distribution of methamphetamine by a jury. He appealed his conviction, arguing that the trial court erred in admitting social media account records without proper authentication. Defendant argued that the identifying information contained on Exhibit 17a—his name, two emails (one of which was his name, and the other his moniker), and a telephone number—did not contain sufficient "distinctive characteristics" under Fed. R. Evid. 901(b)(4) to authenticate the records given that the government offered no evidence linking him to the email addresses and phone number. The Sixth Circuit affirmed, holding that the records were properly authenticated and admitted into evidence.

> "We have an account in defendant's name, an email address with his name and moniker, a location linked to defendant, dates that correspond to witness testimony, and a picture of defendant. We also have powerful circumstantial evidence linking defendant to the account—changes to the account a few days after Aker's arrest, including the deletion of Aker as a friend. Thus, we have more "than the page itself" to support authentication. *United States v. Vayner*, 769 F.3d 125, 132 (2d Cir. 2014)."

SELF-AUTHENTICATION

United States v. Todd, 791 Fed.Appx. 10 (11th Cir. Oct. 11, 2019) – Defendant was convicted of filing tax returns fraudulently claiming that individuals were entitled to receive the American Opportunity Tax Credit (AOTC) and the Fuel Tax Credit (FTC).The United States District Court for the Northern District of Georgia, Mark H. Cohen, J., sentenced defendant to 222 months in prison, found that the fraudulent scheme resulted in loss of $3,631,466 and ordered restitution in that amount. Defendant appealed. The Eleventh Circuit affirmed defendant's conviction, finding no abuse of discretion by the trial court. Specifically, in response to defendant's evidentiary authentication objection, the appellate court held that United States seal and Library of Congress signature certifying that photocopies in exhibit were true representations of Congressional transcripts were sufficient for self-authentication, and thus admission of exhibit containing defendant's Congressional testimony concerning his prior conviction for conspiring to commit tax fraud was not abuse of discretion.

Chapter 23 – Original Writings

WHEN AN ORIGINAL IS REQUIRED

Markets Group, Inc. v. Oliveira, 2020 WL 820654 (S.D.N.Y. Feb. 3, 2020) – Markets Group, Inc. filed action for breach of contract and misappropriation of trade secrets against former employee Oliveira. Defendant filed a motion for summary judgment, seeking dismissal of all claims against him.

While employed at Markets Group, one of Oliveira's main responsibilities was to build "customer lists" in Excel, containing "leads, people, companies" to whom Markets could sell insurance. After resigning, Oliveira incorporated LinkBridge Investors LLC, which focused on investor relations and conference planning. Prior to LinkBridge's first conference, Oliveira and his staff compiled invitation lists by using public websites like Google and LinkedIn, the same websites Oliveira had consulted to build customer lists while under Markets' employ, and by purchasing "lists and leads" from an outside company. He did not possess any hard copies or electronic copies of Markets' customer lists and did not use them to compile LinkBridge's invitation lists.

Markets argues that the customer lists built by Oliveira contained substantial nonpublic information that took effort to obtain, making them protectible trade secrets. Markets does not point to a single customer list that contains the "nonpublic information" referenced in their arguments, instead relying solely on CFO Timothy Raleigh's testimony to support its contentions. The court held that Raleigh's statements regarding the content of the customer lists violate the best evidence rule (Rule 1002) and therefore was inadmissible. The statements do not satisfy any exceptions provided within the Federal Rules of Evidence because Markets never contended that the original nonpublic customer lists are unavailable and unattainable.

THE RIGHT TO USE DUPLICATES

Croy v. Ravalli, 2020 WL 4001133 (D. Mont. July 15, 2020) – In June 2017, Western Montana Excavation, LLC graded a road between Teddy Bear Lane and Northview Drive in Stevensville, Montana Montana apparently to provide access to a parcel owned by Sunnyside Orchards, LLC. Nicole Croy and other adjacent property owners (collectively "Croy") sued Sunnyside Orchards, its registered manager Starlight Interests, LLC, its realtor Lee Foss, Western Montana Excavation, Ravalli County, and the Ravalli County Board of Commissioners, alleging that the road was illegally built. The crux of the case is whether the disputed road was built on a properly platted public highway, which requires an examination of county records going back over a century.

Defendants sought summary judgment that a public highway was established in 1909 by the plat submitted as Exhibit V, which both parties agree is a copy of the original. The court grants defendant's motion for summary judgment, holding Exhibit V is admissible to prove the contents of the original 1909 plat under Rule 1004.

> "The question remains whether Exhibit V is admissible to prove the contents of the original 1909 plat. Generally, the original is required to prove a writing's contents. Fed. R. Evid. 1002. However, secondary evidence of the writing is admissible if

"all the originals are lost or destroyed, and not by the proponent acting in bad faith." Fed. R. Evid. 1004(a); *Hendrick v. Hughes*, 82 U.S. 123, 130 (1872) (concluding that a copied plat "was competent secondary evidence of the contents of the original plat which was lost"). Whether the originals have been lost or destroyed, such that other evidence is appropriate, is a threshold question for the court. *See* Fed. R. Evid. 1008. Here, the summary judgment record did not initially include any evidence about the status of the original 1909 plat or the diligence of the County's search. *See, e.g.*, *Sauget v. Johnston*, 315 F.2d 816, 817 (9th Cir. 1963). However, at the Court's direction, Foss supplemented the record with an affidavit and testimony from Regina Plettenberg, the Ravalli County Clerk and Recorder. Plettenberg's affidavit establishes that the original 1909 plat could not be located after a thorough search of the Ravalli County records. Considering secondary evidence, such as Oertli's copy labeled Exhibit V, is therefore appropriate."

WHEN NO ORIGINAL OR DUPLICATE IS AVAILABLE

Elliot v. Cartagena, 2020 WL 4432450 (S.D.N.Y. July 31, 2020) – Plaintiff brought a copyright infringement action, alleging that he is a co-author of the song "All the Way Up." Plaintiff asserts that he and defendant created the song's prototype together in 2015. "All the Way Up" was publicly released on March 2, 2016 as a song created by defendants Joseph Cartagena ("Fat Joe"); Karim Kharbouch ("French Montana"); Reminisce Smith Mackie ("Remy Ma"); and others. Plaintiff was not named as one of the song's authors.

Shortly after the song was released, in early March 2016, plaintiff and Fat Joe spoke over the phone. During the call, plaintiff "said he wanted to get paid up front or have publishing going forward. In mid-March, plaintiff and Fat Joe had a meeting at an IHOP restaurant. During the meeting, Fat Joe gave plaintiff a check for $5,000. The check denoted that it was for "write." Fat Joe also put a "piece of paper" in front of plaintiff. Plaintiff signed the paper and took the check, depositing the money after the meeting.

Defendants moved for summary judgment on the ground that plaintiff contractually gave up all of his rights to the song by signing the agreement contained in the piece of paper. During discovery, the Court directed the parties to file "whatever versions of the ['piece of paper'] are in their possession" and "sworn statements from the relevant parties addressing the lack of possession (i.e. total or unsigned)." On September 19, 2019, defendants submitted a sworn declaration by Moreira (Fat Joe's attorney at the time in question), claiming that she had prepared the "piece of paper." Moreira submitted a copy of the Draft Agreement along with her declaration. Fat Joe states in his declaration that he printed out the Draft Agreement without making any changes and brought it to his meeting with plaintiff at the IHOP restaurant. As to the whereabouts of the signed copy of the "piece of paper," Moreira states in her declaration that she never received it. Fat Joe also certifies in his declaration that he could not locate a signed copy of the "piece of paper" after a reasonable search of his home, his personal belongings and the people "in [his] circle at the time." However, Fat Joe further states that he "may have provided the document to [his] then-manager, Mr. Elis Pacheco." According to Fat Joe, "Pacheco was contacted by e-mail regarding this matter," but it is Fat Joe's "understand[ing] that [Pacheco] indicated he was unable to locate a signed copy of the [document]."

At the outset, the court concludes that the Draft Agreement is admissible as a duplicate of the "piece of paper" under Rule 1003. The court then looks to Rule 1002 (best evidence rule) and Rule 1004 to determine if the court may consider the Draft Agreement for the purpose of inferring the terms of the parties' signed agreement. The court found that the defendants failed to fully satisfy their burden to invoke Rule 1004(a).

> The Court nonetheless concludes that defendants have failed to fully satisfy their burden to invoke Rule 1004(a). It is defendants' burden to prove by the preponderance of proof that all copies of the signed agreement between the parties are lost or destroyed. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 n.10 (1993) (concluding that preliminary questions concerning the admissibility of evidence should be established by a preponderance of proof). Having considered the various statements attributed to Pacheco that were offered by Fat Joe, Moreira and Kupinse, the Court concludes that these hearsay statements fall short of direct testimony by Pacheco assuming his availability. While there is no obvious reason to believe that these hearsay statements offered are not true, given the centrality of the issue of whether Rule 1004(a) can be invoked to establish the contractual terms between the parties, the Court concludes that defendants should be required to exhaust all effort to obtain a sworn testimony by Pacheco.

WHEN RECORDS ARE VOLUMINOUS

United States v. Melgen, 2020 WL 4381842 (11th Cir. July 31, 2020) – Defendant was convicted of 67 counts of defrauding Medicare in connection to his ophthalmology practice in Palm Springs, FL. Defendant appealed, arguing that the trial court erred in admitting summary charts into evidence under Rule 1006. At trial, the government introduced summary charts of Medicare records under Rule 1006 to demonstrate that defendant's practices were markedly different from similarly situated physicians. Those records were compiled by drawing out particular doctors' data from raw Medicare data. In order to make the summaries relevant, the government pulled the data for only those self-identified ophthalmologists who (1) billed Medicare for over 500 injections of Lucentis from 2008–2013, (2) had at least 2,000 Medicare patients during that time, and (3) billed at least one claim each of those years. Defendant argued that there was no evidence supporting the comparison criteria used in creating the summaries. The government argued that it had explained its comparator criteria through the expert testimony of Dr. Fine, a retina specialist who endorsed the 500-injection cutoff. The government also introduced testimony regarding that criterion from Dr. Julia Haller, an expert ophthalmologist based in Philadelphia. She testified that 500 injections of Lucentis over a six-year period would be a conservative estimate for identifying other retinal specialists. After the charts were admitted, the witness who had prepared the charts then testified that the requirement that the comparators had treated 2,000 patients per year was based on Melgen's own patient population of slightly more than 2,000 patients during the relevant period, and that the requirement of treating one patient per year during the period ensured that the sample did not include doctors that had not practiced throughout the relevant period. The court affirmed the trial court's decision:

> "Where, as here, the underlying evidence is made up of voluminous Medicare claims, a district court has good reason to apply Rule 1006 to allow a summary

> chart. "Summary charts are permitted generally by Federal Rule of Evidence 1006 and the decision whether to use them lies within the district court's discretion." *United States v. Richardson*, 233 F.3d 1285, 1293 (11th Cir. 2000). Under that rule, "the essential requirement is not that the charts be free from reliance on any assumptions, but rather that these assumptions be supported by evidence in the record." *Id*. at 1294 (quoting *United States v. Diez*, 515 F.2d 892, 905 (5th Cir. 1975)). Here, the 500-injections-over-six-years criterion was supported by the opinion of Dr. Haller (whom, we note, Melgen was able to cross-examine). The 2,000-patient cutoff reflected Melgen's own patient load. And the one-patient-each-year criterion matched Melgen's own consistent practice during the relevant period. We therefore find no abuse of discretion in the district court's decision to admit the charts under Rule 1006. Permitting the introduction of the underlying data under the business records exception to hearsay was also well within the district court's discretion."

Ramirez v. U.S. Immigration and Customs Enforcement, 2020 WL 3604041 (D.C. Cir. July 2, 2020) – Plaintiffs brought a class action suit alleging violations of the Administrative Procedure Act by U.S. Immigration and Customs Enforcement in connection with ICE's processing of eighteen-year-olds-who came to the United States as unaccompanied alien children. When minors lacking immigration status arrive in the United States without parents or other guardians, they are placed in the custody of the Department of Health and Human Services, Office of Refugee Resettlement ("HHS" and "ORR"). If they are still in custody on their eighteenth birthday, the now-adult immigrants "age out" of HHS and ORR custody and are transferred to ICE custody. Immigrants who undergo this transfer from HHS to ORR are referred to by the parties as "age-outs" and a subset of these age-outs make up the plaintiff class in this case. A provision of a 2013 statute amending the Trafficking Victims Protection Reauthorization Act ("TVPRA")1 codified at 8 U.S.C. § 1232(c)(2)(B), requires that when ICE receives custody of an age-out it must "consider placement in the least restrictive setting available after taking into account the alien's danger to self, danger to the community, and risk of flight." 8 U.S.C. § 1232(c)(2)(B). Plaintiffs argue that a significant number of ICE field offices and officers automatically place many age-outs in adult detention settings without giving less-restrictive settings the consideration required. At trial, plaintiffs showed a series of Rule 1006 summary graphs to demonstrate the variations in field office detention rates. Each is a line graph that charts, for each month, the percentage of age-outs encountered at one or more field offices. They summarize the information contained in the ERO Custody Management Division raw data provided by defendants. Defendants objected to the use of these summaries at trial, arguing that they are visually misleading for various reasons. The court rejected this argument and affirmed, finding that the summaries were clear and accurate depictions of the underlying data and sufficiently supported by expert testimony.

Chapter 24 – The Constitution and Evidence

SCOPE OF CROSS EXAMINATION

State v. Jackson, 2020 WL 3579673 (N.J. July 2, 2020) – Defendant was convicted of third-degree conspiracy to commit burglary. In his appeal, defendant argues that he was denied his Sixth Amendment right to confrontation when the trial court prohibited testimony of a cooperating witness who was facing the same charges. The New Jersey Supreme Court held that the trial court did err when it barred counsel for defendant from pursuing the line of questioning during cross-examination concerning cooperating witness's plea bargain and his sentencing exposure. The court found that the error was not harmless, and therefore reversed, vacated, and remanded the case for a new trial.

> we must balance defendant's right to confront Clarke with the full exposure of his potential sentence against the trial court's concern that the jury may deadlock or find defendant not guilty if it inferred his sentencing exposure from the charges Clarke faced.
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> Defendant was entitled to question Clarke about his subjective understanding of the benefit of his plea bargain, including what sentence he faced and what was offered in the plea agreement.
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> The trial court barred all testimony about the maximum sentence Clarke faced, which in turn prevented the jury from hearing the effect that sentencing exposure had on Clarke's mindset when negotiating his plea with the State.

Viera v. Sheahan, 2020 WL 3577390 (E.D.N.Y. June 30, 2020) – Petitioner was convicted by a jury in 2011 of the first-degree manslaughter of Elsmaker Iverson, who was shot and killed outside of a Brooklyn, NY deli In November 2008. Police learned of Petitioner's involvement in the fatal shooting as a result of information provided by a witness to the shooting, Christopher Hodge. Hodge was arrested on December 16, 2008. After seeing a photo of a recent shooting victim, Mr. Iverson, at the police precinct, Mr. Hodge told a detective that he knew both Petitioner and Mr. Iverson, and that he witnessed Petitioner shooting Mr. Iverson. Petitioner asserted four grounds for relief, including that the trial court's denial of defense counsel's motion to view Mr. Hodge's psychiatric records, as well as the striking of a series of questions on cross-examination related to those records, violated petitioner's rights under the confrontation clause of the Sixth Amendment of the Constitution. The court denied the petition, holding that his Confrontation right was not violated by the trial court's refusal to allow use of Hodge's mental health records during cross examination.

> "[The Confrontation] right, however, is not unlimited, and "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things,

harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. VanArsdall*, 475 U.S. 673, 679 (1986). **When the cross-examiner intends to utilize the contents of confidential, privileged, or otherwise sensitive information, it is normal practice for the trial court to review the information in camera, and to make a determination about whether the information is appropriate for cross-examination.** *See Pennsylvania v. Ritchie*, 480 U.S. 39, 60-61 (1987). **An individual's psychiatric records are confidential, and such records should be used on cross-examination only when "their confidentiality is significantly outweighed by the interest of justice."** *Delio v. People of State of New York*, No. 02-cv-5258, 2003 WL 22956953, at *12 (E.D.N.Y. Oct. 21, 2003) (quoting *People v. Duran*, 713 N.Y.S.2d 561, 562 (2nd Dep't 2000)). "It is normal practice for the trial court to review [psychiatric records] in camera to ascertain if the report contains any relevant information for the purposes of cross-examination." Id. at *13 (citing *Ritchie*, 480 U.S. 39). Here, that is precisely what the state trial court did. The trial judge reviewed Mr. Hodge's psychiatric record, made a determination that Mr. Hodge's ability to testify would not be affected by any mental health condition, and thus prevented use of the record for cross-examination. Accordingly, Petitioner has not shown that the trial court's decision to prevent cross-examination of Mr. Hodge based on his psychiatric records deprived him of his Sixth Amendment right to confront Mr. Hodge. The records in question were filed in this matter under seal, and this court found nothing in them indicating that the trial court erred by not allowing Petitioner to use them on cross-examination. Moreover, defense counsel was able to cross-examine Mr. Hodge about his plea agreement and the resulting requirement for Mr. Hodge to receive certain treatment. Petitioner was therefore not deprived of his constitutional right to confront Mr. Hodge."

THE RIGHT TO FACE-TO-FACE CONFRONTATION

United States v. Casher, 2020 WL 3270541 (D. Mont. June 17, 2020) – The Government served trial subpoenas on third parties Curtis Chrystal and Craig Sciara, requiring that they personally appear as witnesses at the jury trial scheduled for June 22, 2020. Due to the ongoing COVID-19 pandemic, both witnesses have concerns about traveling, especially Mr. Chrystal given his age and underlying health conditions., Both Mr. Chrystal and Mr. Sciara moved the Court to quash their subpoenas. In the alternative, they askedto testify by videoconference. The court denied the request to quash and held that allowing the witnesses to testify via videoconferencing raises serious Confrontation Clause concerns.

> "[I]n a civil case, videoconference testimony would ordinarily be acceptable under these circumstances. However, because a criminal defendant risks incarceration, the United States Constitution affords greater protections, including the defendant's right "to be confronted with the witnesses against him." This confrontation requirement may be satisfied absent a physical, face-to-face confrontation only where (1) the "denial of such confrontation is necessary to further an important public policy," and (2) "the reliability of the testimony is otherwise assured." *Maryland v. Craig*, 497 U.S. 836, 850 (1990); see *U.S. v. Carter*, 907 F.3d 1199, 1205–06 (9th Cir. 2018)."

"In this case, there are no realistic alternatives available to the Court. First, the Court already considered a continuance but found it impracticable. COVID-19 is unprecedented as much as it is unpredictable. Unlike the witness's pregnancy in Carter, there is no way for the Court to know when the crisis will end. Second, depositions at this late hour would require a continuance. They would also deprive the jury of the opportunity to observe the witnesses under direct and cross examination. Third, testimony from the two witnesses is anticipated to impact most (if not all) the counts with which Mr. Casher is charged. It would be unreasonable to sever them at this point[.]"

Chapter 25 – The Constitution and Hearsay

WHICH ASSERTIONS ARE "TESTIMONIAL" HEARSAY?

United States v. Santos, 947 F.3d 711 (11th Cir. Jan. 9, 2020) – Defendant was convicted of procuring naturalization unlawfully and related offenses. In his appeal, defendant argued that he was deprived of his Sixth Amendment right to confrontation when the trial court admitted the annotated N-400 Naturalization Application into evidence. All individuals seeking naturalized citizenship are required to submit an N-400 Naturalization Application and participate in an interview under oath with a USCIS adjudicator. During the naturalization interview, the adjudicator, in accordance with USCIS policy and training, reviews the information in the Form N-400 with the applicant, placing a checkmark next to each confirmed answer and noting any corrections using red ink. Defendant contends that the adjudicator's statements in red ink were testimonial under *Crawford*, and therefore inadmissible. The court affirms, holding that statements from annotated N-400 applications are nontestimonial and therefore not governed by *Crawford*.

> "Here, we conclude that Santos's annotated Form N-400 Application, like the annotated Form N-445 in *Lang*, is a "nontestimonial public record produced as a matter of administrative routine" and "for the primary purpose of determining [Santos's] eligibility for naturalization." See *id*. at 22. **That is, the circumstances of the naturalization interview objectively indicate that the primary purpose of the interview is to review the Form N-400 with the applicant and verify the applicant's answers so that a determination can be made as to the applicant's eligibility for naturalization.** See *Davis*, 547 U.S. at 822, 126 S. Ct. at 2273-74. Indeed, all naturalization applicants are required complete and sign a Form N-400 Application, attend a naturalization interview, and then USCIS adjudications officers perform the same verification process consistent with USCIS's protocol in every naturalization interview. USCIS officers are not conducting the interviews because they suspect the applicants of crimes and are not making the red marks on the Form N-400s for later criminal prosecution."

State v. Roy, 597 S.W.3d 710 (Mo. Ct. App. Jan. 27, 2020) – Defendant was convicted of first-degree murder and armed criminal action. Defendant appealed, arguing that the trial court erred in admitting Officer Bolton's testimony that the victim's mother said defendant killed the victim. At trial, defense counsel objected to the testimony, arguing that the statement was testimonial and therefore violated defendant's right to confrontation. The prosecution responded that the statement was not offered to prove the truth of the matter asserted, but rather to facilitate the development of *res gestae*, and was therefore not testimonial. The appellate court affirmed, agreeing that the statement was not testimonial and therefore not within the purview of the Confrontation Clause. The court also explained that even if the statement was offered to prove the truth of the matter asserted, it would not qualify as testimonial under the "primary purpose" test set forth in *Ohio v. Clark*.

> "Even if the testimony had been offered for the truth of the matter asserted, the record in the instant matter, as considered in accord with the "primary purpose test" and other relevant considerations as set out in *Ohio v. Clark*, demonstrates that the challenged statement was not testimonial. Officer Bolton responded to a 911 call "[t]hat there was a female to the home that had been stabbed and that there was

> another person there that had called 9-1-1."10 Upon arrival, Officer Bolton observed a woman (whom he would later find to be Victim's mother) "very frantic and upset." Without being asked any questions by Officer Bolton, "[s]he was screaming that her daughter was dead inside the residence." At the time Mother made the statement identifying Roy, police had not independently confirmed the identities of the man and the woman standing on the front porch, or independently confirmed the identity or medical status of Victim (or for that matter the number of victims). Nor did police yet have any information to suggest that whomever stabbed Victim was not still in the house or in the immediate vicinity. An objective view of the parties and circumstances does not indicate that the "primary purpose" of Mother's statement was to establish or prove past events for possible future use in prosecution. *See Williams*, 567 U.S. at 57–58, 132 S.Ct. at 2228 (finding that there was no Confrontation Clause violation where a lab report admitted at trial "was sought not for the purpose of obtaining evidence to be used against [defendant], who was not even under suspicion at the time, but for the purpose of finding a rapist who was on the loose.")."

THE HEARSAY OF CHILDREN

Ramirez v. Tegels, 413 F.Supp.3d 808 (W.D. Wis. Sept. 26, 2019) – Defendant was convicted of first-degree sexual assault on his eight-year-old stepdaughter. The Wisconsin Court of Appeals affirmed his conviction, and he petitioned for federal habeas relief. He argues that his appellate counsel performed in a constitutionally deficient manner by failing to raise a *Crawford* challenge to the introduction of the out-of-court statements of child victim M.R. and her brother, also a young child. At defendant's trial, the state presented the following out-of-court statements from M.R. and her brother: (1) M.R.'s statements accusing defendant of sexual assault, made to Officer Larsen, Detective Gregory, Nurse Karpowicz-Halpin, and Dr. Siegel; and (2) her brother's statement that he saw defendant on top of M.R. on the bed and saw "white boogers" on the bed, made to Detective Gregory. The district court granted the petition for relief, finding that defendant's rights to effective assistance of appellate counsel were violated when appellate counsel failed to challenge the admission of M.R.'s and her brother's out-of-court statements under the Confrontation Clause of the Sixth Amendment and the error was not harmless.

> "Although the state relies on *Clark* in its opposition brief, the statements at issue in this case are distinguishable from those in *Clark*. At the very least, M.R's and her brother's statements to Officer Larsen and Detective Gregory appear to be testimonial. The statements were not spontaneous and were not made in the context of an ongoing emergency. *See Clark*, 135 S. Ct. at 2181 (emphasizing the "informal and spontaneous" nature of the conversation). At the time M.R. and her brother were interviewed by law enforcement, Ramirez had been arrested on domestic assault charges already. There was no concern that M.R. would be discharged into Ramirez's custody. The interrogations were much more formal than those in *Clark*. M.R.'s and her brother's statements to Officer Larsen and Detective Gregory were made in response to police questioning as part of a sexual assault investigation. The statements were memorialized in police reports and later introduced into evidence at trial. Although M.R. and her brother were children, they were older than the three-year-old child in *Clark*. M.R. was eight years old and her brother was five.

> They likely understand that by making statements to police officers who were investigating a crime, their statements could be used in a later criminal prosecution. It is a closer question whether M.R.'s statements to hospital staff were testimonial. If the primary purpose of M.R.'s statements was to obtain a diagnosis or treatment, her statements were nontestimonial. Some of M.R.'s statements were for the purpose of obtaining medical treatment. She answered Nurse Karpowicz-Halpin's questions about whether she was hurting and what Ramirez had done to her. On the other hand, some of M.R.'s statements to Nurse Karpowicz-Halpin were not clearly for the purpose of diagnosis or treatment, such as M.R.'s description about where the assault happened, what Ramirez was wearing, and that Ramirez was responsible for her November 1998 injury. There are other factors that would tend to make some of M.R.'s statements to Nurse Karpowicz-Halpin testimonial. M.R.'s statements were not "spontaneous" or made in the context of an ongoing emergency. Cynthia and M.R. did not go to the hospital of their own volition. Officer Larsen told Cynthia that M.R. needed to be examined at the hospital and he took M.R. there. Officer Larsen arranged for the examination and was present while M.R. made statements to Nurse Karpowicz-Halpin about the incident. Officer Larsen even participated in the examination by asking questions. He left the room while M.R. got undressed, but he waited at the hospital until he received a report from the medical providers who had examined M.R. Officer Larsen's presence and participation during Nurse Karpowicz-Halpin's interview suggest that at least some of the statements was to establish past events potentially relevant to a later prosecution, rather than to provide medical treatment or meet an ongoing emergency."

People v. Jurewicz, 942 N.W.2d 116 (Mich. App. Aug. 6, 2019) – Defendant was convicted of felony murder and first-degree child abuse in connection to the murder of his girlfriend's 18-month-old child, BH. He appealed, arguing that the district court erred in admitting statements made to child protective services by child victims, violating his Sixth Amendment right to confrontation. At the time of BH's murder, defendant was living with his girlfriend and her three children, EH, LH, and BH. After BH's death, BH's mother left defendant and defendant began dating again. Two months later, defendant was present when his new girlfriend's young son, JP, was found smothered to death in his crib. While BH's death was being investigated, Child Protective Services (CPS) was investigating EH and LH's home to ensure their safety. Following JP's death, CPS also began investigating the home of JP's brother, SC, to ensure SC's safety. During separate forensic interviews with CPS, SC and EH stated that they had been choked by defendant. Defendant was eventually charged and convicted with BH's murder on a theory that the cause of BH's death was homicide from blunt-force trauma. The trial court permitted the statements, concluding that they were not given for testimonial purposes, but to address ongoing emergencies in a childrens' homes. The appellate court agreed, finding no confrontation right violation.

> "Defendant contends that the statements from SC and EH are testimonial in nature because they were taken after the investigation into defendant was underway. Although it is true that EH and SC were both interviewed after BH's death and after the investigation concerning that death had begun, the children were not

> interviewed to obtain information about BH's death or defendant's involvement in his death. Both children were interviewed by CPS workers—not law enforcement officers—for the purpose of assessing their own safety in light of the deaths of BH and JP. It is also notable that both children were approximately three years old at the time of their statements, and it is thus highly unlikely that they intended for their statements to be a substitute for trial testimony. In light of all the circumstances, despite the formality of the interviews, it is clear that the children were interviewed in order to ensure their safety and not to aid a police investigation, and that the children were too young to understand the legal implications of their statements; therefore, the statements were not testimonial."

FORENSIC RECORDS AS TESTIMONIAL HEARSAY

Garcia v. State, 2020 WL 2487383 (Miss. May 14, 2020) – Defendant was convicted on a guilty plea of capital murder arising from the rape and murder of a five-year-old girl. He appealed, arguing that his constitutional right to confront his accuser was violated by the admission of pathology expert's testimony about the victim's cause of death. Dr. LeVaughn, admitted as an expert witness in pathology, testified that he believed JT had been sexually assaulted before she died and that she died by strangulation. LeVaughn relied at least in part on the findings of another pathologist. Defendant argues that under *Bullcoming*, LeVaughn's statements qualified as surrogate testimony and are therefore inadmissible. The court rejects this argument, finding defendant's reliance on *Bullcoming* misplaced.

> "[T]his Court is not presented with the same question. The State did not admit Dr. McGarry's autopsy report through Dr. LeVaughn. So *Bullcoming's* specific concern of "surrogate testimony" is not at issue. Instead, Dr. LeVaughn was admitted as an expert in pathology. And he gave his independent expert opinion that JT had been sexually assaulted before she died and that she died by strangulation. As Garcia points out, Dr. LeVaughn did rely in part on Dr. McGarry's autopsy report and Officer Koon's autopsy photos to form his expert opinion. But this fact does not place his testimony in the *Bullcoming* surrogate-testimony category."

United States v. Barber, 937 F.3d 965 (7th Cir. Aug. 27, 2019) – Defendant was convicted of stealing firearms from federally licensed firearms dealer, possessing firearms as felon, and possessing stolen firearms. On appeal, he claimed his constitution right of confrontation by the admission of records from Bureau of Alcohol, Tobacco, Firearms, and Explosive (ATF) records without testimony from responsible officials violated Confrontation Clause. In particular, defendant objected to the admission of the evidence the government used to prove that the dealer from whom he stole the guns was federally licensed. It submitted Dutchman's license, or "Blue Ribbon Certificate," along with accompanying authenticating documents from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF). Those documents included a License Registration Report, which shows the date the license was issued, expiration date, and its status as active, as well as two signed statements from ATF officials representing that Dutchman was licensed during the period when the robbery took place. None of those officials appeared at trial. The court

of appeals held that the trial court did err in admitting the records without testimony from the preparers but that the error was harmless and did not warrant reversal.

> "In this case, the affidavits from the ATF officials suffer from the same infirmity as the analysts' certificates in *Melendez-Diaz* and the blood-test results in *Bullcoming*. Relevant to *Melendez-Diaz*, they go beyond simple authentication of a copy. The ATF agents' affidavits explain the purpose of the records and interpret them as proof that these are the records used for firearm licenses and that Dutchman was licensed during the relevant period. Those statements rest on an inference about the continuing validity of the license, and that inference requires an interpretation of what the record shows or a certification about its substance or effect. In other words, the government is relying on information beyond what the license itself says. For example, the affidavit could imply that ATF has a practice of documenting on its copy of a license information about suspensions (if any), or it might suggest that the affiant agent ran a search in order to confirm that Dutchman did not have a licensing issue at the time of the robbery. Defense counsel is entitled to know about and challenge whatever process went into generating this type of evidence. Relevant to *Bullcoming*, the government did not offer a supervisor or other responsible official for cross-examination."

THE FAIR OPPORTUNITY FOR CROSS-EXAMINATION

State v. Hutton, 205 A.3d 637 (Conn. App. Mar. 19, 2019) – Defendant was convicted of murder based on allegations that he shot victim during a dispute about gang turf and drugs and that victim eventually died of complications from his gunshot wounds. On appeal, he argued that he was deprived of his Sixth Amendment right to confront and cross examine witnesses against him. Specifically, he argued that the court violated his confrontation rights by improperly admitting into evidence a witness' prior videotaped statement to police because the witness was functionally unavailable for cross-examination due to his refusal to provide verbal responses to any questions asked by the prosecutor or defense counsel when called to testify before the jury. The appellate court reversed and remanded the case for a new trial, holding that defendant was deprived of his Sixth Amendment rights.

> "We agree with the defendant that, despite Williams' physical presence on the witness stand, the defendant was not afforded a meaningful opportunity to cross-examine Williams about his prior statement due to Williams' outright refusal to answer questions, and, therefore, the admission of Williams' statement violated the defendant's right to confrontation. We also agree that the state has failed to demonstrate that the error was harmless beyond a reasonable doubt. […] The mere fact that a witness is called to the stand and placed under oath does not mean that the witness is necessarily available for cross-examination. In some circumstances, an otherwise available witness might render themselves unavailable by his or her actions on the witness stand. Although no appellate court in this state has squarely addressed whether a witness is "available for cross-examination" if he or she refuses outright to answer any questions after being sworn in to testify, courts in other jurisdictions that have considered this issue have concluded that such a witness is functionally unavailable and, therefore, the admission of a prior statement of that witness would violate the confrontation clause's guarantee of an

opportunity to cross-examine. Although not binding on this court, we find these cases persuasive."

FORFEITING THE RIGHT TO PRECLUDE TESTIMONIAL HEARSAY WITHOUT CONFRONTATION

Scott v. State, 139 N.E.3d 1148 (Ind. Jan. 31, 2020) – Defendant was convicted of battery resulting in bodily injury to a pregnant woman, obstruction of justice, and 30 counts of invasion of privacy. He appealed, arguing that his Sixth Amendment rights were violated when the trial court admitted the victim's prior statements to two law enforcement officers. The court of appeals affirmed, holding that defendant forfeited his Sixth Amendment right to confrontation due to his own wrongdoing.

> "Defendant's conduct in repeatedly urging victim, his girlfriend, to change her story and not attend depositions or trial was designed, at least in part, to keep her from testifying against him, and thus defendant's wrongdoing forfeited his Sixth Amendment right to confront victim, and victim's statements to law enforcement were properly admitted despite her refusal to testify at trial for battery resulting in bodily injury to a pregnant woman; evidence indicated that victim cooperated with law enforcement after the incident by providing information about the incident and defendant, but defendant attempted to contact her nearly 400 times and successfully contacted her over 100 times, convincing her to ask prosecutor and court to dismiss the case and ultimately to stop cooperating."