Principles of Evidence

Seventh Edition

2024 Supplement

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Updates to the Federal Rules of Evidence

Rule 702. Testimony by Expert Witnesses

"A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the proponent demonstrates to the court that it is more likely than not that:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert's opinion reflects a reliable application of the principles and methods to the facts of the case."

Notes of Advisory Committee on 2023 Amendments. Rule 702 has been amended in two respects:

(1) First, the rule has been amended to clarify and emphasize that expert testimony may not be admitted unless the proponent demonstrates to the court that it is more likely than not that the proffered testimony meets the admissibility requirements set forth in the rule. *See* Rule 104(a). This is the preponderance of the evidence standard that applies to most of the admissibility requirements set forth in the evidence rules. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987) ("The preponderance standard ensures that before admitting evidence, the court will have found it more likely than not that the technical issues and policy concerns addressed by the Federal Rules of Evidence have been afforded due consideration."); *Huddleston v. United States,* 485 U.S. 681, 687 n.5 (1988) ("preliminary factual findings under Rule 104(a) are subject to the preponderance-of-the-evidence standard"). But many courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).

There is no intent to raise any negative inference regarding the applicability of the Rule 104(a) standard of proof for other rules. The Committee concluded that emphasizing the preponderance standard in Rule 702 specifically was made necessary by the courts that have failed to apply correctly the reliability requirements of that rule. Nor does the amendment require that the court make a finding of reliability in the absence of objection.

The amendment clarifies that the preponderance standard applies to the three reliability-based requirements added in 2000—requirements that many courts have incorrectly determined to be governed by the more permissive Rule 104(b) standard. But it remains the case that other

admissibility requirements in the rule (such as that the expert must be qualified and the expert's testimony must help the trier of fact) are governed by the Rule 104(a) standard as well.

Some challenges to expert testimony will raise matters of weight rather than admissibility even under the Rule 104(a) standard. For example, if the court finds it more likely than not that an expert has a sufficient basis to support an opinion, the fact that the expert has not read every single study that exists will raise a question of weight and not admissibility. But this does not mean, as certain courts have held, that arguments about the sufficiency of an expert's basis always go to weight and not admissibility. Rather it means that once the court has found it more likely than not that the admissibility requirement has been met, any attack by the opponent will go only to the weight of the evidence.

…

Rule 702 requires that the expert's knowledge "help" the trier of fact to understand the evidence or to determine a fact in issue. Unfortunately, some courts have required the expert's testimony to "appreciably help" the trier of fact. Applying a higher standard than helpfulness to otherwise reliable expert testimony is unnecessarily strict.

(2) Rule 702(d) has also been amended to emphasize that each expert opinion must stay within the bounds of what can be concluded from a reliable application of the expert's basis and methodology. Judicial gatekeeping is essential because just as jurors may be unable, due to lack of specialized knowledge, to evaluate meaningfully the reliability of scientific and other methods underlying expert opinion, jurors may also lack the specialized knowledge to determine whether the conclusions of an expert go beyond what the expert's basis and methodology may reliably support.

The amendment is especially pertinent to the testimony of forensic experts in both criminal and civil cases. Forensic experts should avoid assertions of absolute or one hundred percent certainty—or to a reasonable degree of scientific certainty—if the methodology is subjective and thus potentially subject to error. In deciding whether to admit forensic expert testimony, the judge should (where possible) receive an estimate of the known or potential rate of error of the methodology employed, based (where appropriate) on studies that reflect how often the method produces accurate results. Expert opinion testimony regarding the weight of feature comparison evidence (i.e., evidence that a set of features corresponds between two examined items) must be limited to those inferences that can reasonably be drawn from a reliable application of the principles and methods. This amendment does not, however, bar testimony that comports with substantive law requiring opinions to a particular degree of certainty.

Nothing in the amendment imposes any new, specific procedures. Rather, the amendment is simply intended to clarify that Rule 104(a)'s requirement applies to expert opinions under Rule 702. Similarly, nothing in the amendment requires the court to nitpick an expert's opinion in order to

reach a perfect expression of what the basis and methodology can support. The Rule 104(a) standard does not require perfection. On the other hand, it does not permit the expert to make claims that are unsupported by the expert's basis and methodology.

Pending Amendments to the Federal Rules of Evidence

Rule 613. Witness's Prior Statement (Effective until December 1, 2024)

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.
(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Rule 613. Witness's Prior Statement (Approved Amendment Effective after Dec.1, 2024)

By order dated April 2, 2024, the Supreme Court of the United States approved the following amendments to Rule 613, effective Dec. 1, 2024, and authorized their transmission to Congress in accordance with 28 USCS § 2074:

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Unless the court orders otherwise, extrinsic evidence of a witness's prior inconsistent statement may not be admitted until after the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it~~, or if justice so requires~~. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

Committee Note (May 10, 2023 Spring Advisory Committee Meeting) (613)

Rule 613(b) has been amended to require that a witness receive an opportunity to explain or deny a prior inconsistent statement before the introduction of extrinsic evidence of the statement. This requirement of a prior foundation is consistent with the common law approach to impeachment with prior inconsistent statements. See, e.g., Wammock v. Celotex Corp., 793 F.2d 1518, 1521 (11th Cir.1986) ("Traditionally, prior inconsistent statements of a witness could not be proved by extrinsic evidence unless and until the witness was first confronted with the impeaching statement."). The existing rule imposes no timing preference or sequence and thus permits an impeaching party to introduce extrinsic evidence of a witness's prior inconsistent statement before giving the witness the necessary opportunity to explain or deny it. This flexible timing can create problems concerning the witness's availability to be recalled, and lead to disputes about which party bears responsibility for recalling the witness to afford the opportunity to explain or deny. Further, recalling a witness solely to afford the requisite opportunity to explain or deny a prior

inconsistent statement may be inefficient. Finally, trial judges may find extrinsic evidence of a prior inconsistent statement unnecessary in some circumstances where a witness freely acknowledges the inconsistency when afforded an opportunity to explain or deny. Affording the witness an opportunity to explain or deny a prior inconsistent statement before introducing extrinsic evidence of the statement avoids these difficulties. The prior foundation requirement gives the target of the impeaching evidence a timely opportunity to explain or deny the alleged inconsistency; promotes judges' efforts to conduct trials in an orderly manner; and conserves judicial resources.

The amendment preserves the trial court's discretion to delay an opportunity to explain or deny until after the introduction of extrinsic evidence in appropriate cases, or to dispense with the requirement altogether. A trial judge may decide to delay or even forgo a witness's opportunity to explain or deny a prior inconsistent statement in certain circumstances, such as when the failure to afford the prior opportunity was inadvertent and the witness may be afforded a subsequent opportunity, or when a prior opportunity was impossible because the witness's statement was not discovered until after the witness testified.

Rule 801. Definitions that Apply to This Article; Exclusions from Hearsay [Effective until December 1, 2024]

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in **evidence** to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement.* The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered:

(i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground; or

(C) identifies a person as someone the declarant perceived earlier.

(2) *An Opposing Party's Statement.* The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;
(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
(E) was made by the party's coconspirator during and in furtherance of the conspiracy.
The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

Rule 801. Definitions that Apply to This Article; Exclusions from Hearsay [Effective December 1, 2024]

By order dated April 2, 2024, the Supreme Court of the United States approved the following amendments to Rule 801, effective Dec. 1, 2024, and authorized their transmission to Congress in accordance with 28 USCS § 2074:

Rule 801. Definitions That Apply to This Article; Exclusion From Hearsay

* * * * *

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

* * * * *

(2) ***An Opposing Party's Statement.*** The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;
(B) is one the party manifested that it adopted or believed to be true;
(C) was made by a person whom the party authorized to make a statement on the subject;
(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
(E) was made by the party's coconspirator during and in furtherance of the conspiracy.
The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).
If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

Committee Note (May 10, 2023 Spring Advisory Committee Meeting) (801)

The rule has been amended to provide that when a party stands in the shoes of a declarant or the declarant's principal, hearsay statements made by the declarant or principal are admissible against the party. For example, if an estate is bringing a claim for damages suffered by the decedent, any

hearsay statement that would have been admitted against the decedent as a party-opponent under this rule is equally admissible against the estate. Other relationships that would support this attribution include assignor/assignee and debtor/trustee when the trustee is pursuing the debtor's claims. The rule is justified because if the party is standing in the shoes of the declarant or the principal, the party should not be placed in a better position as to the admissibility of hearsay than the declarant or the principal would have been. A party that derives its interest from a declarant or principal is ordinarily subject to all the substantive limitations applicable to them, so it follows that the party should be bound by the same evidence rules as well.

Reference to the declarant's principal is necessary because the statement may have been made by the agent of the person or entity whose rights or obligations have been succeeded to by the party against whom the statement is offered. The rule does not apply, however, if the statement is admissible against the agent but not against the principal—for example, if the statement was made by the agent after termination of employment. This is because the successor's potential liability is derived from the principal, not the agent.

The rationale of attribution does not apply, and so the hearsay statement would not be admissible, if the declarant makes the statement after the rights or obligations have been transferred, by contract or operation of law, to the party against whom the statement is offered.

Rule 804. Exceptions to the Rule Against Hearsay – When the Declarant is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

(2) refuses to testify about the subject matter despite a court order to do so;

(3) testifies to not remembering the subject matter;

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) ***Former Testimony.*** Testimony that:
(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; an
(B) is now offered against a party who had — or, in a civil case, whose predecessor in interest had — an opportunity and similar motive to develop it by direct, cross-, or redirect examination.
(2) ***Statement Under the Belief of Imminent Death.*** In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.
(3) ***Statement Against Interest.*** A statement that:
(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
(B) If offered in a criminal case as one that tends to expose the declarant to criminal liability, the court finds it ~~is~~ supported by corroborating circumstances that clearly indicate trustworthiness — after considering the totality of circumstances under which it was made and evidence, if any, corroborating it. ~~if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.~~
(4) ***Statement of Personal or Family History.*** A statement about:
(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or
(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.
(5) [*Other Exceptions.*] [Transferred to Rule 807.]
(6) ***Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.*** A statement offered against a party that wrongfully caused — or acquiesced in wrongfully causing — the declarant's unavailability as a witness, and did so intending that result.

Committee Note (May 10, 2023 Spring Advisory Committee Meeting) (804)

Rule 804(b)(3)(B) has been amended to require that in assessing whether a statement is supported by "corroborating circumstances that clearly indicate its trustworthiness," the court must consider not only the totality of the circumstances under which the statement was made, but also any evidence supporting or undermining it. While most courts have considered evidence independent of the statement, some courts have refused to do so. The rule now provides for a uniform approach and recognizes that the existence or absence of independent evidence supporting the statement is relevant to, but not necessarily dispositive of, whether a statement that tends to expose the

declarant to criminal liability should be admissible under this exception when offered in a criminal case. A court evaluating the admissibility of a third-party confession to a crime, for example, must consider not only circumstances such as the timing and spontaneity of the statement and the third-party declarant's likely motivations in making it. The court must also consider information, if any, supporting the statement, such as evidence placing the third party in the vicinity of the crime. Courts must also consider evidence that undermines the declarant's account.

Although it utilizes slightly different language to fit within the framework of Rule 804(b)(3), the amendment is consistent with the 2019 amendment to Rule 807 that requires courts to consider corroborating evidence in the trustworthiness inquiry under that provision. The amendment is also supported by the legislative history of the corroborating circumstances requirement in Rule 804(b)(3). See 1974 House Judiciary Committee Report on Rule 804(b)(3) (adding "corroborating circumstances clearly indicate the trustworthiness of the statement" language and noting that this standard would change the result in cases like Donnelly v. United States, 228 U.S. 243 (1913), that excluded a third-party confession exculpating the defendant despite the existence of independent evidence demonstrating the accuracy of the statement).

Rule 1006. Summaries to Prove Content

Original: The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

Amended Version:

(a) Summaries of Voluminous Materials Admissible as Evidence. The ~~proponent~~ court may admit as evidence ~~use~~ a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

(b) Procedures. The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) Illustrative Aids Not Covered. A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.

Committee Note (May 10, 2023 Spring Advisory Committee Meeting) (Rule 1006)

Rule 1006 has been amended to correct misperceptions about the operation of the rule by some courts. Some courts have mistakenly held that a Rule 1006 summary is "not evidence" and that it

must be accompanied by limiting instructions cautioning against its substantive use. But the purpose of Rule 1006 is to permit alternative proof of the content of writings, recordings, or photographs too voluminous to be conveniently examined in court. To serve their intended purpose, therefore, Rule 1006 summaries must be admitted as substantive evidence and the rule has been amended to clarify that a party may offer a Rule 1006 summary "as evidence." The court may not instruct the jury that a summary admitted under this rule is not to be considered as evidence.

Rule 1006 has also been amended to clarify that a properly supported summary may be admitted into evidence whether or not the underlying voluminous materials reflected in the summary have been admitted. Some courts have mistakenly held that the underlying voluminous writings or recordings themselves must be admitted into evidence before a Rule 1006 summary may be used. Because Rule 1006 allows alternate proof of materials too voluminous to be conveniently examined during trial proceedings, admission of the underlying voluminous materials is not required and the amendment so states. Conversely, there are courts that deny resort to a properly supported Rule 1006 summary because the underlying writings or recordings—or a portion of them—have been admitted into evidence. Summaries that are otherwise admissible under Rule 1006 are not rendered inadmissible because the underlying documents have been admitted, in whole or in part, into evidence. In most cases, a Rule 1006 chart may be the only evidence the trier of fact will examine concerning a voluminous set of documents. In some instances, however, the summary may be admitted in addition to the underlying documents.

A summary admissible under Rule 1006 must also pass the balancing test of Rule 403. For example, if the summary does not accurately reflect the underlying voluminous evidence, or if it is argumentative, its probative value may be substantially outweighed by the risk of unfair prejudice or confusion.

Consistent with the original rule, the amendment requires that the proponent of a Rule 1006 summary make the underlying voluminous records available to other parties at a reasonable time and place. The trial judge has discretion in determining the reasonableness of the production in each case but must ensure that all parties have a fair opportunity to evaluate the summary. Cf. Fed. R. Evid. 404(b)(3) and 807(b).

Although Rule 1006 refers to materials too voluminous to be examined "in court" and permits the trial judge to order production of underlying materials "in court," the rule applies to virtual proceedings just as it does to proceedings conducted in person in a courtroom.

The amendment draws a distinction between summaries of voluminous admissible information offered to prove a fact, and illustrations offered solely to assist the trier of fact in understanding the evidence. The former are subject to the strictures of Rule 1006. The latter are illustrative aids, which are now regulated by Rule 107.

Rule 107. (Illustrative Aids)

(a) Permitted Uses. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

(b) Use in Jury Deliberations. An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:
(1) all parties consent; or
(2) the court, for good cause, orders otherwise.

(c) Record. When practicable, an illustrative aid used at trial must be entered into the record.

(d) Summaries of Voluminous Materials Admitted as Evidence. A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

Committee Note (Rule 107)

The amendment establishes a new Rule 107 to provide standards for the use of illustrative aids. The new rule is derived from Maine Rule of Evidence 616. The term "illustrative aid" is used instead of the term "demonstrative evidence," as that latter term has been subject to differing interpretation in the courts. An illustrative aid is any presentation offered not as evidence but rather to assist the trier of fact in understanding evidence or argument. "Demonstrative evidence" is a term better applied to substantive evidence offered to prove, by demonstration, a disputed fact.

Writings, objects, charts, or other presentations that are used during the trial to provide information to the trier of fact thus fall into two categories. The first category is evidence that is offered to prove a disputed fact; admissibility of such evidence is dependent upon satisfying the strictures of Rule 403, the hearsay rule, and other evidentiary screens. Usually the jury is permitted to take this substantive evidence to the jury room during deliberations and use it to help determine the disputed facts.

The second category—the category covered by this rule—is information offered for the narrow purpose of helping the trier of fact to understand what is being communicated to them by the witness or party presenting evidence or argument. Examples may include drawings, photos, diagrams, video depictions, charts, graphs, and computer simulations. These kinds of presentations, referred to in this rule as "illustrative aids," have also been described as "pedagogical devices" and sometimes (and less helpfully) "demonstrative presentations"—that

latter term being unhelpful because the purpose for presenting the information is not to "demonstrate" how an event occurred but rather to help the trier of fact understand evidence or argument that is being or has been presented.

A similar distinction must be drawn between a summary of voluminous admissible evidence offered to prove a fact, and a summary of evidence that is offered solely to assist the trier of fact in understanding the evidence. The former is subject to the strictures of Rule 1006. The latter is an illustrative aid, which the courts have previously regulated pursuant to the broad standards of Rule 611(a), and which is now to be regulated by the more particularized requirements of this Rule 107.

While an illustrative aid is by definition not offered to prove a fact in dispute, this does not mean that it is free from regulation by the court. It is possible that the illustrative aid may be prepared to distort or oversimplify the evidence presented, or stoke unfair prejudice. This rule requires the court to assess the value of the illustrative aid in assisting the trier of fact to understand the evidence or argument. Cf. Fed. R. Evid. 703; see Adv. Comm. Note to the 2000 amendment to Rule 703. Against that beneficial effect, the court must weigh most of the dangers that courts take into account in balancing evidence offered to prove a fact under Rule 403— one particular problem being that the illustrative aid might appear to be substantive evidence of a disputed event. If those dangers substantially outweigh the value of the aid in assisting the trier of fact, the trial court should prohibit the use of—or order the modification of—the illustrative aid. And if the court does allow the aid to be presented at a jury trial, the adverse party may ask to have the jury instructed about the limited purpose for which the illustrative aid may be used. Cf. Rule 105.

The intent of the rule is to clarify the distinction between substantive evidence and illustrative aids, and to provide the court with a balancing test specifically directed toward the use of illustrative aids. Illustrative aids can be critically important in helping the trier of fact understand the evidence or argument.

Many courts require advance disclosure of illustrative aids, as a means of safeguarding and regulating their use. Ordinary discovery procedures concentrate on the evidence that will be presented at trial, so illustrative aids are not usually subject to discovery. Their sudden appearance may not give sufficient opportunity for analysis by other parties, particularly if they are complex. That said, there is a wide variety of illustrative aids, and a wide variety of circumstances under which they might be used. In addition, in some cases, advance disclosure may improperly preview witness examination or attorney argument. The amendment therefore leaves it to trial judges to decide whether, when, and how to require advance notice of an illustrative aid.

Because an illustrative aid is not offered to prove a fact in dispute and is used only in accompaniment with presentation of evidence or argument, the amendment provides that illustrative aids are not to go to the jury room unless all parties consent or the court, for good cause, orders otherwise. The Committee determined that allowing the jury to use the aid in deliberations, free of the constraint of accompaniment with witness testimony or party presentation, runs the risk

that the jury may unduly emphasize the testimony of a witness with whom it was used, or otherwise misinterpret the import, usefulness, and purpose of the illustrative aid. But the Committee concluded that trial courts should have some discretion to allow the jury to consider an illustrative aid during deliberations.

If the court does allow the jury to review the illustrative aid during deliberations, the court must upon request instruct the jury that the illustrative aid is not evidence and cannot be considered as proof of any fact.

This rule is intended to govern the use of an illustrative aid at any point in the trial, including in opening statement and closing argument.

While an illustrative aid is not evidence, if it is used at trial it must be marked as an exhibit and made part of the record, unless that is impracticable under the circumstances.

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.

2022 Cases

Judicial Notice
Seymour v. Seymour, 263 A.3d 1079 (Me. 2021). The Maine Supreme court ruled that the trial court abused its discretion when it failed to take judicial notice of vaccine information available on the CDC website. A father sought to modify his divorce agreement due to changed circumstances after his ex-wife and the mother of his children refused to have their children vaccinated. The children's father asked the court to take judicial notice of the pages on the CDC website containing information about childhood vaccination. He provided printouts of the information, including the CDC's recommended vaccine schedule, information regarding the ways in which different vaccines strengthen the immune system, and safety information addressing common concerns about vaccines. The trial court declined to take judicial notice. The Maine Supreme Court ruled that this was an error. Despite the mother's argument that there is a heated public debate over the safety and necessity of vaccinations, because the effectiveness of vaccines is a matter of scientific fact, in order to be subject to judicial notice, the necessity of vaccines need only be accepted by the scientific community, not universally accepted by the public at large. On remand, the trial court was required to take judicial notice that the information regarding vaccines that the CDC provides on its website represents the CDC's position. The Maine Supreme court also ruled that if the mother would like to contest whether this position should be accepted as scientific fact, the trial court would need to determine whether the CDC's position is generally accepted as fact within the scientific community, a question that may also be resolved through judicial notice.

Stipulations
Jackson v. United States, 2021 U.S. Dist. LEXIS 67995 Jackson argued ineffective assistance of counsel after his lawyer convinced him to sign a Stipulation of Facts that clearly established he'd committed all of the elements of an Armed Career Criminal Offense. He argues that this stipulation violated his Fifth Amendment right against self-incrimination. The court ruled against him, highlighting that the judge in his case explicitly asked him if he understood that by agreeing to the stipulated facts, he essentially admitted to all of the elements required to establish that he was factually guilty of the offenses he was charged with. The court further argues that a Fifth

Amendment violation doesn't occur when the defendant knowingly, freely and intelligently waives his right against self-incrimination. The court additionally speculates that Jackson's decision to stipulate to facts that would allow the prosecution to prove his guilt was a strategic decision because it allowed him to effectively plead guilty, which would help him at his sentencing hearing because it would appear as if he were taking responsibility while preserving his ability to appeal the denial of the Motion to Suppress, which he would not have been able to do if he had just pled guilty.

American Southwest Mortgage Corp. v. Continental Casualty Company, CIV-20-00422-PRW, 2022 WL 1299975 (W.D. Okla. Apr. 4, 2022) Plaintiffs and Defendant stipulated to facts governing a summary judgment inquiry. These facts included the stipulation that there were three erroneous audit reports. However, throughout the summary judgment filings, the plaintiffs stressed that there were only two erroneous audits. The court asked both parties to file additional briefings to resolve this disputed fact. Plaintiffs argue that on motions for summary judgment, courts regard stipulations of fact as conclusive admissions that do not require additional evidentiary support. However, the court found good cause to give Defendant relief from the stipulated fact of three erroneous reports. The court emphasized that while the plaintiffs are correct that stipulations are usually binding, adherence to stipulated fact is not categorical and the court may always relieve a party from a stipulation that "might work injustice." Plaintiffs were therefore held to the facts as they represented them in their summary judgment filing, *i.e.*, that there were only two erroneous reports.

Admissions

McNulty v. Middle East Forum, 19-CV-05029-AB, 2021 WL 5050085 (E.D. Pa. Nov. 1, 2021). McNulty filed an amended complaint against the Middle East Forum, Greg Roman and Daniel Pipes alleging a hostile work environment and disparate treatment in violation of Title VII of the Civil Rights Act of 1964, and assault and battery under common law against Mr. Roman, among other allegations. Defendants sent McNulty's lawyer 81 requests for admission. He did not respond to the email within 30 days of receipt because he missed the email, and the RFAs were admitted to by default. Eighteen days later, McNulty responded and asked for withdrawal of the default admission. She specifically asked for withdrawal of four out of the eighty-one RFAs because they would be dispositive to her case if admitted. The court granted McNulty's request for withdrawal because these four RFAs were sufficiently material to McNulty's case and the defendants were only able to present conclusory allegations regarding how withdrawal of the admissions would prejudice them. The court explains that courts generally allow parties to withdraw or amend admissions if doing so would promote the presentation of the merits of the case without prejudicing the requesting party. Courts are more likely to allow withdrawal of a default admission when the admission is due to professional incompetence on the part of the party's lawyer and not the fault of the party themselves.

Witness Testimony

State v. Crew, 868 S.E.2d 351 (N.C. Ct. App. 2022). After being convicted of dogfighting, felony cruelty to animals, misdemeanor cruelty to animals and restraining dogs in a cruel manner, Crew appeals on the basis that the trial court erred when it allowed the prosecutor to ask a leading question to an expert witness who testified that it was her expert opinion that Crew was

using these dogs for an organized dogfighting operation. Crew specifically objects to the prosecution's leading question intending to get the expert to confirm that in her expert opinion all of the dogs were being kept for dogfighting purposes. Although Crew acknowledges that the trial court's decision to permit this leading question was discretionary, he nevertheless asks the Court of Appeals to rule that the trial court's decision to permit the prosecution to ask the expert witness leading questions constituted abuse of discretion or plain error. The appeals court rejected his argument, explaining that trial courts have the discretion to permit a leading question that elicits testimony that has already been received into evidence without objection.

Exhibits

Ewing v. Carnival Corp., No. 19-20264-CIV, 2022 WL 1719315 (S.D. Fla. May 27, 2022). The court granted Mr. Ewing a new trial due to a prejudicial demonstration video shown by the defense in his negligence claim against Carnival Corporation. The trial arises out of an incident in which a stowed bunk bed slid out and hit him on the head, causing head and neck injuries, while he was sitting on his bed eating pizza during a cruise. Ewing's theory was that the bed had been improperly locked by a Carnival employee. Before trial, Carnival's theory was that the bunk beds had defective screws. Despite agreeing not to accuse Ewing of fraud during the trial, Carnival made a video showing a security guard jimmying the lock open with a butter knife and showed the video to the jury. This demonstration was ostensibly introduced in order to impeach the testimony of one of Ewing's expert witnesses that for this type of accident to have happened, a Carnival employee must have either forgotten to lock the bed or failed to push the bed back far enough for the lock to work properly. When the expert referred to this type of lock as "tamper-resistant," defense counsel introduced the video as impeachment evidence. Although the judge allowed the defense to show the jury this video (but refused to enter it into evidence), after the trial was over, the judge granted Ewing's request for a new trial because it was prejudicial and speculative, implying to the jury that Ewing had vandalized the lock and lied about it. Additionally, it was not connected to any testimony. The defense failed to present any evidence that Ewing had jimmied the lock open or even to demonstrate that the conditions shown in the video were substantially similar to the circumstances experienced by Ewing when he was injured. Ultimately, the court ruled that allowing this video to be shown to the jury had violated Ewing's substantial rights and he was therefore entitled to a new trial.

Presumptions

Matter of Welfare of Child. of B.A.F., No. A21-0029, 2021 WL 2908525 (Minn. Ct. App. July 12, 2021). B.A.F.'s parental rights were terminated after two of her children were found staying in a known drug house and tested positive for methamphetamine. The district court found that B.A.F. was statutorily presumed unfit to parent because her parental rights to her first child had been terminated. It then terminated her parental rights to her other three children. While there is a presumption that a mother is unfit to parent if her rights to a previous child were terminated, this presumption is rebuttable. If the parent successfully rebuts this presumption, the county must prove by clear and convincing evidence that the mother is unfit to parent. This usually involves a consistent pattern of specific conduct demonstrating lack of parental fitness. B.A.F. argued that the district court erroneously failed to find that she rebutted the presumption of unfitness, pointing to evidence she offered at trial. The appeals court found that the trial court used the wrong evidentiary standard in deciding she had not met her burden. To rebut the presumption that she was an unfit mother, B.A.F. was not required to prove her parental fitness by clear and

convincing evidence. The appeals court additionally ruled that the county had not proven by clear and convincing evidence that B.A.F remained unfit to parent, because contrary to the determination of the trial court, mere proof of continued methamphetamine use does not alone prove lack of parental fitness.

2021 Cases

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.

2022 Cases

FRE 103, Rulings on Evidence
United States v. Roof, 10 F.4th 314, 373-74 (4th Cir. 2021). White supremacist spree killer Dylann Roof's objections to a victim's statements that he was "evil" were overruled by the district court and the appeals court because these objections were not made at the time the evidence was presented. Roof's argument was that when one of his victims stated at trial that he was "evil" and would go to the "pit of hell," his Eighth Amendment rights were violated, which rendered his trial fundamentally unfair, in violation of his due process rights. Instead of objecting while she was giving her testimony, Roof's lawyer objected during recess, claiming that he waited out of respect for her, given her emotional state. When she made similar comments on cross-examination, his lawyer didn't make any objections at all, instead waiting until the next day to seek a mistrial. The district court overruled this objection partially because it was untimely. The 4th Circuit affirmed, holding that because the objections were not made at the time the evidence was offered, only plain error review would be available to Roof.

Rule 104, Preliminary Questions
United States v. Porter, 562 F. Supp. 3d 1162 (E.D. Cal. 2022). Prior to Porter's sexual assault trial, the court overruled Porter's objections to including the testimony of a witness he had previously sexually assaulted. Because Porter was not charged with sexual assault against this witness and because Porter argues that his conduct doesn't constitute sexual assault because the witness stayed in a relationship with him while these assaults were occurring, the court determines that in order to be admissible, this evidence must also satisfy the rule of conditional relevance under FRE 104(b). The court rules that this evidence does satisfy the requirements of 104(b) because this witness told investigators that Porter forced her to engage in sex acts against her expressed objections. At least one of her statements was recorded and transcribed and it was produced in discovery. Porter's lawyer also conceded at oral argument that the witness will testify that these sexual interactions with Porter were nonconsensual. Based on this evidence, and in the absence of any dispute that the witness would testify in a way that's consistent with her prior statements, the court determined that a reasonable jury could find by a preponderance of evidence that Porter sexually assaulted this witness. Because the court also concluded that the probative value was not outweighed by the prejudicial effect of this evidence, the court concluded that the evidence of Porter's multiple sexual assaults against this witness was admissible.

Rule 105: Limiting Evidence That is Not Admissible Against Other Parties or For Other Purposes
United States v. Castro, No. 19-CR-20498, 2022 WL 2127954 (E.D. Mich. June 13, 2022). In a case regarding the murder of a man who was killed by the defendants due to his Child Exploitation Enterprise conviction, the government filed a motion to prohibit the defendants from introducing evidence that the victim, Maire, had a vacated Child Exploitation Enterprise conviction. The court allowed the defense to present the date and the title of the conviction while preventing the defense from going into detail about the underlying conduct. In its pretrial motion, the government conceded that the defense could present evidence that the defendants targeted the murder victim Maire because they thought he was a child molester, but it sought to exclude

evidence of the specifics of his vacated conviction for child exploitation enterprise and the conduct underlying the offense. The Court decided to allow the jury to hear that Maire was convicted of Child Exploitation Enterprise and to hear the date of his conviction, but chose to exclude any further evidence of his conviction, including evidence of the details of the underlying conduct. The Court also chose to similarly limit the introduction of evidence regarding witness Figura's conviction when Figura was a codefendant in Maire's Child Exploitation Enterprise conviction. The court found that the count and date of Maire's Child Exploitation Enterprise conviction was admissible because it was relevant, and despite the government's objections, it was also not unduly prejudicial. The court believed that merely allowing the parties to present the jury with evidence that the defendants targeted Maire because they thought he was a child molester without allowing the jury to see the count and date of the conviction that caused them to believe this would unnecessarily deprive the jury of relevant information. However, the Court explained that the jury didn't need to hear the details of Maire's case because the defendants didn't kill him due to the details of the case, they killed him due to the general fact of his conviction, and this conviction is only relevant to the degree that it sheds light on the defendants' motive for killing Maire. The Court then pointed to FRE 105 to justify including the title of Maire and Figura's convictions while limiting the scope of the evidence that the defense could include.

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.

2022 Cases

Relevance Fundamentals

State v. Bey, No. A20-1097, 2021 WL 2794672 (Minn. Ct. App. July 6, 2021), *review granted in part* (Sept. 21, 2021), *aff'd*, No. A20-1097, 2022 WL 2137007 (Minn. June 15, 2022). After Bey was found guilty of two counts of first degree burglary and two accounts of second degree assault with a dangerous weapon when he broke into his estranged wife's apartment to take his children away from their mother, Bey argues that the district court plainly erred by admitting five pictures of guns from his cellphones because they were not relevant, and even if they were marginally relevant, that relevance was substantially outweighed by the danger of unfair prejudice. Three of the photos depicted Bey holding the guns, the other two showed guns displayed on a bed. The Court of Appeals explains that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence" while noting that even when evidence is relevant, it "may be excluded if its probative value is substantially outweighed by danger of unfair prejudice." The appeals court ruled that these photos of guns on Bey's phone were relevant to disprove his argument that the thing he was carrying that his family and other witnesses identified as a gun was actually a toy gun belonging to his son. One of the guns in the photos looks like the gun he was described as carrying during his assault, which offers proof that he was actually carrying a gun. Because the pictures are relevant in corroborating the witnesses' testimonies that Bey was carrying a real gun and not a toy like he testified, the Court of Appeals found the pictures of guns on Bey's phone to be admissible.

People v. Parker, 13 Cal. 5th 1 (2022). On his appeal to the California Supreme Court for his conviction for first degree murder, Parker argued that the trial court erred in its decision to include numerous photos that he claimed were prejudicial. The first set of photos he objected to were a set of photos taken from a collection of more than 1,000 pages of pornographic material in which the face of his victim was pasted over the bodies of women cut out of pornographic magazines. The Court ruled that this evidence was admissible because the images overwhelmingly featured women with shaved pubic hair and his victim's body was found with freshly shaved pubic hair and a to-do list that was found with his victim's severed fingers referenced shaving her pubic hair. The court also noted that many of the women in these photographs were handcuffed and that this was relevant because the victim's wrists were bruised in a manner consisted with being handcuffed for too long.

Relevance –- The Importance of Context

Brummett v. Burberry Ltd., 597 S.W.3d 295 (Mo. Ct. App. 2019). The Missouri Court of Appeals did not find an error when the trial court chose to allow the defense to introduce evidence that Brummett had a previous abortion when she mentioned multiple times during direct examination that she had been considering aborting her fetus while working at Burberry because she didn't want her child to face the same discrimination that she was experiencing at Burberry as a Muslim woman. This arose during a lawsuit in which Brummett sued Burberry for religious discrimination and retaliation. Before trial, the trial court sustained Brummett's motion to exclude the evidence of an abortion she'd had before she was employed at Burberry after she argued that it was neither logically nor legally relevant, and that as a hot-button issue, it was

unduly prejudicial. However, the court clarified that it would reassess based on the evidence presented at trial. During direct, Brummett, repeatedly testified that she contemplated terminating her pregnancy due to the severity of Burberry's discriminatory and retaliatory actions. She as cross examined by Burberry without objection. Burberry asked for a bench conference and explained that evidence of her prior abortion was relevant to challenge her claim that she considered terminating her pregnancy due to Burberry's extreme discriminatory treatment, and the court agreed that Burberry could question her about her prior abortion. The court agreed with Burberry that her prior abortion was logically relevant to demonstrate to the jury that factors other than Burberry's alleged mistreatment of Brummett played a significant role in her willingness to consider ending her pregnancy and cast doubt on her claims that her desire to have an abortion was evidence of extreme mental distress.

Relevance, Statistics and Probabilities

State v. Jackson, 498 P.3d 788 (Or. 2021). The Oregon Supreme Court affirmed the trial court's ruling that the state could not cross-admit evidence that DNA matching Jackson's DNA profile was found at the scenes of the murders of four sex workers. The state attempted to justify inclusion of this evidence using the doctrine of chances, which states that the more frequently a rare incident occurs, the less likely it is that this series of events is explainable by coincidence or chance. In this case, the state employed expert testimony stating that sex workers are murdered infrequently enough and the likelihood that a person's DNA would be found at the scene of a sex worker's murder were low enough that the presence of Jackson's DNA at all four crime scenes is probably not a coincidence. The Supreme Court of Oregon takes as a given that the state has proved that this is a statistical improbability. However, the Court explains that the state misunderstands what the doctrine of chance can prove on its own, that by itself the doctrine of chances is insufficient as a theory of relevance. While it is true that the probability that Jackson's DNA would be present at all four crime scenes by coincidence is low, this does not decrease the likelihood that that its presence at any given crime scene did not occur by coincidence. Even if chance cannot adequately explain a series of events, it is still very possible that any individual event in that sequence can be explained by chance. Therefore, the state cannot ask the jury to convict Jackson of killing the sex worker he is accused of killing at that specific trial merely based on the probability that he murdered at least one of the four sex workers whose crime scene his DNA was found at. The court explained that only prohibited character-based reasoning can take the state's argument from its general claim that it is unlikely that Jackson did not murder any of the dead sex workers when his DNA was found on or near all of them, to the specific argument that this means he killed any specific sex worker. Therefore, the evidence that Jackson's DNA was found at the scene of the third victim's murder is irrelevant and therefore inadmissible at Jackson's trial for murdering the first sex worker, and vice versa.

2021 Cases

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.

2022 Cases

Character Evidence Fundamentals

State v. Evans, 492 P.3d 418 (Kan. 2021). During Evans' appeal of her convictions for first-degree murder, conspiracy to commit first-degree murder, arson and aggravated burglary, the Kansas Supreme Court holds that the trial court did not err in admitting evidence of Evans' prior bad acts because there was a direct connection between her earlier conduct and the crimes she was charged with. The court also explained that this evidence was necessary to include because it "served to tie up loose ends" by providing Evans' motive, it helped prove she was the one who killed the victim and it demonstrated planning activity. Before killing the estranged father of her children, Evans stalked him and threatened him for months, and attempted to solicit other people to kill him. Evans objected to the inclusion of these prior bad acts at trial, but the trial court allowed the prosecution to include this evidence. The Kansas Supreme Court explains the three-part test courts use in determining whether to include evidence of prior bad acts. First, the court must consider whether the evidence is relevant to establish a material fact at issue. Next, the court must figure out whether the material fact is disputed and whether the material fact is relevant to prove a disputed fact. Because the witnesses did not clearly see Evans and she drove someone else's car to the victim's house before she shot him six times and set his house on fire, her identity as the killer was disputed, and the court determined that her motive for killing the victim would also be unclear to the jury if they did not have access to evidence of her behavior leading up to the murder. Therefore, the court determined that this prior-act evidence satisfied the first two prongs required for inclusion. Finally, the court must ensure that the prejudicial effect of the evidence doesn't outweigh its probative value. The Kansas Supreme Court ruled

that while the evidence is prejudicial because it casts Evans in an extremely unflattering light, its value as proof of important elements of the case that cannot be proven through other means make its probative value much more significant than its risk of prejudice, and it is therefore admissible.

Acts Masquerading as Character

State v. Olson, No. A20-1455, 2022 WL 893790 (Minn. Ct. App. Mar. 28, 2022). Olson appeals his conviction of first-degree possession of meth. He was charged after the police found a bag of meth concealed in a car that Olson and two others were sitting in. At Olson's trial, the state introduced eight former controlled substances convictions and showed four photographs in which Olson was using meth. Olson argues that the admission of these twelve prior bad acts was unfairly prejudicial, and the Court of Appeals for Minnesota agrees. The court explains that while this evidence was relevant to prove that Olson was familiar with meth and knew that it was illegal to possess meth, the twelve piece of evidence that the state introduced were highly prejudicial and cumulative. The jury could have easily inferred that Olson's numerous prior drug convictions and the pictures of Olson using meth demonstrated a propensity towards meth usage that Olson was indulging at the time of the incident. Therefore, the trial court erred in allowing the state to include twelve pieces of bad act evidence and Olson is entitled to a new trial.

Qualifications of a Character Witness

State v. Holliday, 20 Wash. App. 2d 1079 (2022). Holliday was convicted of second-degree murder after a medical examiner and several doctors determined that abusive head trauma caused the death of a baby in Holliday's care. Holliday appeals this conviction, arguing that the trial court violated his right to present a defense when it excluded evidence of his reputation for peacefulness and his prior experience caring for young children. Holliday motioned in limine for a childhood friend to testify that he had a reputation for peacefulness, arguing it was relevant to whether he intended to cause the baby bodily harm. The trial court explained that while Holliday was permitted to offer evidence of his good reputation, that evidence had to come from a more neutral member of the community who knew him as an adult, not a childhood friend. Because people can change significantly between childhood and adulthood, Holliday's behavior as a child was not necessarily pertinent to his character as an adult. However, the trial court held off on making a final decision until Holliday provided some evidence as to what this childhood friend's testimony would be. Holliday never proffered any specific testimony or asked the trial court to revisit motion, so the appeals court ruled that Holliday had waive error regarding his reputation for peacefulness. Before trial, Holliday also attempted to include testimony from friends and family members that would demonstrate that he was experienced in taking care of young children. His argument was that in most cases of shaken baby syndrome, the caretaker shook the baby out of frustration when it wouldn't stop crying. Therefore, it was relevant that he was experienced with taking care of children and always treated them appropriately. The trial court ruled that this testimony regarding Holliday's patience with children was also character evidence but that it would be admissible as long as it came from neutral members of a general community. However, because the witnesses Holliday offered to the court were overwhelmingly family members or friends, they were not neutral enough to provide reliable character evidence. The appeals court ruled that the trial court did not err in its decision to exclude evidence of Holliday's character from his friends and family members, noting that this evidence would have been admissible had it come from a more neutral source, a community that is both neutral and general.

Permissible Form of Character Testimony

People v. Hawkins, No. 352394, 2022 WL 413602 (Mich. Ct. App. Feb. 10, 2022). Kenneth Hawkins appeals his convictions of first-degree premeditated murder, mutilation of a dead body, felon in possession of a firearm and two counts of possession of a firearm during the commission of a felony. The conviction arose out of an incident during which Hawkins shot and killed a man who Hawkins had just observed choking his daughter, but who had let go by the time Hawkins shot him. Hawkins' defense at trial was that he was defending his daughter when he intervened in the altercation between his daughter and the victim, and that he grabbed a gun before he approached the victim because the victim had been known to carry guns. Hawkins argued that the trial court erred when it excluded evidence of the victim's reputation in the community. At trial, a defense witness testified that she'd seen the victim threaten people with guns before. He'd threatened the witness's brother, Hawkins' daughter and on patrons of the social club where Hawkins' daughter worked. The witness testified that she had also heard that the victim had threatened his own brother with a gun. When Hawkins' lawyer asked if this witness knew about the victim's reputation in the community, the prosecutor objected based on relevancy, arguing her opinion wasn't relevant because she wasn't on trial. The trial court sustained the objection. The appeals court holds that this was an error because the Michigan Rules of Evidence allow the evidence of the character of an alleged homicide victim to be admitted when the defendant argues self-defense. Under that circumstance, evidence of a victim's aggressive personality can be offered by the accused. Evidence in the form of reputation, opinion and even specific instances of conduct are all allowed. Even if the defendant does not know of the decedent's violent reputation, reputation evidence is still permissible to show that the decedent was the probable aggressor. The court concludes that the witness's opinion of the victim's reputation for violence was admissible because it was relevant to whether the victim was the aggressor in the altercation that resulted in his death.

When character is an element

State v. Wilson, 502 P.3d 679 (Mont. 2022). Wilson was convicted of theft and burglary after entering an intake center of a nonprofit for the disabled after hours and taking donated items such as electronics, recreation equipment and clothing, which he then gifted to his girlfriend and children. In his appeal, Wilson argues that his tendency to volunteer and to work odd jobs in search of employment was a pertinent character trait, therefore he should have been allowed to include testimony regarding a specific instance of conduct. His contention is that this testimony would have contradicted the prosecution's opening argument that Wilson saw the disabled as "something less" and that the court erred in striking the testimony of a witness who testified that he offered to remove snow at a motel and that he would not accept more than $2 for his work even though he was offered $10. The Montana Supreme Court responds that a character trait must be an essential element for evidence of specific conduct demonstrating this trait to be admissible. The Court then explains that for a character trait to be an essential element, "proof or failure of proof of the character trait by itself must actually satisfy an element of the charge, claim or defense" The court states that in order to convict Wilson, the state needed to prove he knowingly entered or remained unlawfully in an occupied structure and either purposely or knowingly committed an offense within the structure. Proof that Wilson frequently volunteered and worked odd jobs in search of more stable employment does not by itself establish that Wilson had permission to enter the intake center or that his decision to remain was lawful. Therefore, his tendency to volunteer his labor doesn't constitute an essential element of the crime

or its defense. Because the character trait Wilson wanted to prove was not an essential element, he was not permitted to prove this trait using an example of a specific instance of 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?

2022 Cases

Rule 403: Excluding Relevant Evidence For Prejudice, Confusion, Waste of Time or Other Reasons

United States v. August, No. EP-21-CR-00912-FM, 2022 WL 780583 (W.D. Tex. Mar. 10, 2022). August, a doctor who was indicted with counts of distribution of a controlled substance causing death or serious bodily injury, has made a motion in limine to prevent the government from referring to any party, witness or decedent as a "victim," arguing that using this language is

tantamount to stating that a crime has been committed. The court ultimately grants August's motion, ruling that although statements and arguments made by attorneys are not evidence, testimony from witnesses is evidence. Therefore, if an attorney elicits testimony labelling a particular individual a victim, Rule 403 could provide the defendant protection if the use of the term is substantially more prejudicial than probative. The court then looks to the definition of the word "victim" in Black's Law Dictionary, which defines a victim as "a person harmed by a crime, tort or other wrong." The court concludes that this definition necessarily implies that a crime has been committed. This leads the court to preclude anyone from referring to an individual as a victim because the term victim "encourages the jury to find guilt from improper reasoning due to the implication that a crime has already been committed by [August]."

Fields v. Commonwealth, 865 S.E.2d 400 (Va. App. 2021). Fields drove a car into a group of counter-protestors in Charlottesville, Virginia, killing one person and injuring others. He was charged with first-degree murder, malicious wounding, aggravated malicious wounding and leaving the scene of the accident. He was found guilty on all counts. On appeal, he claims the circuit court erred when it admitted into evidence memes he'd posted showing a car driving violently into a group of pedestrians. He also challenges the circuit court's admission of a photo of Hitler that he texted to his mother. Although he does not dispute the relevance of the Hitler text, he argues that its relevance was outweighed by the risk of unfair prejudice that it posed. Because it was sent one day before he drove over the counter-protesters, the Commonwealth argued that it demonstrates his intent, motive and state of mind. The Hitler photo was a response to his mother's warning to be careful and it was accompanied his statement that "we're not the ones who need to be careful." The appeals court ruled that the photo was admissible because provided context for what he meant by "we're not the ones who need to be careful." The court also pointed to the circuit court's statement that the photo would not have been included if he'd been charged with an unrelated crime, such as burglary, and that it was included not to turn the jury against him, but because it was relevant to prove that he knew political opponents would be at that rally and that his actions were premeditated. Similarly, the appeals court ruled that probative value of the memes he posted on Instagram were not outweighed by their potential for unfair prejudice because they would not inherently prevent jurors from rationally considering and weighing that evidence with the other evidence. The court explained that while it was prejudicial in that it made him look guilty, it was not unfairly prejudicial, and it was extremely probative. The court additionally quoted *Powell v. Commonwealth*, explaining, "all evidence tending to prove guilt is prejudicial to an accused, but the mere fact that such evidence is powerful because it accurately depicts the gravity and atrociousness of the crime or the callous nature of the defendant does not thereby render it inadmissible." 267 Va. 107, 141, 590 S.E.2d 537 (2004). The appeals court concludes that viewed in the light most favorable to the Commonwealth, the fact that Fields posted two images involving the same type of violence he later committed demonstrates that the circuit court had a basis for believing that the memes had significant probative value. Therefore, the circuit court did not err when it admitted these memes into evidence.

403: Beyond "Unfair Prejudice."

United States v. Maurya, 25 F.4th 829 (11th Cir. 2022). Hardwick appeals his convictions for conspiracy, making a false statement to a financial institution and wire fraud after he was caught siphoning money from his law firm to pay off gambling debts. On appeal, his case was

consolidated with that of his employee and co-conspirator. During his trial, he attempted to paint his employee, Ms. Maurya as the mastermind and sole knowing participant in this fraud. To that end, he attempted to introduce evidence of Maurya's prior bad acts, arguing that this evidence was necessary to demonstrate that she had a pattern of moving from employer to employer, siphoning off company money for herself and then altering the companies' records to hide her tracks. The evidence Hardwick attempted to introduce was a suicide note from a former romantic partner and MHS coworker, a video of Maurya lying to a former employer and testimony from Maurya and four of her former employers, who Hardwick argues were in a unique position to illuminate how she created an aura of prosperity at each company where she had worked, often while embezzling from them. The district court limited this evidence to testimony from two of her former employers, while excluding the video tape and the suicide note. The district court concluded that in addition to being less uniquely probative or trustworthy than it initially appeared to be, the suicide note was cumulative. As the court explained, "there is other evidence indicating Ms. Maurya's previous untruthfulness that does not involve the suicide note." The appeals court explains that the district court did not abuse its discretion when it excluded this evidence, pointing to the fact that Hardwick himself admits that had the four witnesses been called, it is likely that their testimonies would have overlapped in some respects. As the appeals court states, district courts are permitted to limit the number of defense witnesses when the proposed testimony would be cumulative.

403: Not All or Nothing

United States v. Cole, No. 1:20-CR-424, 2022 WL 266615 (N.D. Ohio Jan. 28, 2022). Cole ran an international adoption business and was indicted for conspiracy to defraud the United States and for alleged false statements to both an adoption accrediting agency and a Polish government agency. The indictment alleges that she and her co-conspirators transferred a child to an unapproved family and hid material facts regarding their role in the transfer. Cole moves to exclude evidence of or reference to her adoption agency's prior debarment, arguing it would be unfairly prejudicial and pointing to the fact that the proceedings against the agency require a different burden of proof than the criminal case against her. The court partially grants and partially denies this motion. The government cannot present evidence on the State Department findings or conclusions that resulted in the debarment, but it can present evidence that the State Department investigated the adoption agency. The court agrees with Cole that this evidence is potentially prejudicial because Cole was not a party to the proceeding and the debarment required a lower standard of proof than her current indictment, stating that the potential prejudice outweighs the relevance of the evidence. However, the court chooses not to fully exclude the evidence because the State Department's investigation and the Council of Accreditation referral are relevant to the issue of whether Cole's actions impaired, obstructed and defeated the State Department's lawful functions.

Rule 105: A Partial Fix; Limiting Evidence that is not Admissible Against Other Parties or For Other Purposes

United States v. Agee, No. 119CR00103TWPDLP, 2021 WL 2894782 (S.D. Ind. July 9, 2021). The district court refused Agee's request to sever her wire fraud trial from her co-conspirators'. Although one of her codefendants admits to some of the allegations and admits she and Agee were trying to hide information, the district court holds that Agee will not be denied a fair trial if she is jointly tried with her codefendants because Agee's name can easily be redacted from her

codefendant's incriminating statements and the jury will be given a limiting instruction. The government promises to seek to avoid references to Agee that may have been discussed by her codefendant during the proffer entirely when possible, and when not possible, the government will anonymize references to the other defendants in a way that would not make them facially identifiable. The district court holds that because the government can effectively and appropriately redact or anonymize any codefendant statement if it is introduced into evidence while the court gives a limiting instruction, Agee is not entitled to sever her trial from her codefendant's, even though that codefendant implicated her in a government proffer that may be admitted into evidence.

2021 Cases

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…

2022 Cases

Mental State

United States v. Sanft, No. CR 19-00258 RAJ, 2021 WL 5336206 (W.D. Wash. Nov. 16, 2021). Defendants were charged with conspiring to violate the Clean Water Act, knowingly violating requirements imposed in a pretreatment program approved under the CWA, knowingly making a false material statement in a document required to be filed under the CWA and making false statements to the United States. The defendants moved to exclude regulatory reports and administrative citations for violations as well as related communications or testimony containing allegations of administrative claims, arguing that this evidence would be irrelevant and unfairly prejudicial. In response, the government argues that this evidence is relevant to help establish intent. Regulators had shown Sanft reports that someone had tampered with Seattle Barrel's

wastewater filtration system and that hoses were found running from the facility to nearby train tracks. Sanft claimed that these were acts of employees that he had not been aware of, yet he continued to employ managers he knew committed the violations. Similarly, when EPA agents confronted him with evidence of environmental violations, he expressed shock and dismay, insisting he had no idea employees were dumping wastewater. The government argued that the prior regulatory reports were relevant to rebut Sanft's claimed lack of knowledge. The court holds that the regulatory reports are admissible because they demonstrate Sanft's knowledge of the wastewater dumping, which is an element of the CWA violation he is charged with. The court also explains that the earlier regulatory violations were not too remote in time because they happened between 2012 and 2018, and they were similar to the charged offenses because they both involve improper discharge or treatment of wastewater by Seattle Barrel. The court therefore concludes that the evidence of past regulatory violations is admissible to demonstrate knowledge, intent and lack of mistake.

Identity

State v. Grubbs, 974 N.W.2d 535 (Iowa Ct. App. 2022). Grubbs appeals his conviction for robbing Sam's Food, arguing that the district court improperly admitted evidence of other bad acts in violation of Iowa Rule of Evidence 5.404(b)(1). The evidence Grubbs objects to is surveillance video footage of a Burger King that was robbed earlier that day. The district court ruled that this evidence was admissible, but only for the purpose of proving identity. In its review of the admissibility of the evidence, the appeals court notes that because Grubbs contends that he was not the robber of Sam's Food, the identity of the Sam's Food robber was a disputed issue, which makes evidence that helps prove the robber's identity relevant. The court also finds enough distinctive similarities between the robber of Sam's Food and the person who robbed the Burger King earlier that day, specifically, the unique stone washed, distressed, jean shorts the robber was wearing in both videos. Security footage of an apartment complex also shows a person wearing similar clothing at the residence of the mother of two of Grubbs's children. Additionally, phone records place Grubbs's phone near Cedar Rapids when the Cedar Rapids Burger King was robbed, then at Davenport in time for the Sam's Food robbery. In light of the strong connections between Grubbs and the two robberies, the appeals court finds the required "clear proof" that the same person robbed the Burger King and the Sam's Foods and that the person who robbed those places was Grubbs. The appeals court concludes that because this evidence did not require arousing a jury's suspicion or speculation to connect Grubbs to these two burglaries, the evidence was properly admitted to help prove the identity of the Sam's Food robber.

Motive

People v. Covlin, 205 A.D.3d 578, 168 N.Y.S.3d 70 (2022). During Covlin's appeal of his second-degree murder conviction, the court ruled that evidence of Covlin's extramarital affairs and assault on his wife were relevant and admissible because they helped establish his motive for killing his wife. This evidence supported an inference that Covlin would expect to be disinherited in his wife's will soon, which provided him with a motive to kill her before she could write him out of her will. The prosecution's theory of the case was that Covlin killed his wife using a Taekwondo chokehold and attempted to make it look like an accident so that he could inherit her money before she officially divorced him, which would allow him to continue to spend his time playing backgammon without needing to earn an income. Therefore, the

evidence of his affairs and assault on his wife were admissible because they helped establish his motive for killing his wife.

Plan/Common Scheme

State v. Dinkins, 868 S.E.2d 181 (S.C. Ct. App. 2021). During Dinkins' appeal of his convictions for second degree assault and battery and criminal sexual conduct with a minor, the appeals court upheld the trial court's decision to admit evidence of prior acts of sexual misconduct and assault against the victim. After reviewing evidence of seven separate instances in which Dinkins had sexually assaulted his niece, the trial court found that two of the incidents were admissible in order to demonstrate intent and a common scheme. The appeals court held that the trial court did not err in admitting this evidence because they all involved the same victim and they all occurred within a two-year period. These prior acts were probative as to a pattern of grooming, demonstrating an escalation of conduct towards the child. Because they are relevant to proving a common scheme on the part of the defendant, these instances of sexual abuse were admissible.

Lack of Mistake/Accident

People v. LaDuke, 166 N.Y.S.3d 697 (2022). LaDuke appeals his convictions of attempted assault in the first degree, reckless endangerment in the second degree, criminal mischief in the second degree, criminal contempt in the first degree, unlawful fleeing a police officer in a motor vehicle in the third degree and attempted criminal contempt in the second degree. One of the grounds for his appeal is his contention that the trial court erred in allowing evidence of his prior acts of domestic violence towards the victim. LaDuke and the victim were involved in an on-again/off-again romantic relationship for about four years. After she broke up with him, she went to a friend's house. When she left her friend's house, he followed her car, repeatedly rear-ended her, ran her car off the road, and chased her when she attempted to flee on foot. He yelled at the victim that he would kill her until he was chased off by a police officer. At trial, the victim testified that LaDuke had been violent before. LaDuke claims that this prior bad-acts evidence was inadmissible. In response, the court explains why prior bad-acts evidence is considered especially relevant in cases involving domestic violence, stating, "in situations involving domestic violence, prior bad acts are more likely to be relevant and probative because the aggression and bad acts are focused on one particular person, demonstrating the defendant's intent, motive, identity and absence of mistake or accident." The court concludes that the testimony regarding LaDuke's prior acts of domestic violence toward the victim was properly admitted to show LaDuke's intent and lack of mistake, to provide background information on his relationship with the victim, and to complete the victim's narrative as to why she was afraid he'd hurt or kill her.

State v. Jones, 637 S.W.3d 526 (Mo. Ct. App. 2021). Jones appeals his convictions of second-degree murder, armed criminal action and tampering with physical evidence. These convictions are based on an incident in which Jones, along with a fellow security officer, left the property he was hired to protect as a security guard, went to a nearby parking lot and shot a drunk man in his car. Jones argues that the trial court erred in admitting evidence related to the revocation of his prior security license following an incident during which he gave false information to a 911 dispatcher regarding a car accident. The appeals court holds that the evidence regarding the revocation of his security license was admissible because as part of his defense, Jones claimed that he believed that as a security guard, he not only had a duty to protect the property he was

hired to work at, but also that if he saw a crime or felony in progress it was his responsibility to act to prevent it. The court points out that in order to get a security license, one must take a test that requires one to demonstrate one's knowledge that a security guard's authority is limited to the property they were hired to protect. Therefore, the fact that Jones ever had a security license is evidence that he did not actually mistakenly believe that he had the authority to investigate crimes even if they were not occurring on the property he was hired to protect. This fact makes the evidence relevant and therefore admissible.

404(b) Proof in Civil Cases

Pintro v. Rosenworcel, 554 F. Supp.3d 14 (D.D.C. 2021). The court grants Pintro's motion to include evidence of her former supervisor's promotions of white employees instead of the plaintiff during the five-year period before the racially discriminatory non-promotion of the plaintiff at issue in this case. Pintro is a Black attorney of Haitian descent who works at the FCC and has sued for racial and national origin discrimination. Pintro was the Senior Legal Advisor in the Strategic Analysis and Negotiations Devision of the FCC's International Bureau. From 2003 to 2009, she was supervised by Kathryn O'Brien, who is white. Pintro alleges that from 2003 to 2008, O'Brien provided preferential work assignments with management designations to ten white attorneys who were less qualified than Pintro, while deliberately excluding Pintro from these assignments and other opportunities for career advancement. The promotion at issue in this case is a Deputy Division Chief position that was vacant in 2008. The defendant argues that the court should preclude Pintro from presenting evidence regarding the other nine times O'Brien selected a white attorney for a management position because the court has already entered summary judgment in favor of the defendant because Pintro failed to exhaust administrative remedies. In response, Pintro argued that these selection decisions are admissible because they demonstrate O'Brien's discriminatory motive and intent. The court rules in favor of Pintro, arguing that a jury could reasonably draw the inference that O'Brien's promotions of these white employees over a five year-period demonstrates that her decisions were based on inappropriate discriminatory factors instead of merit, especially because the character and type of the discrimination alleged in these other promotion decisions are similar and close in time to the discrimination alleged by the plaintiff in the current case. The court rules that at trial, Pintro can introduce evidence of her prior non-selections from 2003 to 2008 but that she must present this evidence solely for the purpose of demonstrating that O'Brien acted with discriminatory motive or intent in selecting a white employee instead of Pintro for the 2008 Acting Deputy Division Chief position.

404(b) and Corporate Entities

Erhart v. BofI Holding, Inc., No. 15-CV-02287-BAS-NLS, 2022 WL 107111 (S.D. Cal. Jan. 10, 2022) Erhart blew the whistle on Bofl Holding Inc. regarding Bofl allegedly giving a false or misleading response to an SEC subpoena investigating securities fraud and Bofl allegedly making unauthorized, risky loans to politically exposed persons and criminals, which could impact the Bank's financial condition. He also claimed that the bank wasn't making timely 401(k) contributions, in violation of federal labor regulations and that its CEO was potentially engaging in tax fraud or money laundering. Bofl moves in limine to exclude evidence that it was a "boys' club" with a "fear-based culture" and that individuals working at the bank would often make inappropriate jokes and engage in crude behavior, arguing that this information would be irrelevant and unfairly prejudicial. The court agrees that most of the evidence regarding a culture

of sexual harassment is not relevant to the violations of law that Erhart has alleged throughout this case, nor is it relevant to his retaliation claim. However, the court chooses not to exclude evidence that Bofl had a "fear-based" culture that discouraged employees from reporting wrongdoing and reprimanded them for raising concerns because this evidence may be relevant to Erhart's retaliation claims. The court then directs the reader to FRE 404(b)(2) which says that acts which may show character may nonetheless be admissible to prove motive or intent.

When is an Act Not an "Other" Act?

Commonwealth v. Harding, 170 N.E.3d 720 (Mass. App. Ct. 2021). On a daylong crime spree in the states of New York and Massachusetts, Harding committed a botched robbery in New York, kidnapped and raped his brother's girlfriend in Massachusetts, came back to New York, planned additional crimes and manipulated his friend into helping him escape to Canada. A Massachusetts trial court convicted him of three counts of rape and a single count of kidnapping. On appeal, he claims it was error for the court to admit evidence of certain prior and subsequent bad acts. The appeals court does not find this to be a convincing argument because all of the crimes committing during this spree were part of an "inextricably intertwined" course of conduct. His failed armed robbery in New York was what led him to seek a ride from his brother's girlfriend. Out of desperation to avoid the police, he forced her to drive him to Massachusetts, where he raped her, believing he was about to die. She was able to convince him that people would notice her absence and told him to ask his friend and roommate for help. He then forced that friend to drive him around New York while he planned additional crimes that he believed would aid him in his escape to Canada. When that friend got free, he gave the police the information that led to Harding's arrest. All of these events were connected to the others and they all happened within a twenty-four hour period. The crimes that happened in New York were necessary to include to help the jury understand what happened in Massachusetts. The court concludes that given this reality, "any prejudice from admission of the bad acts evidence here can hardly be called unfair; the defendant cannot expect to avoid evidence of bad acts that were uncharged solely by reason of the cartological accident of a State boundary separating them. There was no abuse of discretion in admitting the bad act evidence."

Balancing and 404(b)

State v. Thoren, 970 N.W.2d 611 (Iowa 2022). Thoren was convicted of third-degree sexual abuse after vigorously rubbing a client's vagina while performing reiki on her. He argues that the court of appeals erred in affirming his conviction because the district court violated the principle that prior bad acts can't be used to prove propensity, and the evidence that he'd had his massage license revoked for groping and sexually assaulting women while he massaged them unfairly prejudiced the jury against him. At trial, Thoren's primary defense was that the client who accused him of sexually assaulting her while he performed reiki merely felt a "phantom touch" and that he did not actually touch her below the navel. In light of this defense, the Iowa Supreme Court held that the testimony of some of Thoren's former massage clients who he sexually assaulted was permissible because the evidence that he'd sexually assaulted clients could help prove that he actually touched the woman who received reiki from him. However, the court ruled that the lower courts erred in allowing the prosecution to use this testimony to prove motive, intent or lack of mistake because Thoren did not dispute any of those things at his trial. The Iowa Supreme Court also held that because the trial court did not give a sufficiently specific and clear limiting instruction that the jury could only consider the revocation of Thoren's massage license

as evidence that he actually touched his reiki client, Thoren's conviction was vacated and he was granted a new trial.

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."

2022 Cases

Rule 406: Habit; Routine Practice

Doe by next friend Rothert v. Chapman, 30 F.4th 766 (8th Cir. 2022). Chapman appeals after her motion for summary judgment was denied in a lawsuit alleging that she violated Doe's 14th Amendment rights when Chapman, a circuit court clerk, told Doe that Doe would not be able to get a judicial bypass allowing her to obtain an abortion without notifying her parents. Chapman claims quasi-judicial immunity because she was acting at the direction of the judge. However, the judge claims that the didn't remember telling Chapman not to accept an application for judicial bypass authorizing Doe to get an abortion unless the parents were notified. He explained that he wouldn't have had the authority to require parental notification unless he looked at the law. He then added, "that's not how I would usually operate." The district court then denied Chapman's motion for summary judgment partially because there was a genuine dispute of material fact regarding whether the judge had told Chapman to notify the parents before allowing Doe to apply for judicial bypass to get an abortion. Chapman argues that lack of memory alone is not enough to create a genuine issue of material fact. The appellate court notes that this is correct. However, the appellate court also points out that the judge was not testifying merely to lack of memory, he was testifying to his own habit or routine practice, which is sufficient

evidence to create a genuine dispute regarding material fact. The court then explains that evidence of habit is admissible at trial and that evidence that may be admissible at trial is admissible at the summary judgment phase. Because the judge's statement that he would not usually give a pre-filing direction created a genuine issue of material fact, Chapman's motion for summary judgment on the basis of quasi-judicial immunity was denied.

Williams v. Am. Multi-Cinema, Inc., No. 2:20CV140-PPS, 2022 WL 2304237 (N.D. Ind. June 27, 2022). The court entered summary judgment in favor of AMC in Williams' lawsuit seeking damages for injuries he suffered when his chair broke without warning while he was watching a movie at the AMC at his local mall. The General Manager testified that the AMC ushers clean the auditoriums after every movie showing and that during this cleaning process, they inspect the seats for defects. The GM says that every other week she would remind the ushers to look out for and report any repairs need in any auditoriums, including any issues with the seats. The court holds that this is admissible evidence of company routine practice and because Williams has not offered any admissible proof that AMC failed to exercise reasonable care to ensure its seats were safe, the court grants AMC's motion for summary judgment.

Rule 407: Subsequent Remedial Measures

United States v. Balwani, No. 5:18-CR-00258-EJD-1, 2022 WL 597040 (N.D. Cal. Feb. 28, 2022). Balwani was charged with ten counts of wire fraud and two counts of conspiracy to commit wire fraud. The government contends that Balwani knew that Theranos' technology was not reliable or consistently accurate, yet he defrauded investors, doctors and patients by pretending that Theranos' blood-testing devices could reliably and accurately test for health conditions using only one drop of blood. In relation to these charges, Balwani motions to exclude evidence that Theranos voided numerous patient test results on the grounds that this evidence is inadmissible as a subsequent remedial measure. The court notes that while evidence of subsequent remedial measures is almost never admissible to prove an organization's liability, there is an exception for subsequent remedial measures that the organization was forced to take by the government. Because allowing government-mandated remedial measures to be used to prove liability will not discourage remedial measures from being taken, government-mandated remedial measures are not covered by FRE 407. Here, Theranos voided test results after the Center for Medicare and Medicaid Services (CMS) investigated its lab and determined that the lab was not in compliance with the conditions required for CLIA certification and that these deficiencies posed an immediate threat to patient health and safety. CMS gave Theranos ten days to come into compliance. In response, Theranos hired a new lab director, who determined that Theranos would need to void its test results to come into compliance with the CMS directive. Balwani argues that because CMS didn't tell Theranos that it had to void the test results in order to come into compliance, that Theranos's voiding of the results was voluntary and therefore inadmissible under FRE 407. The court disagrees, explaining that because the lab director determined that Theranos would have to void its test results in order to comply with CMS's directive, this remedial measure undertaken by Theranos was not voluntary and therefore is not inadmissible under FRE 407.

Rule 408 Compromise Offers and Negotiations

United States v. Harvey, No. 2:20-CR-202, 2022 WL 374408 (S.D. Ohio Feb. 8, 2022). Harvey was indicted for knowingly aiming a laser pointer at an Ohio State Highway Patrol surveillance

aircraft. After he was arrested, Harvey claimed that he was just aimlessly pointing it into the sky, something he'd done without incident on numerous camping trips. The government notes that several of the statements in his Response Letter are inconsistent with statements he made to the Columbus police on the night of his arrest. The government therefore seeks to have the Response Letter admitted. Even though Harvey's lawyer sent the response letter so that he could advocate for a specific monetary sanction for Harvey, the court holds that the letter is not inadmissible under Rule 408 because Rule 408 allows prior inconsistent statements made during compromise negotiations to be admitted for impeachment purposes when offered in a criminal case and when the negotiations relate to a claim by a public officer in the exercise of its regulatory, investigative or enforcement authority. The Response Letter is being offered in a criminal case, it relates to the FAA's claim against Harvey and it was written in response to the FAA's exercise of its regulatory and investigative authority. The court therefore concludes that even though Rule 408 would normally bar the use of prior inconsistent statements made during a settlement negotiation, under these specific circumstances, the contents of the Response Letter are admissible for impeachment purposes.

Rule 410: Using a Guilty Plea or Plea Discussions

United States v. Mullins, No. CR-21-60-CBG, 2022 WL 2306819 (E.D. Okla. June 27, 2022). Ahead of his trial to determine whether he is eligible for post-conviction relief after being convicted of murdering his ex-girlfriend, Mullins motions to suppress evidence that he argues is inadmissible under FRE 410. After a conversation with an assistant district attorney in which Mullins' former lawyer alleges that he was told the ADA would not seek the death penalty if Mullins led law enforcement to the victim's body, Mullins' former lawyer informed the police that Mullins would lead them to her body. Her body was found wrapped in a blue tarp and buried under gravel. Mullins was then charged with first degree murder and entered a blind guilty plea. He was given a life sentence without the possibility of parole. The court is not convinced by Mullins' argument that his statements that led the police to the victim's body are inadmissible under FRE 410. The ADA was not present when Mullins made those statements and because his lawyer had allegedly already spoken to the ADA about taking the death penalty off the table if Mullins led law enforcement to his girlfriend's body, Mullins should have known to negotiate any plea agreement with the ADA and not with the police. The court therefore concludes that this evidence is not inadmissible under FRE 410. In addition to attempting to suppress the statements he made to law enforcement, Mullins also motions to suppress the evidence derived from that conversation, such as the testimony of those present at the site where she was found, photos of her body taken at the site, shell casings and a bullet recovered from the site and the medical examiner's report. The court balks at this request, stating that there is no evidence that FRE 410 is so far-reaching. The court emphasizes that FRE 410's plain language indicates that only statements made during plea discussions are inadmissible and that there is no restriction, explicit or implied, on the use of evidence derived from those statements. The court also notes that every federal court to have considered the issue has found that FRE 410 doesn't require suppression of derivative evidence.

FRE 411: Proof of Insurance Coverage

Johnson v. Lopez-Garcia, No: 20-2024, 2021 WL 3630109 (E.D. La. Aug. 17, 2021). This motion arises out of a lawsuit for damages suffered in an accident from when Garcia tried to turn his tractor trailer onto a no truck route street and hit Johnson's car. Defendants seek to exclude

evidence of insurance coverage and insurance policy limits under FRE 411. The plaintiffs concede that the limits of the policy are inadmissible but argue that they should be able to introduce evidence of the existence of the policy to avoid influencing the jury to keep the award low based on an assumption that the defendants will not be able to pay a high damages award if they assume the defendants are uninsured and will pay the damages out of pocket. The plaintiffs are also adamant that they are not attempting to introduce evidence of the policy to prove the defendants acted negligently. The court decides to admit evidence of the existence of the policy but not the coverage amount because the insurance company is a party in this matter.

Camm v. Clemons, No. 414CV00123TWPDML, 2021 WL 5235097 (S.D. Ind. Nov. 9, 2021). After his wrongful conviction for murdering his wife and children, Camm sues for unlawful arrest and detention in violation of his Fourth Amendment rights and a Brady claim based on the suppression of the lack of qualifications of a forensic assistant and suppression of facts regarding the handling of a DNA profile. The warrant for his arrest was based almost exclusively on the observations of a plainly unqualified forensic assistant who was not trained to do anything more than photograph evidence. Investigators and prosecutors exaggerated his qualifications in a probable cause affidavit and at trial. Camm was convicted twice, though both convictions were eventually overturned, and his third trial resulted in his acquittal. Ahead of trial, Clemons requests that the court prohibit testimony indicating that the State of Indiana will indemnify any of the defendants. The court grants this request, noting that reference to indemnity is similar to reference to insurance, which is not permitted under FRE 411. The court also explains that indemnity evidence is highly prejudicial and irrelevant to the issue of whether any of the defendants are liable for Camm's damages.

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.

2022 Cases

Rule 412: Rape Shield Protection

State v. Mulhern, 2022 WI 42. The trial court ruled that it was error for the original trial court to admit evidence that the victim had not had sex in the week preceding the sexual assault. To determine whether the rape shield statute prohibiting evidence regarding the victim's general sexual behavior included lack of sexual conduct, the state looked at prior Wisconsin cases that held that it did, including that it was inadmissible for a teenage victim to testify that she'd been a virgin before her rape. However, the court held that this error was harmless and reinstated Mulhern's conviction because the State had a very strong case against him and a reasonable jury likely would have found him guilty even without the victim's testimony that she hadn't had sex with anyone the week before he assaulted her. In explaining why the victim's testimony that she

hadn't had sex with anyone the week before the assault was inadmissible, the court did not say that it was prejudicial, just that it did not fall under any of the exceptions that would allow evidence of a victim's past sexual conduct to be admitted.

Rule 413 Similar Crimes in Sexual Assault Cases

United States v. Ahmed, No. 21-CR-4087-LTS-KEM, 2022 WL 782024 (N.D. Iowa Mar. 14, 2022). Ahmed is charged with two counts of kidnapping. Both charges arise out of incidents in which he would not let the victim out of his car after she asked him to let her out. Both kidnappings ended with Ahmed raping the women and leaving them at a gravel road or a park. Ahmed argues that the Rule 413 exception to the prohibition on propensity evidence doesn't apply here because he is not charged with sexual assault, he is only charged with kidnapping. The district court rejects this argument, taking a fact-specific instead of categorical approach to Ahmed's offenses. The court notes that far more courts have focused on the underlying conduct when determining Rule 413's applicability instead of merely referring to the elements of the charged crime, and that the appeals court whose decisions are binding in Iowa has also taken a broader approach to the application of rule 413. The district court therefore concludes that the weight of the caselaw supports the application of Rule 413 to this case even though Ahmed was not charged with sexual assault and the government does not need to prove he committed sexual assault to prove its case. Ahmed's final argument is that even if Rule 413 applies, the danger of unfair prejudice substantially outweighs the probative value under FRE 403 because if evidence of one crime is admitting during the trial for the other crime, the jury would be encouraged to make the impermissible inference that he has the propensity to commit the crime of kidnapping. The court responds that the jury is allowed to consider propensity evidence under Rule 413 and that while this evidence might be prejudicial, it is not unfairly prejudicial. The court then concludes that because evidence of each kidnapping can be used to prove the other kidnapping regardless of whether Ahmed is given a joint or separate trial for each crime, he is not entitled to have his counts severed.

Rule 414: Similar Crimes in Child Molestation Cases

United States v. Dowty, No. 21-3005, 2022 WL 2125999 (8th Cir. 2022). Dowty was convicted of aggravated sexual abuse of a minor, his cousin. During his trial, the jury heard testimony from two sisters who he had also sexually abused. Dowty appeals, arguing that the district court erred by allowing his prior victims to testify because these prior acts were too dissimilar to the charged act, they were too remote in time and they were too prejudicial. The district court determined that this evidence was probative because of the similarities between the methods of abuse and the age of the victims. The court also concluded that the probative value of the evidence was not substantially outweighed by prejudice or any other Rule 403 factors. The appeals court seems to accept the district court's reasoning on these issues. The appeals court then explains that it does not find Dowty's argument that these other instances of sexual abuse happened too long ago to be relevant to be convincing because, according to the appeals court, when Rule 414 was enacted, Congress explicitly rejected the idea of putting any time limit on prior sex offense evidence. The appeals court also notes that the district court took steps to ensure the evidence was not unfairly prejudicial by denying the proffered testimonies of two additional women in order to avoid presenting cumulative evidence. The court then concludes that it did not find any prejudicial abuse of discretion in admitting the testimony regarding Dowty's prior acts of sexual abuse under FRE 414.

Rule 415: Similar Acts in Civil Cases Involving Sexual Assault or Child Molestation
Boyce v. Weber, No. 19-CV-3824 (JMF), 2021 WL 2821154 (S.D.N.Y July 7, 2021). Boyce is a former fashion model who is bringing claims against Weber, a fashion photographer and Weber's production company for sexual harassment and discrimination and for sex trafficking. He says that during a one-on-one photoshoot Weber told him to get naked and then took Boyce's hand and used it to rub Boyce's genitals and then to touch Weber's genitals through his pants. He also put his fingers in Boyce's mouth and kissed him on the lips. Boyce requests that the court admit the testimony of ten other male models who Weber was inappropriate with. He argues that this evidence is relevant to prove Weber's MO of sexually touching, fondling or kissing male models during one-on-one photoshoots under the guise of directing the photoshoot or otherwise offering creative direction. The court concludes that the testimony of six of the ten men is admissible under Rules 404, 413, and 415 because the incidents they describe are all sexual assault within the meaning of rule 413, and they help prove Weber's MO. The court explains that it chose to exclude the testimony of four of the ten victims because the testimony would either be needlessly cumulative, or Weber's behavior with them, while creepy, coercive and inappropriate, did not rise to the level of sexual assault.

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.

2022 Cases

The Privilege Against Self-Incrimination

Ex parte Doe, No. 1191073, 2021 WL 2879327 (Ala. July 9, 2021). Doe was dropping off her children to stay with a friend at her friend's apartment. She testifies that while she was in the common area of the apartments, she was raped in front of her children. She sued the apartment complex and the security company. The apartment complex and the security company filed a joint motion to stay the civil action pending the outcome of the criminal proceeding against the rapist, Jones. They claim that this civil proceeding and the criminal proceeding against Jones are parallel and that his privilege against self-incrimination would be threatened if he's called for a deposition in this case while the criminal proceeding is still pending. The trial court granted the motion to stay. On appeal Doe argues that the trial court abused its discretion by granting the motion to stay based on speculation that Jones might assert his Fifth Amendment right against self-incrimination. She also says that the apartment complex and the security company can't assert the Fifth Amendment for Jones and that they failed to present evidence that he had asserted or would assert his Fifth Amendment right against self-incrimination in response to discovery that he may or may not face in this case at some future date. The Alabama Supreme Court agrees that the apartment complex and the security company can't assert the Fifth Amendment on Jones's behalf. Jones is the only defendant against whom criminal charges have been filed in regard to the rape and he has not invoked his privilege against self-incrimination. Instead, the two corporations filed their motion to stay based on speculation that he might later invoke his Fifth Amendment rights in response to discovery in this civil case. The court explains that the privilege against self-incrimination is "essentially a personal one, applying only to natural individuals…it cannot be utilized by or on behalf of any organization, such as a corporation." These two corporations did not have their own Fifth Amendment rights and they

could not assert these rights on behalf of Jones. The court concludes that the trial court exceeded its discretion in granting the corporations' motion for a stay.

Attorney-Client Privilege

United States v. Paulus, No. 0:15-CR-00015-DLB-EBA-1, 2021 WL 4494607 (E.D. Ky. Sept. 30, 2021). Paulus is a doctor who is being charged with fraud after reporting inaccurately high degrees of arterial blockage in patients, performing unnecessary stent procedures and then billing patients and their insurance companies for the procedures. Ahead of a second trial after his original conviction was vacated because the government withheld exculpatory evidence from him, the government seeks to compel information from the hospital he worked at, regarding an investigation the hospital made into Paulus's surgeries. Before the initial trial, the hospital sent the government a letter that demonstrated that around 7% of the surgeries he performed were unnecessary. The government originally intended to share this letter with Paulus, but the hospital objected, arguing it was protected by attorney-client privilege and the work product doctrine. The district court agreed with the hospital and ruled that the government could not share this information with Paulus. After the Sixth Circuit remanded the case when it found that there was insufficient evidence to convict, the government did share this information with Paulus. He argued that his due process rights were violated because he viewed the finding that only 7% of his surgeries were unnecessary as exculpatory because the government's argument at trial was that the percentage of unnecessary surgeries was much higher. He argues that a rate of 7% is more consistent with error or difference in opinion than deliberate and systematic fraud. The Sixth Circuit agreed with him and remanded the case for a new trial. Ahead of this new trial, the government is asking the hospital to produce information related to the surgeries that the investigation did not find were unnecessary. In response, the hospital argues that this information is protected by attorney-client privilege and the work-product doctrine. The court finds that although both of these things originally did apply because the hospital hired outside counsel and drew up an explicit agreement with the investigative service that emphasized that this information would be protected by attorney-client privilege and the work product doctrine, the hospital waived both of these protections when it shared the letter summarizing number of surgeries that it found to be unnecessary out of the total number that it investigated. The court explains that voluntary and deliberate disclosure to an adversary waives attorney-client privilege and work product protection. It then further explains that selective disclosure of information of internal reviews to the government during a healthcare fraud investigation waives attorney client privilege and work product protection regarding undisclosed information that concerns the same subject matter. Therefore, because the hospital gave the government some information regarding its investigation into Paulus's surgeries, it waived its privileges and it must now produce the rest of the information that the government is requesting in regards to that investigation.

Spouses and Communications

United States v. Helbrans, No. S219CR497NSR0102, 2021 WL 5132403 (S.D.N.Y. Nov. 4, 2021), *reconsideration denied*, No. S319CR497NSR010204, 2021 WL 5233611 (S.D.N.Y. Nov. 10, 2021). Helbrans and Rosner were charged with parental kidnapping after transporting Helbrans' daughter, Jane Doe, who is thirteen, across state lines in order to reunite her with her adult husband, Rosner's son Jacob. Rosner attempted to invoke spousal privilege on behalf of Jane Doe and Jacob. The court ruled that spousal privilege does not apply to their marriage because the marriage is not legally recognized by the state of New York, and Jacob, Rosner and

Helbrans, who are all representing themselves, have not provided any evidence that a marriage between an adult and a thirteen-year-old is valid in Guatemala, where the marriage was performed. The court explains that because marital privilege deprives fact finders of potentially useful information, the party seeking to invoke the privilege bears the burden of proving that a valid marriage existed at the time the communication they claim is privileged was made. Alternatively, the court also explains that there is a strong public policy incentive not to find spousal privilege in cases in which the testifying spouse or one of their children is the victim.

Psychiatrist/Patient Communications

Capps v. Dixon, No. CV 20-1118 (RMB/AMD), 2022 WL 889969 (D.N.J. Mar. 25, 2022). Plaintiffs are attempting to compel unredacted versions of the fitness for duty reports of two police officers who they claim used excessive force when arresting them. The court granted their motion, holding that the police officers did not have an expectation of confidentiality regarding fitness for duty reports that they knew would be shared in their entirety with the Chief of Police. The court explains that whether therapist-patient confidentiality existed with respect to the fitness for duty reports hinges on whether the officers had an expectation of privacy. In previous cases, the court has held that therapist-patient privilege existed regarding fitness for duty reports in situations where the only thing that would be disclosed was whether the officer was fit for duty, not what the officer and the counselor discussed during the process of determining the officer's fitness for duty. Similarly, even in cases in which the contents of the fitness for duty report have been disclosed to the Chief of Police, therapist-patient privilege still existed when the officer believed incorrectly that the contents of the report would not be shared. Here, the officers admitted that they knew the Chief of Police would receive the report in its entirety, therefore they did not have an expectation of confidentiality. The court also explains that the same public policy concerns do not attach to fitness for duty reports when the officer knows that passing the evaluation is required if the officer wants to keep his job. The court noted that in these situations, the officer already has an incentive to withhold embarrassing or damaging information regarding the officer's mental health, so compelling the information contained in the fitness for duty report does not necessarily jeopardize a sacred relationship of trust between therapist and patient in the way that choosing not to protect information from other counseling sessions would.

Privileges and Mandatory Reporting Laws

Horton v. State, No. A-13538, 2022 WL 855656 (Alaska Ct. App. Mar. 23, 2022). Horton was convicted of two counts of first-degree sexual abuse of a minor and four counts of second-degree sexual abuse of a minor for offenses committed against his stepson and his daughter. On appeal, he argues that the superior court erred when it denied his request to subpoena his wife's therapy records after she told her therapist about her son's initial allegations against Horton. Because Horton is only now bringing these arguments up, the court can only reverse if it finds plain error. The court finds no reversible error. Horton argues that the records aren't privileged because his wife knew that the therapist was a mandatory reporter when she shared her son's allegations, claiming that she talked to her therapist about it partially because she was a mandatory reporter and she was trying to figure out how to report the allegations to the proper authorities. The court responds that it is not clear that a therapist's mandatory report is now admissible in a criminal proceeding under Alaska law, and that even if it is, that doesn't necessarily mean that the underlying mental health records that the report came out of are no longer protected by therapist-patient privilege. As the state points out, the mandatory reporting statutes require the therapist to

tell the authorities about child abuse their clients have told them about, but they do not require the therapist to turn over the patient's mental health records. Given the constitutional requirement that the court strictly construe any exceptions to the therapist-patient privilege, the court does not find that the superior court plainly erred in treating Horton's wife's mental health records as privileged.

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.

…

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.

2022 Cases

Rule 601: Competency to Testify in General

State v. Landingham, 2021-Ohio-4258. Landingham appeals his conviction for assault. He argues that the trial court erred when it admitted the testimony of a schizophrenic, McCauley. The appeals court rules that this was not an error because the witness proved that he knew right from wrong and he promised to tell the truth. Landingham also criticizes the substance of McCauley's testimony. McCauley admitted he only vaguely remembered what happened because his medication interferes with his memory and he admitted on cross-examination that he sometimes talks to people who aren't there. However, the court notes that Landingham's lawyer was able to cross-examine McCauley regarding his faulty memory and his mental illness, so these complaints relate to his credibility and the weight his testimony should be given, not his competency to testify.

Int. of K.B., 265 A.3d 818 (Pa. Super. 2021). The superior court affirms the trial court's testimony that A.B., the juvenile victim was not competent to testify in the delinquency proceedings against K.B, a juvenile family friend who allegedly raped her. Although A.B. demonstrated that she knew the different between the truth and a lie by identifying truthful and untruthful statements and she testified that she knew it was important to tell the truth, the court

ruled that she was not a competent witness because she lied during her competency hearing, telling the questioner what she thought she was supposed to say instead of telling the truth. On cross-examination, she admits that she answered "yes" to the question of whether she was in tenth grade during direct examination because she thought she was supposed to answer that way and she was trying to get the answer right. She also testified that the answer was a lie. The court points out that the record shows that she did not understand the duty and importance of telling the truth. Therefore, the district court didn't abuse its discretion when it found she was incompetent to testify. Additionally, the court found that the trial court did not abuse its discretion when it found she was not able to perceive accurately because she did not understand the seriousness of the allegations against K.B. An expert witness testified that she still loves K.B., considers him a member of the family and does not understand the impact or seriousness of the allegations. The trial court points out that a competency hearing of a minor partially focuses on determining whether the minor can perceive the nature of the events they will be testifying about. Because the trial court reasonably concluded that A.B. did not, the trial court did not err when it found she was incompetent to testify for this alternative reason.

Rule 603: Oath or Affirmation to Testify Truthfully

In re Marriage of Johnson, 972 N.W.2d 871 (Iowa Ct. App. 2021). A dissolution of marriage decree granted both parties joint legal custody of their daughter. The mother had physical care over her daughter. In a later proceeding, the father got physical custody. The mother appeals. She asserts that her daughter was not placed under oath, so her testimony cannot be considered. The district court failed to place her under oath before taking her statement. Instead, the judge merely stressed that the daughter should feel she could be honest and the judge promised to be honest in return. The father argues that this statement was essentially an oath. The appeals court disagrees, explaining that the district court's statement that the daughter should feel like she can be honest is not the same as an oath or affirmation that impresses upon her the need to be honest. The daughter also never provided any affirmation that she understood the requirement to testify truthfully or that she knew what it meant to tell the truth. The court rules that because the district court did not obtain an oath or affirmation from the daughter before she gave her statement, the court cannot consider her statement that she would prefer to live with her father to be testimony.

Rule 602: Personal Knowledge

United States v. Moore, No. 18-198 (JEB), 2022 WL 715237 (D.D.C Mar. 9, 2022). Defendants are charged with various counts related to the kidnapping, ransom and murder of Andre Carlos Simmons Jr. The issue here is the scope of questioning of certain employees at the D.C. Department of Forensic Sciences. Recently, this department has faced allegations of misconduct in analysis and testing, which it has been investigated for. Its accreditation was suspended pending the investigation. None of the DFS witnesses the government will call are subject to these allegations of misconduct and none of them performed any analysis or testing. Instead, they merely performed largely routine tasks of evidence collection, such as taking photographs, swabbing items for DNA, processing items for fingerprints and recovering pieces of evidence. However, one of the witnesses was encouraged to resign after she was caught regularly entering dates on her crime scene reports that were different from the dates she actually uploaded and distributed them. The government motions to limit questioning of the DFS employees regarding allegations of misconduct involving analysis and testing at the agency. Specifically, the government does not want questioning about potential institutional corruption and broader

allegations against DFS. They would prefer the questioning to focus on the individual employees' testimonial bias. The court points out that "it is undisputed that Defendants may cross-examine the witnesses about their personal knowledge of the ongoing D.C. OIG investigation of DFS and its potential impact on their testimony." A previous case that dealt with the same issue held that DFS witnesses can be cross-examined on their awareness that the investigation is happening, whether they believe they're a subject of the investigation and the potential penalty they think they could face due to the investigation. These questions will allow the jury to assess the witness' personal knowledge of the ongoing investigation and its potential effect on their testimony. But the court holds that the defendants cannot question the DFS witnesses more broadly about the allegations of misconduct at the agency except to ask them whether they knew DFS had lost its scientific accreditation with respect to certain units. The court explains that since most of the misconduct involved firearms and ballistics analysis, the investigations into this misconduct are largely irrelevant to this case, and it is unlikely that these employees would have the personal knowledge required to testify on that matter.

Tolbert v. Discovery, Inc., No. 4:18-CV-00680-KOB, 2021 WL 3793045 (N.D. Alabama Aug. 26, 2021). Angelina Jolie's stunt double, Melanie Tolbert, is suing Discovery because she claims that the company copied her idea for a mother-daughter home renovation show with its HGTV series *Good Bones*. In 2014, she and her mother made a teaser for their mother-daughter home renovation series and sent the teaser out to various producers working in the home renovation television industry. During the summary judgment phase, Discovery motions to strike paragraph nine of Tolbert's declaration, which lists 21 producers in the home renovation tv industry who she pitched her teaser to in 2014. She claims each one of them has a direct tie to HGTV/Discovery. Discovery responds that Tolbert has not established that she could've possibly had any personal knowledge of these statements. Tolbert claims that she knows these people have ties to Discovery because she used IMDb to look up the people who she sent her teaser to. The court finds that she lacks personal knowledge that the named producers had ties to Discovery. But the court chooses not to strike her identification of these producers by name, as she does have personal knowledge of which producers she emailed the teaser to. The court also strikes her paragraphs regarding standard industry practice in the home renovation reality series industry. Although she has worked in Hollywood producing music videos and shorts and she has interacted with protection crews as an actress, she does not have production experience on a home renovation show, so she does not have personal knowledge of what industry practice within that field is. After striking much of Tolbert's declaration, the court grants Discovery's motion for summary judgment as to Tolbert's copyright infringement claim because she has not produced evidence that the company had a reasonable opportunity to view her teaser and too much of her argument is based on speculation.

The Scope of Direct Examination—Bolstering

United States v. Hidalgo-Sanchez, 29 F.4th 915 (7th Cir. 2022). On appeal after his conviction for taking part in a drug distribution conspiracy, Hidalgo-Sanchez's codefendant, Gomez, argues that the government impermissibly bolstered the testimony of the detective by inducing him to testify about the complex process required to get approval for a wiretap. The court agrees that the government engaged in impermissible bolstering by asking irrelevant questions designed to convince the jury that multiple high-ranking people concluded that there was probable cause to believe defendants were committing crimes. Unfortunately, because Gomez did not object to this

testimony, the court can only conduct plain error review. The government concedes that this was an error and it was plain. However, the court finds that in the face of the overwhelming evidence against Gomez, this improper bolstering did not affect his substantial rights or seriously affect the fairness of his judicial proceedings. Despite ultimately finding that the government did not commit plain error by bolstering the testimony of the detective, the court harshly criticizes the government for its bolstering, pointing out that the court is "disturbed that the government continues to use bolstering evidence in criminal trials" fifteen years after the cases that determined that testimony regarding the many layers of approval to obtain a wiretap is inadmissible bolstering. The court also notes that while there is no proof here that the government deliberately tried to get away with bolstering, the court can imagine that some prosecutors may weigh the risk and reward of bolstering their weak cases, hoping that defense counsel will not object and that the deferential plain error standard will allow them to get away with it. For that reason, the court also disapproves of the defense's failure to object to this bolstering at trial, noting that the defense's objection was a critical difference between C*unningham*, a case in which the defendant was granted a new trial because of the government's bolstering, and *McMahan*, a case in which the bolstering was acknowledged to be error but the conviction was upheld because the defense was not able to meet its high burden under plain error review.

Rule 611(b): The Scope of Cross-Examination

Moss v. Shelby Cnty. Civ. Serv. Merit Bd., No. W201701813COAR3CV, 2021 WL 4786370 (Tenn. Ct. App. Oct. 14, 2021), *appeal granted* (Mar. 25, 2022). Moss was a firefighter and paramedic who was fired from his job after he got into a fight with an anti-Obama protester wearing an Obama mask. This fight eventually escalated to the point where Moss pulled a gun on this man and his friend. On appeal, he argues that he was denied the chance to present evidence of disparate discipline when the Board ruled that his lawyer could not cross-examine the Chief on an employee who had committed sexual battery. During direct examination, the Chief explained that if there's a domestic incident with a weapon involved and the employee is the primary aggressor, they will be terminated. On cross-examination, Chief Benson clarified that this policy applied to all violence or assaults generally, not just domestic assaults. Moss's lawyer asked if this rule also applied to sexual battery. Chief Benson replied that it did. Moss's lawyer then asked about a specific employee who committed sexual battery but was not fired. When Shelby County's lawyer objected, Moss's lawyer explained that he was trying to impeach the statement that anyone who committed an assault would be terminated. The Board Chairman upheld the objection. The appeals court states that The Board misconstrued Rule 611 and that this line of questioning was a permissible form of impeachment evidence regarding Chief Benson's stated uniform approach to terminating employees who were involved in an assault when the employee is the primary aggressor and a weapon is involved. The court then concludes that the board's decision to exclude evidence of disparate treatment was unreasonable and arbitrary.

Forms of Questions

State v. Robinson, 509 P.3d 1023 (Ariz. 2022). Robinson was sentenced to death after he was found guilty of beating, binding and immolating his nine-months pregnant girlfriend. On appeal, Robinson claims the prosecutor impermissibly asked leading questions of the medical examiner recording the timing of his girlfriend's death. He states that the prosecutor committed additional

misconduct by demonstrating how Robinson might have held his girlfriend's neck while applying the duct tape. The trial court sustained Robinson's objections to the questioning and demonstrations. The court also held a bench conference during which it rebuked the prosecutor for giving a demonstration based on speculation. The judge also criticized the prosecutor for leading his own witness. However, the trial court ruled that this misconduct was not grounds for a mistrial because duct tape had been applied to the victim's face and it was "fair to assume" that it hadn't been applied gently. The Arizona Supreme Court agrees that the prosecutor's conduct did not rise to the level of prosecutorial error, explaining that Robinson overstates the extent to which the prosecutor led the medical examiner during direct examination. Only three of the six questions Robinson listed in his brief related to the timing of Robinson's girlfriend's death, and only one of those leading questions was asked on direct. The one leading question posed on direct asked whether the medical examiner changed his opinion on the timing of the victim's death because he was now taking note of specific factors that he had earlier credited for his changed opinion. The court notes that the medical examiner had already identified these factors by the time the prosecutor asked him that leading question. The Arizona Supreme Court's opinion does not explicitly list what the two leading questions asked on redirect were, but they also appear to relate to the timing of the victim's death, and they were asked in response to testimony elicited by Robinson's lawyers during cross-examination. In footnote twelve, the court explains that the prosecutor's question regarding when the medical examiner's report says that the victim was last seen on the date of her death was part of a line of questioning about how the medical examiner changed his opinion on the victim's time of death. The questions Robinson objected to that were not related to time of death were about the difficulty of inflicting defensive wounds when restrained and the means Robinson used to physically restrain the victim.

Rule 615: Sequestration and Excluding Witnesses

United States v. Edwards, 34 F.4th 570 (7th Cir. 2022). Edwards was identified as the man who committed ten robberies in the Madison area in the fall of 2018 when he was caught on camera robbing a liquor store. Edwards appeals his convictions of robbery, brandishing a firearm in furtherance of a crime of violence, being a felon in possession of a firearm, possession with intent to distribute marijuana and possession of a firearm in furtherance of a drug trafficking crime. Before trial, the government requested that two case agents be excluded from witness sequestration. Because this case was multi-jurisdictional, the district court partially granted the motion, sequestering only Detective Keith until she'd completed her testimony. After she finished giving her testimony, she sat in the gallery while Detective Johnson testified. Soon after, a juror told the court that he thought Detective Keith had been shaking her head and making faces in order to coach Detective Johnson's testimony. The district court criticized Detective Keith for her lack of professionalism but denied Edwards' motion for a mistrial. The district court ruled that Detective Johnson credibly testified that he was not influenced by Detective Keith's behavior, Detective Johnson's testimony was consistent with other evidence presented and trial and there wasn't enough overlap between the testimonies for the judge to believe Johnson's testimony was coached. The appeals court holds that the district court didn't abuse its discretion when it let Detective Keith stay in the courtroom after her testimony because her presence was essential to the government's case. The court also notes that Keith was properly sequestered until she'd completed her testimony, which eliminated the risk that the testimony of other witnesses would impact her testimony. Additionally, the appeals court rules that the trial

court did not err when it exempted the FBI agent from sequestration because this FBI agent was the lead investigator for the case and fell under the case agent exemption to rule 615.

Rule 612: Writing Used to Refresh a Witness

Luke v. United States, No. 3:20-cv-00297-SLG, 2022 WL 1746845 (D. Alaska May 31, 2022). In a wrongful death suit alleging that the Alaska Native Medical Center Hepatology and Liver Clinic failed to adequately diagnose and treat Plaintiffs' wife/mother, a nurse at the clinic referred to a document while answering questions in a deposition. When the plaintiffs' lawyer asked her what the document was, she said it was a letter she'd gotten from the director of the liver clinic. After reviewing the document, defense counsel agreed to provide a redacted version, arguing that the protected parts were subject to the work-product doctrine. The defense additionally claims that they didn't ask the nurse to refer to this document before or during the deposition and that they didn't even know what she was looking at until they got a copy of the document during a break in the deposition. They claim that this letter from the director of the clinic contains questions the defendant's lawyers asked the director and his answers to those questions. They claim that this letter therefore reveals the mental impressions and opinions of the defense's lawyers. While the plaintiffs don't dispute the redacted material would normally be covered by work-product privilege and they're not claiming that they have a substantial or compelling need for the redacted material, the plaintiffs assert that they are still entitled to the unredacted version of this letter because the work-product privilege was waived when the witness relied on the document during her deposition. They claim that under these circumstances, most courts have held that Rule 612 gives the examining party an absolute right to see what the witness is consulting. In response, the defense argues that it did not waive the work-product doctrine because defense counsel was unaware that the nurse would rely on this document or bring it to her deposition. The court ultimately agrees with the defense and decides not to compel disclosure of the redacted portions of the letter. The court reasons that the defense did not intentionally waive work-product protection because the nurse did not inform the defense that she'd rely on the document to give testimony. The court also explains that there is no reason to believe she relied on the redacted parts of the letter during her testimony, as the only matters her testimony referenced were unrelated to the privileged material. The court then states that the purpose of Rule 612 is to enable effective cross-examination of witnesses regarding the basis of their testimony, stating that this would not be served by compelling disclosure of the redacted parts of the letter.

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." 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.

2022 Cases

Rule 608: A Witness's Character for Truthfulness or Untruthfulness

Commonwealth v. Troha, 268 A.3d 413 (Pa. Super Ct. 2021). Troha appeals his convictions of three counts of involuntary deviate sexual intercourse with a child, indecent assault, and indecent exposure, two counts of unlawful contact with a minor and one count each of corruption of minors and endangering welfare of children. One of his female friends caught him with an erect penis and his pants around his ankles while her daughter played with dolls in front of him. On appeal, he claims that the trial court erred by not allowing testimony from the victim's paternal grandmother regarding the victim's mother's reputation for truthfulness. It appears that the admissibility determination did not go his way at trial because he phrased his request incorrectly. During a sidebar, his lawyer asked to use the witness's mother-in-law as a reputation witness for her character for truthfulness. The lawyer then brought up rule 608(a), explaining that evidence of truthful character is admissible only after a witness's character for truthfulness has been attacked, and that this evidence of truthful character can be presented in the form of reputation testimony. When the judge asked who attacked the mother's reputation for truthfulness, Troha's lawyer told the judge "I have." The judge and the prosecution both agreed that Troha's lawyer misunderstood rule 608(a) if he was arguing that he should be able to attack a witness's character for truthfulness and then bring in a character witness to talk about their reputation for truthfulness. The prosecutor explained that the prosecution would be able to bring in a character witness after the defense attacked the witness's character for truthfulness, but that the defense can't attack a prosecution witness's character, then use that attack to bring in a witness who will support that evidence regarding the witness's untruthfulness under the guise of admitting evidence of their character for truthfulness. On appeal, the superior court explains that Troha's current argument, that he wanted to present evidence of the mother's reputation for untruthfulness in the community does not conform with the request he made at trial, that her mother-in-law testify to her character for truthfulness, so his claim is not preserved for review and his convictions and sentences are affirmed.

Rule 607: Who May Impeach a Witness

People v. Quezada, 2022 IL App (2d) 200195. As part of his appeal after being convicted of attempted murder of a police officer, aggravated discharge of a firearm and unlawful possession of a firearm by a gang member and possession of a defaced firearm, Quezada argues that the trial court erred when it allowed the prosecution to play an unredacted, two-hour-long videotape of a prosecution witness's police interrogation, ostensibly to impeach that witness. The court agreed. Although the witness's testimony did contain minor inconsistencies, those inconsistencies were

not significant enough or damaging enough to the prosecution to justify impeachment of its own witness. Additionally, the videotape of the interrogation contained a litany of inadmissible evidence, such as hearsay, police narrative and opinions on Quezada's guilt, and inflammatory gang references. While the state argued that the witness was vague and inconsistent enough that he was clearly trying to cast doubt on the statements he made to the police and distance himself from the police interview, the court ruled that the witness had testified consistently on the substantive matters he was called to testify on. Before the state introduced the videos, the witness had testified on direct examination that Quezada owned the gun that was used to shoot at the police officers and that he was the shooter. He also confirmed that he was near Quezada during the second shooting and that he saw him pull the trigger. The court also explains that by showing the jury the entire interrogation, the state was able to improperly bolster the consistent parts of the witness's testimony while showing the jury statements made by nontestifying witnesses as well as the detectives' opinions that Quezada was guilty. The court held that the admission of these videos did not constitute plain error, nor did it demonstrate ineffective assistance of counsel (mainly because the videos also offered evidence that supported Quezada's argument that the police harassed the witness into telling them what they wanted to hear by repeatedly threatening him and interrupting him when he said he hadn't seen the shooter and didn't think Quezada was guilty). However, the court ultimately reversed Quezada's conviction because this evidence, along with inadmissible, prejudicial evidence regarding Quezada's gang membership, deprived Quezada of a fair trial, the court reversed Quezada's convictions and granted Quezada a new trial.

Proof of Inconsistent Statements/Rule 613 Prior Statements of Witnesses

United States v. Bergrin, No. 20-2828, 2022 WL 1024624 (3d Cir. Apr. 6, 2022). Bergrin was a high-profile criminal defense lawyer who was convicted of conspiring to kill adverse witnesses and operating a drug-trafficking ring out of his law office. In his attempt to get a new trial, he claims that he and his team of private investigators have found witnesses who will testify that he was framed. The appeals court affirms the district court's rejection of his arguments. After one of Bergrin's clients was arrested in 2003 for selling crack, he told Bergrin that his buyer, Kemo, was a police informant. The record at trial shows that Bergrin met with members of the drug trafficking organization and repeated "no Kemo, no case" and told them not to let Kemo testify. A few months later, Young, a prosecution witness at Bergrin's trial, shot and killed Kemo and Bergrin was convicted of conspiring to commit that murder. Bergrin now claims he has discovered two witnesses who will testify that Young lied on the stand to frame him as a conspirator in Kemo's murder. One witness claims that Young called him and told him he was getting out of prison early because he'd falsely confessed to shooting Kemo in order to get a more lenient sentence. Young told him that the prosecutors kept pressuring him about Bergrin until he fabricated the "no Kemo, no case" story. Another witness, an inmate of Young would have testified that Young lied during a conversation the inmate had with Young while wearing a wire, and that he'd gone around the prison saying that he was going to "pin this on [Bergrin]" to get out of prison earlier. The appeals court notes that this testimony would have been admissible to impeach Young under FRE 613b. However, the Court explains that Bergrin had already spent multiple days attempting to impeach Young on cross-examination, but the jury still accepted Young's testimony, and that the introduction of this additional impeachment evidence would not have tipped the balance regarding Young's credibility in Bergrin's favor, so the Court did not err in failing to grant Bergrin a new trial on the basis of this evidence.

Fishon v. Peloton Interactive, Inc., 19-cv-11711 (LJL) 2022 WL 179771 (Jan. 19, 2022). This issue arises out of a class action lawsuit Fishon is bringing against Peloton for misrepresentations to consumers that its library of classes was ever-growing and failing to disclose the imminent removal of over half of its on-demand library after classes that used songs that Peloton had not been given permission to use and had to be taken down after a separate copyright infringement action. Fishon claims that Peloton defrauded him and other members of a proposed class, deprived them of the benefit of their bargain and unjustly enriched itself at their expense. In opposition to Fishon's motion for class certification, Fishon highlights Fishon's conduct that casts doubt on his integrity and ability to serve as an adequate class representative. Right before he sued Peloton, Fishon pretended to be a lawyer and emailed Peloton with complaints about Peloton, including an email message sent under the signature of a "Barbara Diperio LLP ABCO Attorney" and purports to complain on behalf of her "client," Fishon, about Peloton's service. When questioned about these emails at a deposition, Fishon originally claimed that Diperio was someone who worked as an advisor at his family business. He also claimed he didn't remember who created that email address or why and that he didn't remember if he created it. When asked if Barbara Diperio LLP was an actual law firm, he testified that he didn't know for sure if it was nor not. At one point, he did finally admit that he may have tried to make Peloton believe he had a lawyer in order to get them to respond to his complaints more quickly. Based on his conduct and his answers during his deposition, the Court agrees with Peloton that Fishon's credibility issues render him an inadequate class representative. His emails complaining about how his treadmill was working would be admissible as substantive evidence of prior statements inconsistent with current claims regarding the alleged misrepresentation about the size of Peloton's music library. In his emails, he complained about needing to swap his treadmill twice and the long delivery time. The emails also threatened litigation but did not mention any concerns about the song library.

Johnson v. Pacheco, No. 20-3758-cv, 2022 WL 102072 (2d Cir. Jan. 11, 2022). Johnson lived at a facility for disabled veterans. Among other disabilities, she had a progressive neurological disorder that affected her balance and coordination, and arthritis in her left knee. The morning of the incident, the resident psychiatrist conducted a suicide assessment, determined that Johnson posed an acute risk of harm to herself and called 911. The officers responded to the call and entered the apartment. The officers claim that Johnson fell, sustaining injuries. Johnson, on the other hand, claims that the officers tackled her to the floor and injured her, and she sued them for use of excessive force. At trial, the jury ruled in favor of the defendants. Johnson claims that the district court erred in allowing the defendants to impeach her using extrinsic evidence of a prior inconsistent statement she made. In her medical record, Johnson claims that her balance was worse in 2018, and the court notes that this progression would be consistent with the general progression of her neurological disorder. In contrast, at trial, she claims that at the time of the incident in 2016, her balance and coordination were improving. The appeals court rules that the trial court did not err in admitting this evidence because Johnson's credibility on the improvement of her disorder affecting balance and coordination went directly to the factual issue of whether she was tackled by the defendants or whether she fell on her own.

Relationship of Witness or Parties to Case Outcome

State v. Houston, 511 P.3d 51 (Or. App. 2022). Houston was charged with two counts of first-degree sexual abuse of his girlfriend's six-year-old daughter. The state presented testimony from many witnesses, including a CARES interviewer who had spoken with the victim. In order to impeach the testimony of the CARES interviewer, the defense presented the testimony of an expert psychologist who argued that CARES is part of a multidisciplinary team that includes the police and the district attorney's office and that the purpose of CARES interviews is to provide evidence that can be used in criminal prosecutions for child abuse. The prosecutor objected that the CARES document that stated these things that the expert was basing his testimony on was from 2014 and was therefore outdated. The court did not find this argument convincing, instead choosing to raise and sustain its own objection that labeling CARES as an "adjunct of law enforcement" is not probative to the subject that the expert is supposed to be testifying about, which is the mechanics of the specific interview process used to interview this victim. Houston argues that the court erred in excluding his expert's testimony that CARES is deeply involved with the prosecution. He claims that because the purpose of cares is to assist in prosecuting cases, the process is biased in favor of producing evidence for the prosecution instead of fully investigating alternative hypotheses that would yield a more complete picture of the situation but would not be as convincing in court. The appeals court agrees, explaining that information about the bias or interest of CARES was relevant to the jury's evaluation of the truth of the victim's statements during the CARES interview and that the organization's bias was also relevant to the credibility of the testimony from the CARES interviewer, especially because the prosecution presented CARES as a neutral environment. The appeals court additionally rules that the error in excluding this testimony was not harmless because the CARES interview was critically important evidence for the state. The victim's statements from the interview were the strongest evidence that Houston had abused her. For this reason, the appeals court reversed Houston's conviction and remanded the case.

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.

2022 Cases

Rule 608: A witness's character for truthfulness or untruthfulness (a) reputation or opinion evidence

United States v. Zhong, 26 F.4th 536 (2d Cir. 2022). Zhong was convicted of forced-labor conspiracy, forced labor, concealing passports and immigration documents in connection with forced labor, alien smuggling conspiracy, and visa fraud conspiracy. Zhong was the head of the US operations of a Chinese construction and real estate company. He entered into agreements with the US to bring Chinese workers to the US to work on two projects at Chinese diplomatic facilities. But once these workers were in the country, they were brought to different worksites to work on projects outside of the scope of their visas. In order to work for Rilin, the workers had to pay a high security deposit. Their salary would be much higher than what they'd be able to earn in China, but for the most part, they wouldn't be paid until an undetermined date when Rilin decided that their work was complete. While they were in the US, the workers' families could withdraw 10% of the worker's salaries every two months. Zhong held their passports and visas while they were in the US. The workers also were not allowed to leave worksites or living quarters without permission or to "run away." If they violated these rules, they could be sent back to China without getting their unpaid wages or the security deposit. They'd also be forced to reimburse Rilin for the money it cost the company to send people to search for them. They also weren't permitted to interact with the local Chinese population. Wang, who'd worked at Rilin for years, testified that he overheard Zhong say that they found and punished an escaped worker, and that if other workers tried to escape, they'd beat him up to scare the other workers. Zhong says that the district court erred by preventing Zhong from impeaching Ken Wang by offering testimony regarding Wang's reputation for truthfulness. The court agrees that this constituted error. When Zhong tried to ask two witnesses about Wang's reputation for

truthfulness, the district court sustained the government's objections and didn't allow Zhong to elicit the testimony. One portion of the trial transcript says the district court excluded this evidence because it was hearsay, but as the court explains, reputation evidence is always based on hearsay, so it is not excludable based on the rule against hearsay. The government's other argument was the Zhong's witnesses didn't know Wang well enough to testify regarding his reputation for truthfulness, but one of them was directly supervised for Wang and the other one had worked at Rilin at the same time was Wang for multiple years. The government's final argument was that this evidence would be cumulative of other evidence Zhong offered to impeach Wang, but it doesn't identify any other evidence Zhong presented to show that Wang had a reputation for untruthfulness. Because this was one of many evidentiary errors the trial court made, the appeals court vacated Zhong's convictions for forced labor and remanded the case for a new trial.

State v. Anderson, 498 P.3d 843 (Or. App. 2021). Anderson appeals her convictions for her DUII, unlawful possession of meth and recklessly endangering another person. She argues that the trial court erred in granting the state's motion in limine to exclude the testimony concerning an officer's reputation for truthfulness or untruthfulness. The state concedes that it was error but claims it was harmless error. The court agrees with the state that it was harmless as to the meth possession charge, but not to the other two convictions. Anderson was driving with her child in the passenger seat when a trooper stopped her for erratic driving. The trooper gave her a field sobriety test that she failed and searched her car for drugs. He found meth and marijuana. He arrested her. The trooper then asked Officer Stone to evaluate Anderson. Stone concluded that Anderson was under the influence of an intoxicant. Before trial, the state filed a motion in limine to exclude certain character regarding Stone. The police chief for the City of Springfield said that his reputation was that some people thought Stone was truthful, and others thought he wasn't. The trial court ruled that mixed reputation evidence did not constitute reputation evidence because it was not evidence of either truthfulness or untruthfulness. The appeals court ruled that this was error because mixed reputation evidence does constitute reputation evidence. Either part of the chief's statement that some officers thought Stone was trustworthy and some thought he was untrustworthy would have been admissible by itself, so these two statements are also admissible together. The court also explains that the tests Stone performed on Anderson could've easily been manipulated, so his credibility was important to jury's consideration of her DUII charge and her charge of recklessly endangering another person. Finally, the court concluded that this reputation evidence was not cumulative of another witness's opinion evidence stating that the witness did not believe anything Officer Stone said unless it was backed up by video evidence. Opinion testimony is different from reputation testimony, and the police chief's testimony that some officers thought Stone was trustworthy and others did not, demonstrates that some people agree with the witness that Stone could not be trusted.

Impeaching with Specific Dishonest Acts: FRE 608(b)

United States v. Kurland, 20-CR-306 (S-1) (NGG), 2022 WL 2669897 (E.D.N.Y Jul. 11, 2022). Kurland, a former partner at a major law firm is charged with conspiracy to commit wire fraud, wire fraud, honest services wire fraud, conspiracy to engage in unlawful monetary transactions and unlawful monetary transactions. He turned his specialized legal practice advising winners of major lottery jackpots into a scheme that defrauded his clients of their winnings by either steering them into sham investments or stealing their money, then attempting to cover up the

thefts by laundering the proceeds. Kurland's clients lost at least $80 million. The government wants to use the testimony of two cooperating witnesses who overheard a conversation Kurland had with two unindicted co-conspirators, who are non-testifying declarants in this case. In this conversation, Kurland advocated for a finder's fee for sourcing investors to merchant cash advance businesses without telling the investors that he was taking a finder's fee. The government is seeking to preclude cross-examination of the cooperating witnesses regarding their uncharged prior bad acts. For the first cooperating witness, the government wants to exclude evidence that he visited massage parlors and paid individuals to engage in sexual conduct on multiple occasions. Because these offenses don't inherently bear on his credibility or truthfulness, and there is no evidence that he has been dishonest about this conduct, the court grants the government's motion to exclude this evidence. The second cooperating witness has two incidents of domestic violence with his wife, he engaged sex workers on multiple occasions, and another woman alleged that he sexually assaulted her multiple times. The Court will admit evidence of his contact with sex workers and domestic violence incidents because he initially lied about these things, then later admitted to them. His initial untruthfulness is probative of his lack of truthfulness and therefore admissible. The allegations of sexual assault are not admissible because the only evidence of this crime is the word of the alleged victim, and the Court does not believe that denying an unproven and uncharged allegation is probative of truthfulness.

United States v. Umoren, No. 216CR00374APGNJK, 2021 WL 5761773 (D. Nev. Dec. 3, 2021). Umoren owned and operated a tax preparation business. He allegedly created false tax returns, stole money from the refunds generated by the false returns, and impersonated an FBI agent. The government now motions in limine to introduce impeachment evidence of specific acts by Umoren to impeach him under FRE 608(b)(1) if he testifies. In a previous case, he was charged with wire fraud, aggravated identity theft and money laundering related to the sale of one of his tax preparation businesses. The Court grants the government's motion in limine because these are specific instances of fraudulent acts that the government can properly use to impeach him if he testifies.

Rule 609: Impeachment by Evidence of Conviction of a Crime

Applewhite v. FCA US LLC, No. 1711132, 2022 WL 1538396 (E.D. Mich. May 16, 2022). Applewhite was injured while working for Defendant and Defendant was found to be liable under the Michigan Workers' Disability Compensation Act. Since his injury, doctors have restricted Applewhite from using his left arm. He was working as a floater in the Quality Inspection Center about a decade after his injury. Supervisors use flex charts that indicate the tasks an employee has been trained for and assign floaters open tasks at the beginning of each shift. The supervisor assigned him to the door line, which required repetitive use of one's arms, which Applewhite could not do. He reminded the supervisor of his medical restriction and was removed from the specific assignment. The next day, another supervisor assigned him to the same job, he told them again that he had a medical restriction. He was then told that all quality inspection tasks require use of two arms and that no work was available for him. He was then placed on medical leave with sick and accident benefits. He then filed a complaint with the EEOC and filed this lawsuit. He seeks to exclude any evidence of his vacated convictions or wrongful incarceration. The court agrees, holding that not only are these convictions temporally

irrelevant, but also vacated convictions and convictions subject to a pardon, annulment or other procedure are inadmissible under FRE 609(c)

Rule 806: Attacking the Credibility of Hearsay Testimony

United States v. Portillo, 969 F.3d 144 (5th Cir. 2020). The Bandidos Outlaws Motorcycle Club is an international motorcycle club with about 1100 members worldwide. Pike was the national president of the club from 2005 until 2016. He got this role after the former president pled guilty to a Rico conspiracy. In 2002, Portillo was promoted to national sergeant at arms. He then became national vice president, which apparently required providing the president with plausible deniability. Portillo masterminded the murder of a member of a rival motorcycle club after that rival club member allegedly killed a member of the Bandidos. He also oversaw the murder of a Hell's Angels member in order to scare them away from creating a Texas chapter of the Hell's Angels. Portillo was eventually charged with various murder and racketeering counts. He was found guilty on all counts and sentenced to two life sentences. During Pike's trial, Pike moved to admit a letter Portillo had written him ten months after the two defendants were indicted. In the letter he told Pike "You had nothing to do with it. You or I cannot control what people do 24/7." The district court held that the letter was inadmissible because Portillo never made any inconsistent statements that would've implicated Pike and because Pike was trying to introduce the letter as substantive evidence, instead of impeachment evidence. However, Pike argues that these statements should have been admissible to challenge recorded phone conversations introduced at trial in which Portillo said, "I asked the guy in Houston to turn his back from what I'm gonna do" "His word is final" and "I don't make no majors without him knowing about it." Pike argues that these conversations implied that Pike was involved in the criminal conspiracies of Portillo and the other Bandidos and that Portillo's letter was inconsistent with these statements because it demonstrated Pike's lack of knowledge about the Bandidos' crimes. The appeals court rules that the district court didn't abuse its discretion when it held that Portillo's letter was not inconsistent with any of these statements. His recorded conversations suggested that Pike knew about some of the Bandidos' criminal activities, but he could've easily been ignorant about the crimes Portillo was referring to in his letter. While the district court could have found that these statements were inconsistent, they did not abuse their discretion by holding that the statements were too nebulous to be inconsistent.

Rehabilitating a Witness After a Character Attack

Linkepic Inc. v. Vyasil, LLC, No. 12C09058, 2019 WL 11717093 (N.D. Ill. 2019). Plaintiffs are attempting to bar evidence of defendant's good character or reputation. In response, Defendants argue that they should be allowed to introduce evidence of their good character because plaintiffs have put their character at issue by accusing them of fraud and deceptive conduct. The court notes that FRE 608(a) only allows character evidence to be introduced when the defendant's character for truthfulness is attacked during trial, and that simply being sued for fraud does not necessarily mean that the defendant's character has been "attacked" for purposes of triggering rule 608(a). Instead, there must be some specific challenge to their credibility as witnesses. Only at that point may they introduce evidence of their character for truthfulness, and only for the purpose of rehabilitating their credibility as witnesses. The court grants this motion in part and denies it in part, holding that defendants cannot introduce evidence of their good character in general to rebut Plaintiffs' fraud claims, but they can introduce reputation or opinion evidence if their credibility as witnesses is attacked during cross-examination. The court opines that in its

experience and in light of the strict limits on the permissible forms of character evidence, character witnesses are rarely persuasive to jurors, and are even sometimes harmful.

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)."

"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.

2022 Cases

Rule 701: Opinion Testimony by a Lay Witness
Crawford v. Davis, No. 3:18-CV-1067-DWD, 2022 WL 1081560 (S.D. Ill. Apr. 11, 2022). A prisoner was not permitted to testify that contaminated standing water in the shower of his prison caused his feet to develop fungal infections because to come to that conclusion, the witness would need scientific or medical expertise. A lay witness can only testify to the cause of a medical condition when the jury and its cause are so clearly connected in such an obvious way that common experiences and observations can explain the relationship. But a causal connection that can't be explained to a reasonable degree of certainty without scientific, technical or

specialized knowledge requires expert testimony. The mere fact that Crawford stood in contaminated water and then developed a fungal infection is at best a weak correlation that falls far short of causation, according to the court. Another prisoner may testify that a defendant hit him in the side, causing him to fall and hit his head. He may testify as to the nature and timing of his fall and the nature and timing of his symptoms, but not to the causal relationship between the two, aside from the straightforward observations that the fall caused him immediate pain. He cannot say that the fall caused him to get a concussion or that it caused him to have blood in his urine for the next two days even though he was treated for these conditions.

Wade v. State, No. PD-0157-20, 2022 WL 1021056 (Tex. Crim. App. Apr. 6, 2022). Wade was convicted of aggravated assault causing serious bodily injury when he bit off the earlobe of his ex-wife's new boyfriend. During his trial, Wade testified that, in his opinion, biting off a portion of the victim's ear didn't cause serious bodily injury to him because it did not result in "serious permanent disfigurement." He requested a jury instruction on the lesser included offense of assault by causing bodily injury. The trial court denied his request. The Texas Court of Criminal Appeals holds that Wade's testimony and other evidence at trial could have provided the jury with a valid and rational alternative to the greater offense of aggravated assault. Therefore, the jury should have been given Wade's requested instruction on the lesser included offense of assault. The court explains that "serious bodily injury" can be established without a physician's testimony when the injury and its effects are obvious. This means that lay witness testimony can also be used to refute the severity of the injury, so Wade could rely on lay opinion testimony to cast doubt on whether the victim's disfigurement was serious. Wade's opinion was also rationally based on his observations of the injury, because he admits that he was the one who inflicted it, so he would've been able to personally observe the injury as he inflicted it. Wade and the jury were also able to observe the healed injury during the victim's testimony at trial. Under these circumstances, a reasonable person could form an opinion regarding whether the injury was a "serious permanent disfigurement" given the visibility of the injury.

Opinions as "Shorthand"

State v. Norris, 833 S.E.2d 255 (N.C. 2019). Norris appeals her convictions for robbery with a dangerous weapon and second-degree kidnapping after she robbed a gas station convenience store she used to work at. She argues that the trial court erred when it allowed the police officer who arrested her to testify that he found a sweatshirt and face mask in her closet an hour after the robbery that were identical to those worn by the robber in the surveillance video. Norris claims that this testimony should not have been admitted because the officer was in no better position than the jury to draw that inference from the surveillance footage. The court rejects this argument, saying that a witness can state the instantaneous conclusions they come to regarding the appearance of things based on their observations. These statements are usually referred to as shorthand statements of fact and are admissible even though the witness must also state a conclusion or opinion in rendering them. The court also notes that this issue frequently arises when a law enforcement officer testifies that an object matches something that could be seen in a surveillance video. The court explains that an officer's lay testify is admissible if the officer is giving his interpretation of the similarities between something he saw firsthand and its appearance in a videotape. If he were seeing it for the first time while he was testifying in court, he would not be in a better position to determine if the two items match than the jury would be. However, because he was the one who saw the sweatshirt and the face mask in Norris's

apartment when he came to arrest her, he could testify that these items were identical to the items he saw in the surveillance footage. This was a shorthand statement summarizing a variety of collective observations occurring in the moment and the trial court didn't err when it permitted this testimony.

Opinions and Legal Terminology

Gonzales v. USPS, No. 17-1552, 2022 WL 2816714 (D.P.R July 19, 2022). Ahead of his age and disability discrimination trial against USPS, Gonzales seeks to exclude the testimony of his ex-wife. He cites multiple statements she made in a sworn statement before her deposition in which she revealed what she was going to testify about before the jury. She wrote that he said "I'm going to take advantage of this situation and I will not go back to work. You'll see what a lawsuit I will file against those people, they can go fuck themselves." She claims that she realized he did not have a real case in that moment. She also stated that she did not accompany Gonzales to many medical appointments because she knew his case was "a fraud." The court ruled that she would be permitted to testify about her lay perceptions of his physical injuries but she can't give her legal opinion on ultimate issues of the case, such as whether Gonzales committed fraud.

Is the Opinion "Helpful"?

United States v. Walker, 32 F.4th 377 (4th Cir. 2022). Walker received multiple robbery convictions after he robbed a Rolex store with three accomplices. The plan was for Walker to look around the store to see what would be good to take and to call his accomplices when he wanted them to come in and commit the robbery. His cover story was that he was there to look at engagement rings, but according to a store employee, he didn't seem interested in the rings even though he was asking questions. He also stood very far back from the cases. He pretended to be getting a call from his fiancée while he called the accomplices to come in and rob the store. When they came in, he made a little noise and threw his hands up. One employee testified that he seemed like he was pretending to be afraid. He did not leave the store right away, and when he did, the employees assumed he was leaving to get help, but no help arrived until after they called the police themselves. Both employees testified that they thought he was the decoy guy for the robbery. Walker claims that the district court shouldn't have admitted the testimony of the store employees who claim that he was the decoy guy and that he was trying to pretend to be afraid because these statements were improper lay opinions. He also argues that these statements were not helpful to the jury because the surveillance video was playing during the trial so the jury could judge the situation for themselves. The court disagrees, pointing out that the video was silent and taken from a high angle. Although the court agrees with Walker that the angle and the lack of sound don't undercut the value of the recordings, the employees' testimony is still helpful because they were specifically describing the robbery from their perspectives as victims. If the two witnesses were mere bystanders, their testimony would not provide any information the jury could not glean from the video. However, as victims, the two employees offer a unique viewpoint on the robbery that isn't reflected in the surveillance video, so their statements were properly admitted as lay opinions.

Is it "Lay" or "Expert" Testimony?

Dorchy v. Fifth Third Bank, No. 1:21-cv-10078, 2022 WL 385166 (E.D. Mich. (E.D. Mich. Feb. 8, 2022), *clarified on denial of reconsideration*, No. 1:21-CV-10078, 2022 WL 987177 (E.D. Mich. Mar. 31, 2022). In her employment discrimination case she is bringing after getting fired

from Fifth Third Bank after reporting that she was a victim of domestic violence, Dorchy seeks to exclude the testimony of Threat Assessor Bill Irwin. The court grants her motion to exclude, holding that his testimony would only be admissible as expert testimony, not lay witness testimony. The court also concludes that his testimony is not rooted in personal knowledge and would not be helpful to the trier of fact. Fifth Third Bank consulted with Irwin, who conducted a workplace risk assessment and wrote a report containing his observations and recommendations. Fifth Third admits to relying on his "expert assessment" to terminate Dorchy. His testimony would not be lay testimony based on a process of reasoning familiar in everyday life. Instead, it would be expert testimony based on scientific, technical or other specialized knowledge. His testimony also would not be based on personal knowledge. He did not personally interview Dorchy, her husband, her children or anyone else involved in the domestic violence incident, and he has never even visited the Fifth Third Bank where Dorchy worked. In conducting his expert analysis, he only relied on information Fifth Third Bank provided to him. Because he is being offered as a lay witness without personal knowledge, his opinion testimony regarding any ultimate issues of fact in this case must be excluded from trial and he cannot testify regarding why Dorchy was terminated from Fifth Third Bank.

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. Offil*l, 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."

Cases

FRE 702: The rule governing the admissibility of expert testimony

Who may be an expert
Doe v. Aberdeen Sch. Dist., 565 F.Supp.3d 1149 (D.S.D. 2021). This case arises out of a lawsuit brought by the parents of special needs children who allege their children were abused by a gym teacher and her education aides. This abuse included prying the fingers of one of the children off of the side of the pool and forcing him into the middle of the pool without a life preserver when he didn't want to swim. Another child was confined to the anteroom hundreds of times in a four-

month period. When this child tried to leave the room, the aides would hold the door shut. In support of their allegations of abuse, the parents of these children offer the expert testimony of a licensed independent clinical social worker who drafted five separate reports on each of the children, detailing alleged trauma, providing medical determinations, giving recommendations for continuity of treatment, and making other comments the court views as outside of the purview of a licensed social worker. The court concludes that the plaintiffs' expert witness was not qualified to testify because she has almost no background with special education students. She has only done sex ed for special ed students, which is "a far cry from assessing the harm caused to this vulnerable subset of students from purported trauma and abuse." Her social work background also does not qualify her to make medical conclusions, such as the specific cause for any alleged trauma and potential diminished life expectancy of students. While her CV indicates her forty past court appearances, she doesn't substantively explain the extent of the varying expert opinions she provided. She does not have significant experiences working with special ed students and doesn't have relevant medical or educational training that would provide the needed qualifications to assess the extent of the harm these minor plaintiffs endured from the alleged abuse. The Court concludes that while she is no doubt an expert on other issues surrounding childhood trauma, she is not qualified to provide expert testimony in this instance because she only has a minimal background working with children with special needs. These minor plaintiffs are very different from the children this expert usually works with. The court therefore excludes her testimony.

Experts: The process for determining when an expert is qualified
United States v. Veloz, 948 F.3d 418 (1st. Cir. 2020). Veloz was convicted for conspiracy to kidnap after masterminding a scheme to kidnap drug dealers and hold them for ransom. This scheme involved attaching tracking devices to the cars of drug dealers, learning their typical driving routes, and then using his crew to abduct the drug dealer and hold them for ransom. One of his victims escaped and alerted law enforcement, leading to Veloz's arrest and conviction. One expert who testified for the prosecution was an executive at U.S. Fleet Tracking, a company that created and stored GPS data. This company made the GPS devices Veloz used to track his victims. On appeal, Veloz claims that his exclusion from the voir dire of this expert – which occurred outside the presence of the jury - to determine his qualifications outside the presence of the jury violated his due process clause and confrontation clause rights. The court rejects this argument because Veloz wasn't in a position to help his lawyer in any factual dispute regarding this expert's qualifications, and he has failed to show how his presence at this voir dire would have been necessary to ensure it was a fair and just proceeding. While Veloz's lawyer did ask if Veloz was available to attend the voir dire, the district court was correct that it was not necessary to have Veloz present.

Helpfulness: A necessary condition for permitting expert testimony
Moody v. Walmart, Inc., No. 3:19-CV-537-DPJ-FKB, 2021 WL 4999010 (S.D. Miss. 2021). Moody is suing Walmart for premises liability and general negligence after an employee dropped multiple boxes of cookie dough from a pallet jack on her, causing her to fall into the open bottom of an adjacent refrigerated case while she was shopping in the refrigerated goods aisle of the store. To support her case, Moody intends to call multiple witnesses, including Bremer, an expert in forensic consulting and architecture. The court agrees with Walmart's contention that his testimony would be unhelpful to the jury because he simply chooses the facts he wants to accept

without using any scientific methodology and then tells the jury which result to reach. For example, he speculates that because the employee who was driving the pallet jack saw Moody, he steered the pallet trailing behind him out to his right in order to avoid her and the boxes fell. The court points out that speculative expert testimony like Bremer's is not permitted and that the jury is perfectly capable of drawing its own conclusions from these facts. If Moody's lawyer wants to argue the employee caused the accident, by overcorrecting to avoid hitting Moody, that is the lawyer's job, not the expert's. Bremer's testimony regarding Walmart's safety policies is also unnecessary because it doesn't take an expert to understand the policies warning employees to "look for associates and customers when moving merchandise" or to stack merchandise in a stable manner to avoid injuring customers. Because Bremer's testimony consists of either obvious underlining of facts the jury can observe and understand on their own, or legal conclusions based on inadmissible conjecture, the court will not allow him to testify.

Reliability under rule 702

Nikolova v University of Texas at Austin, No. 1-19-CV-877-RP, 2022 WL 443783 (W.D. Texas, Feb. 14, 2022). Nikolova sued UT Austin after she was denied tenure, alleging sex and pregnancy discrimination. The university motioned to exclude the testimony of Professor Nikolova's expert on the basis that his social framework testimony was not reliable. The majority of his report discusses how sex stereotypes and discrimination are especially rampant in STEM fields. The last part of his report discusses how research on stereotyping, bias and discrimination relates to the plaintiff's case. He concludes by stating the Dean's treatment of the plaintiff was consistent with bias toward pregnant women, mothers and workplace accommodation policy use. The court chose to exclude his testimony as unreliable because this expert admitted in his deposition that his specific causation opinions have not been tested, are not subjected to peer review or publication and are not accepted by the relevant scientific community. The court also notes that this expert's method of deductive reasoning using the social framework theory has been criticized by the scholars who came up with social framework theory because they caution against unscientifically speculating about the linkage of general social framework research to a specific case. They further state that if an expert wants to offer testimony about a specific case, they need to base that testimony on valid social fact research that involves the parties themselves, not subjective extrapolation based on general research involving different individuals. The court also finds this expert's report to be unreliable because it was based on selected documents given to him by Nikolova's lawyer. He did not review the deposition of the Dean or UT Austin policies regarding tenure and promotion decisions. The court concludes that because the plaintiff has the burden of proving that she was discriminated against based on her sex and her decision to take maternity leave, not to prove that sex and pregnancy discrimination exist in the world. Therefore, Professor Nikolova's expert will not provide sufficiently reliable or helpful testimony in this case.

Daubert hearings and a judge's gatekeeping function

State v. Brown, 2016-0998 (La. 1/28/22), *reh'g denied*, 2016-00998 (La. 3/25/22), 338 So. 3d 1138. Brown was sentenced to death after he was convicted of the first-degree murder of a prison guard during an escape attempt in which Brown and others took guards hostage. On appeal, Brown argues the court improperly denied a Daubert hearing before admitting bloodstain pattern analysis. He points to a National Academy of the Science report which casts doubt on the entire discipline and argues bloodstain pattern experts' opinions are more subjective than scientific. He

also claims the court failed to meaningfully assess an expert's knowledge, skill, experience, training or education. The trial court denied this motion because crime scene reconstruction and bloodstain pattern analysis has been recognized and accepted in Louisiana for many years, the defense could hire their own bloodstain analysts, and they could challenge the qualifications and methodologies of the plaintiffs' experts at trial during cross-examination. The Louisiana Supreme Court concludes that the trial court did not abuse its discretion in denying Brown's motion for a Daubert hearing on a subject as well-accepted as bloodstain pattern analysis, or in qualifying the plaintiff's bloodstain pattern expert. The court explains its reasoning by stating that Daubert gives a trial judge considerable leeway in the procedures they will use to determine the reliability of expert testimony. The defendant was not denied a fair trial when the court refused to hold a Daubert hearing to weigh the reliability of the bloodstain pattern analyst's testimony. The defendant had the opportunity to question this expert on the presence of numerous other people at the crime scene prior to his arrival and to point out that the evidence may have been cross-contaminated. There was also substantial additional evidence indicating the defendant's level of involvement in the crime, bloodstain pattern analysis is a well-accepted subject and the expert held extensive qualifications in the subject. He was the director of the Jefferson Parish Sheriff's Office Crime Laboratory and the Director of Forensic Science for Loyola University. He has testified numerous times as an expert in the fields of crime scene reconstruction and bloodstain pattern analysis, he has a master's in Forensic Science and he has taken numerous bloodstain pattern analysis courses. He is also a member of relevant professional organizations.

Rule 703: The rules governing reliable bases of expert opinion

Am. Dairy Queen Corp. v. W.B. Mason Co., No. 18-CV-693 (SRN/ECW), 2022 WL 2760024 (D. Minn. July 14, 2022). Dairy Queen is suing W.B. Mason, an office-supply company, for trademark infringement, trademark dilution, unfair competition, and deceptive trade practices. Dairy Queen holds registered trademarks for Blizzard, a type of milkshake, and it is arguing that W. B. Mason's Blizzard-branded spring water infringes on its trademark and dilutes its brand. As the Court notes, the two companies' Blizzard products have coexisted in the marketplace for the past eleven years, and the two companies are not business competitors. To prove that Blizzard is a weak trademark and thus less entitled to protection, W.B. Mason provided an expert who testified that third-party uses of "Blizzard" branding are common and there are 70 other Blizzard-branded products on the market. This includes Blizzard Wine and Blizzard-branded food and drinks sold at Disney's Blizzard Beach. Dairy Queen objects that this is hearsay because this information comes from a report conduct by the Orange Research Group, which W.B. Mason's expert was not a part of. However, the Court explains that experts can rely on hearsay to form their opinions, so W.B. Mason's expert's opinion is admissible.

Rule 704: expert opinion on the ultimate issue

Owens v. National Collegiate Athletic Association, No 11C6356, 2022 WL 2967479 (N.D. Ill. July 27, 2022). Plaintiffs are suing the NCAA, claiming that the organization negligently failed to adopt and implement proper concussion policies while the plaintiffs were college athletes and that the plaintiffs suffered numerous concussions that led to permanent brain injuries as a result. Ahead of trial, the NCAA motions to exclude the opinion testimony of various plaintiffs' experts, including Dr. Robert Cantu, a concussion expert. One opinion the NCAA objects to is Dr. Cantu's description of the consensus best practices for managing concussions at an

institutional level in amateur sports. Dr. Cantu claims that NCAA failed to adopt these policies or require its member schools to do so. He also states NCAA's response to the plaintiffs' concussions was inconsistent with consensus best practices. Finally, he assesses the current and future medical conditions of the plaintiffs and opines it is more likely than not that their conditions resulted from the NCAA's failure to adopt the consensus best practices. To begin with, the NCAA objects to Dr. Cantu's opinions because they argue he is offering a legal conclusion when he says the NCAA owed the plaintiffs a duty of care that they breached. The court agrees with the NCAA and will strike the portions of Dr. Cantu's testimony that refer to a duty of care or NCAA's breach of the duty of care they owed to the plaintiffs. He can state that the NCAA did not adhere to consensus best practices for preventing or mitigating concussions, but he cannot phrase this as a failure to exercise "ordinary and reasonable care." On the other hand, the court does not have a problem with Dr. Cantu offering his opinion that the NCAA caused the plaintiffs' injuries. The NCAA argues there's no reliable scientific connection between NCAA's alleged failure to implement the best consensus concussion treatment policies and the post-concussion syndrome of one of the plaintiffs. In response, plaintiffs point to his fifty years of medical expertise as a neurologist and his position as a leading spokesperson on concussion management. He has also reviewed Plaintiffs' medical records and performed multiple evaluations of the plaintiffs. To support his conclusions, Dr. Cantu cites numerous peer reviewed studies that suggest that concussions and/or subconcussive hits may lead to post-concussive syndrome. Based on this information and his own experience, Dr. Cantu opines that NCAA's failure to implement concussion management protocols caused the plaintiffs' injuries because it led to the players exacerbating their injuries by returning to play before they had fully recovered. Even though causation is ultimately a question for the jury to decide, the Court will allow Dr. Cantu to offer his opinion regarding NCAA's responsibility for the plaintiffs' post-concussion syndrome.

Rule 705: Disclosing the facts or data underlying an expert

Harris v. State, S22A0092, 2022 WL 2230373 (Ga. June 22, 2022). Harris was convicted of malice murder and cruelty to children after he left his 22-month-son in the car on a hot day and his son died of hyperthermia. The state's theory was that Harris intentionally abandoned his son to die a slow death so he could be free to pursue sexual relationships with various women he had been sexting. Harris's argument was that he tragically forgot he had not dropped off his son that morning and had not known his son was in the car on the day his son died. Despite the existence of sufficient evidence to support Harris's malice murder conviction, Harris was granted a new trial because the state presented substantial amounts of highly prejudicial evidence, such as Harris's tendency to hire sex workers and his sexually explicit texts to underage girls. The court concluded it was likely that this information led the jury to the emotional conclusion that Harris was a bad person capable of doing reprehensible things, and that his conviction may have been based on the jury's disgust with him instead of any evidence demonstrating he purposefully killed his son. Ahead of his retrial, the court addressed various issues that occurred at his original trial. One of these issues was the trial court's order compelling him to disclose to the State notes written by a potential expert witness Harris talked to about incidents involving children forgotten in cars. In response, he gave the state a PowerPoint presentation his expert planned to use during his testimony and a two-paragraph summary of his anticipated testimony. Based on this information, the state learned the expert had interviewed Harris and asked for documentation related to his interviews with Harris. The trial court granted this motion, concluding it was

necessary to allow the state an opportunity for meaningful cross-examination. The Georgia Supreme Court concludes this pretrial order to compel was proper under Rule 705 because this rule gives the court discretion to decide if the expert may testify about an opinion without first providing the facts or data underlying the opinion. It was reasonable for the trial court to conclude the expert based his opinion at least partially on information he got from his interview with Harris, such as whether Harris was in a hurry that day and whether his sleep patterns had been disrupted the night before he left his son in the hot car. Therefore the court did not abuse its discretion when it ordered pretrial disclosure of the expert's notes under Rule 705 because these notes were necessary for meaningful cross-examination.

Treatises and experts rule 803 exceptions to the rule against hearsay
Good v. BioLife Plasma Servs., L.P., No. 1:18-CV-11260, 2022 WL 1837071 (E.D. Mich. June 3, 2022). Good was donating plasma when she passed out after her finger was pricked to obtain a capillary sample. Despite the employee's attempts to prevent her from falling, Good swiveled out of the chair and hit her head on the floor, sustaining a concussion that she claims left her with post-concussive symptoms, hearing loss and personality changes. She sued the operator of the donation center and its parent company for negligence, stating they breached a duty of care owed to her by failing to learn her medical history, which includes a prior fainting spell at the sight of blood which prevent her from donating blood in the past. She also claims they negligently positioned her to obtain the sample because the employee who was collecting the sample was not close enough to prevent her from falling and the chair she was sitting in was high enough that it put her at greater danger of sustaining a brain injury. BioLife seeks to exclude any references to standards formulated by the Clinical Laboratory Standards Institute. This organization forms its standards through a committee of medical experts. Plaintiff's experts have testified BioLife was negligent for failing to collect Good's capillary sample consistent with relevant CLSI standards. BioLife argues these standards are irrelevant because they only apply to medical laboratories. They also argue these standards are inadmissible hearsay because Good is attempting to introduce them for their truth. The Court rejects these arguments, explaining that even if the standards were designed for medical laboratories, they are still relevant to the issue of breach. The CLSI standards also fall within the learned treatise exception to the rule against hearsay. One of the plaintiff's experts is expected to references these standards and discuss their weight at trial. The authors of these standards were unbiased and aware that this material would be read and evaluated by others in their field. For these reasons, the learned-treatise exception to hearsay applies.

Diaz v. United States

144 S. Ct. 1727 (2024)

JUSTICE THOMAS delivered the opinion of the Court.

Federal Rule of Evidence 704(b) prohibits expert witnesses from stating opinions "about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." In this drug-trafficking prosecution, petitioner argued that she lacked the mental state required to convict because she was unaware that drugs were

concealed in her car when she drove it across the United States-Mexico border. At trial, the Government's expert witness opined that most drug couriers know that they are transporting drugs. Because the expert witness did not state an opinion about whether petitioner herself had a particular mental state, we conclude that the testimony did not violate Rule 704(b). We therefore affirm.

I

In August 2020, Delilah Diaz, a United States citizen, attempted to enter the United States from Mexico. When Diaz drove into the port of entry, a border patrol officer asked her to roll down the car's rear driver-side window. The officer left his inspection booth and tried to roll down the window himself. The officer "felt some resistance" and then heard "a crunch-like sound in the door." App. 25. Aware from experience that car doors are a common hiding spot for contraband, the officer investigated further with a "buster," a handheld tool that measures an object's density. After the buster detected an abnormal density in the doors, officers brought in a narcotics detection canine and sent the car through an X-ray machine. They discovered 56 packages of methamphetamine tucked inside the car's door panels and underneath the carpet in the trunk. The methamphetamine weighed just over 54 pounds and had an estimated retail value of $368,550.

Diaz was arrested and, after waiving her *Miranda* rights, agreed to an interview. See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Diaz claimed that she had no idea drugs were hidden in the car.…. Diaz explained that she was driving her boyfriend's car. Contradictorily, she also told officers that she had seen her boyfriend only "two, three times tops," did not know his phone number, and did not know where he lived…. Diaz's story grew even more dubious when officers questioned her about two cellphones discovered inside the car. She acknowledged that she owned one of the phones. But, she maintained the other phone had been "given to [her]" by a friend—whom she would "rather not" identify…. And, she insisted that the phone was "locked" and that she did not "have access to it."….

Diaz was charged with importing methamphetamine in violation of 21 U. S. C. §§952 and 960. The charges required the Government to prove that Diaz "knowingly" transported drugs. In response, Diaz asserted what is known colloquially as a "blind mule" defense: she argued that she did not know that there were drugs in the car. Before trial, the Government gave notice that it would call Homeland Security Investigations Special Agent Andrew Flood as an expert witness. Agent Flood would testify about the common practices of Mexican drug-trafficking organizations. Specifically, he planned to explain that drug traffickers "generally do not entrust large quantities of drugs to people who are unaware they are transporting them."….

Diaz objected to Agent Flood's proffered testimony under Federal Rule of Evidence 704(b). Diaz argued that if Agent Flood testified that drug traffickers *never* use unknowing couriers, that would be functionally equivalent to an opinion about whether Diaz knowingly transported drugs. The District Court granted Diaz's motion in part and denied it in part. The court agreed with Diaz that Agent Flood could not testify in absolute terms about whether all couriers knowingly transport drugs. But, insofar as Agent Flood planned to testify only that most couriers know they are transporting drugs, the court concluded that his testimony was admissible. At trial, Agent Flood testified that "in most circumstances, the driver knows they are hired . . . to take the drugs from point A to point B." App. to Pet. for Cert. 15a. To use an unknowing courier, Agent Flood

explained, would expose the drug-trafficking organization to substantial risk. The organization could not guarantee where, if at all, the drugs would arrive.

Agent Flood acknowledged on cross-examination that drug-trafficking organizations sometimes use unknowing couriers. The jury found Diaz guilty, and the District Court sentenced her to 84 months' imprisonment. On appeal, Diaz again challenged Agent Flood's testimony under Rule 704(b). The Court of Appeals held that Rule 704(b) prohibits only "an 'explicit opinion' on the defendant's state of mind." 2023 WL 314309, *2 (CA9, Jan. 19, 2023). Because Agent Flood did not opine about whether Diaz knowingly transported methamphetamine, the court concluded that the testimony did not violate Rule 704(b). *Ibid.* We granted certiorari, 601 U. S. — (2023), and now affirm.

Federal Rule of Evidence 704 addresses "Opinion[s] on an Ultimate Issue." Rule 704(a) sets out a general rule that "[a]n opinion is not objectionable just because it embraces an ultimate issue." Rule 704(b) adds one caveat: "EXCEPTION: In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Rule 704 departed from the once-prevailing common-law practice. Prior to Rule 704, many States applied what was known as the "ultimate issue" rule. That rule categorically barred witnesses from "stat[ing] their conclusions on" any "ultimate issue"—*i.e.*, issues that the jury must resolve to decide the case. *United States* v. *Spaulding*, 293 U. S. 498,….

For example, in a medical malpractice suit, an ultimate issue may be "whether [the] plaintiff 's condition resulted solely from malpractice." *De Groot* v. *Winter*, 261 Mich. 660, 671, 247 N. W. 69 (1933). In a murder case, by way of comparison, an ultimate issue may be who fired the gun that killed the victim. See *State* v. *Carr*, 196 N. C. 129, 131–132, 144 S. E. 698, 700 (1928). Under the common-law rule, a witness could not provide his answer to those ultimate issues. Witnesses remained free, however, to offer related testimony, even testimony that directly helped the jury resolve an ultimate issue…. The logic underpinning the ultimate-issue rule was that it prevented witnesses from taking over the jury's role…. If a witness gave an opinion "covering the very question which was to be settled by the jury," some feared that the jury would be left with "no other duty but that of recording the finding of [the] witnes[s]." *Chicago & Alton R. Co.* v. *Springfield & N. W. R. Co.*, 67 Ill. 142, 145(1873).

….

Rule 704 made clear that the ultimate-issue rule did not apply in federal courts. When Rule 704 was originally adopted in 1975, it had no exceptions: All ultimate-issue opinions were permitted. 88 Stat. 1937. About nine years later, in the wake of the John Hinckley, Jr., trial, Congress created the exception now found in Rule 704(b).

….

As Rule 704(b) now reads, "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." By its terms, Rule 704(b)'s exception covers a narrow set of opinions. The exception does not apply in civil cases or affect lay witness testimony.

And, it exclusively addresses mental states and conditions that are "element[s] of the crime charged or of a defense." Rule 704(b) thus proscribes only expert opinions in a criminal case that are about a particular person ("the defendant") and a particular ultimate issue (whether the defendant has "a mental state or condition" that is "an element of the crime charged or of a defense").

III

Rule 704(b) applies only to opinions about the defendant. Because Agent Flood did not express an opinion about whether Diaz herself knowingly transported methamphetamine, his testimony did not violate Rule 704(b). Agent Flood instead testified about the knowledge of *most* drug couriers. Specifically, he explained that "in most circumstances, the driver knows they are hired . . . to take the drugs from point A to point B." App. to Pet. for Cert. 15a. That opinion does not necessarily describe Diaz's mental state. After all, Diaz may or may not be like most drug couriers. Diaz herself made this point at trial. She argued that another person, an alleged boyfriend, had deceived her into carrying the drugs. During opening statements, Diaz's counsel explained that Diaz met her boyfriend while she was "broken-hearted over the death of her mother" and recovering from "a debilitating back injury."… Diaz's boyfriend "took advantage" of those circumstances to lure Diaz to Mexico.

….

The jury was thus well aware that unknowing couriers exist and that there was evidence to suggest Diaz could be one of them. It simply concluded that the evidence as a whole pointed to a different conclusion: that Diaz knowingly transported the drugs. The jury alone drew that conclusion. While Agent Flood provided evidence to support one theory, his testimony was just that—evidence for the jury to consider or reject when deciding whether Diaz in fact knew about the drugs in her car. Because Agent Flood did not give an opinion "about whether" Diaz herself "did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense," his testimony did not violate Rule 704(b). Diaz's counterarguments, echoed by the dissent, are not persuasive. Diaz and the dissent argue that Agent Flood "functional[ly]" stated an opinion about whether Diaz knowingly transported drugs when he opined that couriers generally transport drugs knowingly…. That argument mistakenly conflates an opinion about *most* couriers with one about *all* couriers.

….

Here… Agent Flood asserted that Diaz was part of a group of persons that *may or may not* have a particular mental state. Of all drug couriers—a group that includes Diaz—he opined that the majority knowingly transport drugs. The jury was then left to decide: Is Diaz like the majority of couriers? Or, is Diaz one of the less-numerous-but-still-existent couriers who unwittingly transport drugs? The ultimate issue of Diaz's mental state was left to the jury's judgment. As a result, Agent Flood's testimony did not violate Rule 704(b). Diaz and the dissent next zero in on the word "about" in Rule 704(b). They rely on dictionary definitions of "about" to argue that Rule 704(b)'s prohibition includes all testimony that "'concerns' or is 'in reference to' whether the defendant possessed a particular state of mind."

….

A crucial part of that context is the other words in the sentence. See *FCC* v. *AT&T Inc.*, 562 U. S. 397, 405 (2011). The words surrounding "about" make clear that Rule 704(b) addresses a far narrower category of testimony than Diaz and the dissent posit. To begin, the Rule targets "opinion[s]." In other words, the testimony must be more than a general reference, and it must reach a particular conclusion. See Black's Law Dictionary 1244 (rev. 4th ed. 1968) (defining opinion evidence as "what the witness thinks, believes, or infers in regard to facts in dispute"). Moreover, the Rule does not preclude testimony "about" mental-state ultimate issues in the abstract. Instead, it targets conclusions "about whether" a certain fact is true: "[T]he defendant did or did not have a mental state or condition." The language as a whole thus conveys that Rule 704(b) is limited to conclusions as to the defendant's mental state.

….

The reading offered by Diaz and the dissent would have the exception swallow the rule. If Rule 704(b) were as broad as they suggest, it would be a standalone prohibition broader than Rule 704(a)—or even the original ultimate-issue rule. Even though the ultimate-issue rule and Rule 704(a) address opinions that include the ultimate issue itself, Rule 704(b) would prohibit all opinions even related to the ultimate issue of a defendant's mental state. Rule 704's text does not support such an expansion. The Rule as a whole makes clear that an opinion is "about" the ultimate issue of the defendant's mental state only if it includes a conclusion on that precise topic, not merely if it concerns or refers to that topic.

IV

An expert's conclusion that "most people" in a group have a particular mental state is not an opinion about "the defendant" and thus does not violate Rule 704(b). Accordingly, the judgment of the Court of Appeals is affirmed. *It is so ordered*.

JACKSON, J. Concuring

….

I write separately to emphasize that, as Congress designed it, Rule 704(b) is party agnostic. Neither the Government nor the defense can call an expert to offer her opinion about whether the defendant had or did not have a particular mental state at the time of the offense. See *ante,* at 7. But a corollary is also true. Both the Government and the defense are permitted, consistent with Rule 704(b), to elicit expert testimony "on the likelihood" that the defendant had a particular mental state, "based on the defendant's membership in a particular group." Brief for John Monahan et al. as *Amici Curiae* 1 (Evidence Professors Brief). Indeed, the type of mental-state evidence that Rule 704(b) permits can prove essential not only for prosecutors, but for defendants as well. This very case illustrates the significance of mental-state evidence to both parties in a criminal trial. The Government expert opined (based on his almost 30 years of experience as a special agent) that, "in most circumstances," drug couriers know that they are transporting drugs. App. To Pet. for Cert. 10a, 15a. Diaz challenged this testimony, and, today, the Court holds that the Government did not violate Rule 704(b). See *ante,* at 7. Notably, however, the Government

was not the only party that relied on this type of mental-state evidence during the trial. Diaz called an automobile specialist who testified that a driver of her particular car would almost certainly *not* know that it contained drugs.

….

All that said, I fully acknowledge that there are serious and well-known risks of overreliance on expert testimony—risks that are especially acute in criminal trials. See NAFD Brief 21–22, 24–25; see also *United States* v. *Alvarez*, 837 F. 2d 1024, 1030 (CA11 1988) ("When the expert is a government law enforcement agent testifying on behalf of the prosecution about participation in prior and similar cases, the possibility that the jury will give undue weight to the expert's testimony is greatly increased"). But there are also safeguards outside of Rule 704(b) to prevent the misuse of expert testimony. Nothing in the Court's opinion today should be read to displace those important checks and limitations.

….

District court judges also have a role to play. They should be protective of Congress's intent to preserve the jury's core duty, by providing specific admonitions and instructions when expert testimony about a relevant mental state is introduced. See Evidence Professors Brief 27–29; see also *United States* v. *Smart*, 98 F. 3d 1379, 1388–1389 (CADC 1996) (requiring that district courts sometimes use jury instructions to prevent expert testimony from violating Rule 704(b)). With this understanding of both the important uses and the potential misuses of Rule 704(b), I join the Court's opinion.

GORSUCH, J. Dissenting

Federal Rule of Evidence 704(b) prohibits an expert witness from offering an opinion "about whether the defendant did or did not have [the] mental state" needed to convict her of a crime. "Those matters," the Rule instructs, "are for the trier of fact alone." Following the government's lead, the Court today carves a new path around that command. There's no Rule 704(b) problem, the Court holds, as long as the government's expert limits himself to testifying that *most* people like the defendant have the mental state required to secure a conviction. The upshot? The government comes away with a powerful new tool in its pocket. Prosecutors can now put an expert on the stand—someone who apparently has the convenient ability to read minds—and let him hold forth on what "most" people like the defendant think when they commit a legally proscribed act. Then, the government need do no more than urge the jury to find that the defendant is like "most" people and convict. What authority exists for allowing that kind of charade in federal criminal trials is anybody's guess, but certainly it cannot be found in Rule 704.

…..

At trial, deciding whether a criminal defendant acted with a culpable mental state is a job for the jury.

….

Reflecting the centrality of *mens rea* to criminal punishment and the jury's role in finding it, Rule 704(b) of the Federal Rules of Evidence provides that, "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." As the Rule continues: "Those matters are for the trier of fact alone."

….

For a long stretch, many courts barred experts from offering opinions on so-called ultimate issues like *mens rea*…. The Federal Rules of Evidence are no longer so strict, see Fed. Rule Evid. 704(a), except in one respect: *mens rea*. On that particular issue, Congress has concluded that jurors need no help from experts. They are fully capable of drawing reasonable inferences from the facts and deciding whether the defendant acted with the requisite *mens rea.* And in criminal trials that is their job alone. The government violated that Rule in this case. Proceedings began when prosecutors charged Ms. Diaz with importing a controlled substance into this country. See 21 U. S. C.§§952, 960(a)(1). At the trial that followed, Ms. Diaz did not dispute that she had transported drugs across the border. The only question concerned her *mens rea*. If, as the government charged, she transported the drugs "knowingly," she faced a potential sentence of up to life in prison. See §§960(a)(1), (b)(1)(H). If, however, Ms. Diaz acted with some lesser *mens rea* (say, negligence), or perhaps innocently (as what some call a "blind mule"), she was entitled to an acquittal. To help prove that Ms. Diaz "knowingly" imported drugs, the government called to the stand Andrew Flood, one of its own employees, an agent with the Department of Homeland Security. Ms. Diaz had made no admissions to him about her mental state, nor had Agent Flood even interviewed her. Instead, prosecutors called Agent Flood as an expert on the minds of drug couriers (yes, really)

….

And in response to the government's questions, Agent Flood testified that, "in most circumstances, the driver knows they are hired . . . to take the drugs from point A to point B." App. to Pet. for Cert. 15a. That was a violation of Rule 704(b), plain as day. Just walk through its terms. The government called Agent Flood as an "expert witness" to address the question "whether the defendant did or did not have . . . a mental state . . . that constitutes an element of the crime charged." After all, whether Ms. Diaz acted "knowingly" was the only question at trial, all that separated her from a conviction. And Agent Flood proceeded to do just as he was asked, offering an "opinion about" that very question. To be sure, prosecutors thought they had a clever way around the problem. They did not ask Agent Flood to testify explicitly about Ms. Diaz's mental state. Instead, they asked the agent to testify about the mental state of people exactly like Ms. Diaz, drivers bringing drugs into the country.

…..

The Rule does not only prohibit an expert from stating a *definitive* opinion about the defendant's mental state (or, as the government concedes, the mental state of a class that includes her). It prohibits an expert from offering *any* opinion on the subject. Return, once more, to the Rule's terms. It bars an expert from stating an opinion "*about* whether the defendant" had "a mental state . . . that constitutes an element of the crime charged." (Emphasis added.) The word

"about" means "[c]oncerning, regarding, with regard to, in reference to; in the matter of." Oxford English Dictionary (3d ed., June 2024); see Brief for Petitioner 18; see also American Heritage Dictionary 5 (def. 4a) (5th ed. 2011). So whether an expert's opinion happens to be definitive or probabilistic makes no difference. An expert may not state any opinion concerning, regarding, or in reference to whether the defendant, while committing a charged criminal act, had the requisite mental state to convict. Period. Lest any doubt remain, the Rule takes pains to emphasize, "[t]hose matters are for the trier of fact alone."

….

Observe, as well, where today's tiptoeing around the Rule promises to lead.

….

In this case, Agent Flood said "most" people in the defendant's shoes have the requisite *mens rea*. But what if he said, as the government initially proffered, that drivers "generally" know? ECF Doc. 30, at 7. Or that they "almost always" know? Or perhaps an expert puts a finer point on it: "In my experience, 99% of drug couriers know." When cases like those come to us, likely one of two things will happen. We will draw some as-yet unknown line and say an expert's probabilistic testimony went too far. Or we will hold anything goes and eviscerate Rule 704(b) in the process. Rather than face either of those prospects, how much easier it would be to follow where the Rule's text leads.

…..

None of this serves our criminal justice system well. A criminal conviction is "the gravest" condemnation we as a society "permit ourselves to make." Wechsler 528. Allowing into our proceedings speculative guesswork about a defendant's state of mind diminishes the seriousness due them. It risks the reliability of the outcomes they produce…. undermines our historic commitment that *mens rea* is a necessary component of every serious crime by turning the inquiry into a defendant's mental state from an exacting one guided by hard facts and reasonable inferences into a competing game of "I say so." It diminishes our respect for the presumptively free person, his free will and individuality, by encouraging the lazy assumption that he thinks like "most." And it reduces the vital role juries are meant to play in criminal trials. Yes, they can still decide whether the defendant thinks like "*most*" people. *Ante*, at 9. But that role hardly matches Rule 704(b)'s promise that "matters" of *mens rea* at trial belong to the jury "alone."

….

Persuaded that today's decision is mistaken, but hopeful that it will ultimately prove immaterial in practice, I respectfully dissent.

Smith v. Arizona
144 S. Ct. 1785 (U.S. 2024)

JUSTICE KAGAN delivered the opinion of the Court.

….

The question presented here concerns …a case in which an expert witness restates an absent lab analyst's factual assertions to support his own opinion testimony. This Court has held that the Confrontation Clause's requirements apply only when the prosecution uses out-of-court statements for "the truth of the matter asserted." *Crawford*, 541 U. S., at 60, n. 9. Some state courts, including the court below, have held that this condition is not met when an expert recites another analyst's statements as the basis for his opinion. Today, we reject that view. When an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth. As this dispute illustrates, that will generally be the case when an expert relays an absent lab analyst's statements as part of offering his opinion. And if those statements are testimonial too—an issue we briefly address but do not resolve as to this case—the Confrontation Clause will bar their admission.

I

A

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In operation, the Clause protects a defendant's right of cross-examination by limiting the prosecution's ability to introduce statements made by people not in the courtroom. For a time, this Court held that the Clause's "preference for face-to-face" confrontation could give way if a court found that an out-of-court statement bore "adequate indicia of reliability." *Ohio* v. *Roberts*, 448 U. S. 56, 65–66 (1980). But two decades ago, the Court changed course, to better reflect original understandings. In *Crawford* v. *Washington*, the Court deemed it "fundamentally at odds with the right of confrontation" to admit statements based on judicial determinations of reliability. 541 U. S., at 61.

….

The Clause's prohibition "applies only to testimonial hearsay"—and in that two-word phrase are two limits. *Davis* v. *Washington*, 547 U. S. 813, 823 (2006). First, in speaking about "witnesses"—or "those who bear testimony"—the Clause confines itself to "testimonial statements," a category whose contours we have variously described.'

….

Second and more relevant here, the Clause bars only the introduction of hearsay—

meaning, out-of-court statements offered "to prove the truth of the matter asserted." *Anderson* v. *United States*, 417 U. S. 211, 219 (1974). When a statement is admitted for a reason unrelated to its truth, we have held, the Clause's "role in protecting the right of cross-examination" is not implicated. *Tennessee* v. *Street*, 471 U. S. 409, 414 (1985); see *Anderson*, 417 U. S., at 220. That is because the need to test an absent witness ebbs when her truthfulness is not at issue. See *ibid.*; *Street*, 471 U. S., at 414; *infra*, at 13–14, 17. Not long after *Crawford*, the Court made clear that the Confrontation Clause applies to forensic reports. In *Melendez-Diaz* v. *Massachusetts*, state prosecutors introduced "certificates of analysis" (essentially, affidavits) stating that lab tests had identified a substance seized from the defendant as cocaine. 557 U. S., at 308. But the State did not call as witnesses the analysts who had conducted the tests and signed the certificates. We held that a "straightforward application" of *Crawford* showed a constitutional violation. 557 U. S., at 312.

….

We again underscored that the Confrontation Clause commanded not reliability but one way of testing it—through cross-examination. See *ibid.* And we thought that method might have plenty to do in cases involving forensic analysis. After all, lab tests are "not uniquely immune from the risk of manipulation" or mistake. *Id.*, at 318.

….

Two years later, the Court relied on *Melendez-Diaz* to hold that a State could not introduce one lab analyst's written findings through the testimony of another.' [*Melendez-Diaz* v. *Massachusetts,* 557 U. S. 305].

…..

Like *Melendez-Diaz*, this case involves drugs. In December 2019, Arizona law enforcement officers executed a search warrant on a property in the foothills of Yuma County. Inside a shed on the property, they found petitioner Jason Smith. They also found a large quantity of what appeared to be drugs and drug-related items. As a result, Smith was charged with possessing dangerous drugs (methamphetamine) for sale; possessing marijuana for sale; possessing narcotic drugs (cannabis) for sale; and possessing drug paraphernalia. He pleaded not guilty, and the case was set for trial. In preparation, the State sent items seized from the shed to a crime lab run by the Arizona Department of Public Safety (DPS) for a "full scientific analysis."… The State's request identified Smith as the individual "associated" with the substances, listed the charges against him, and noted that "[t]rial ha[d] been set."… Analyst Elizabeth Rast communicated with prosecutors about exactly which items needed to be examined, and then ran the requested tests…. Rast prepared a set of typed notes and a signed report, both on DPS letterhead, about the testing. The notes documented her lab work and results.

….

After listing the eight items, the report stated that four "[c]ontained a usable quantity of methamphetamine," three "[c]ontained a usable quantity of marijuana," and one "[c]ontained a usable quantity of cannabis."… The State originally planned for Rast to testify about those

matters at Smith's trial. But with three weeks to go, the State called an audible, replacing Rast with a different DPS analyst as its expert witness. In the time between testing and trial, Rast had stopped working at the lab, for unexplained reasons. And the State chose not to rely on the now-former employee as a witness. So the prosecutors filed an amendment to their "final pre trial conference statement" striking out the name Elizabeth Rast and adding "Greggory Longoni, forensic scientist (substitute expert)."… Longoni had no prior connection to the Smith case, and the State did not claim otherwise. Its amendment simply stated that "Mr. Longoni will provide an independent opinion on the drug testing performed by Elizabeth Rast." *Ibid.* And it continued: "Ms. Rast will not be called. [Mr. Longoni] is expected to have the same conclusion."

…..

And when Longoni took the stand, he referred to those materials and related what was in them, item by item by item.

….

After thus telling the jury what Rast's records conveyed about her testing of the items, Longoni offered an "independent opinion" of their identity.

….

After Smith was convicted, he brought an appeal focusing on Longoni's testimony. In Smith's view, the State's use of a "substitute expert"—who had not participated in any of the relevant testing—violated his Confrontation Clause rights…. The real witness against him, Smith urged, was Rast, through her written statements; but he had not had the opportunity to cross examine her…. The State disagreed. In its view, Longoni testified about "his own independent opinions," even though making use of Rast's records.

….

The Arizona Court of Appeals affirmed Smith's convictions, rejecting his Confrontation Clause challenge. It relied on Arizona precedent (similar to the Illinois Supreme Court's decision in *Williams*) stating that an expert may testify to "the substance of a non-testifying expert's analysis, if such evidence forms the basis of the [testifying] expert's opinion." App. to Pet. for Cert. 11a–12a (quoting *State ex rel. Montgomery* v. *Karp*, 236 Ariz. 120, 124, 336 P. 3d 753, 757 (App. 2014)). That is because, the Arizona courts have said, the "underlying facts" are then "used only to show the basis of [the in-court witness's] opinion and not to prove their truth." *Ibid.*, 336 P.3d, at 757. On that view, the Court of Appeals held, Longoni could constitutionally "present[] his independent expert opinions" as "based on his review of Rast's work." App. to Pet. for Cert. 11a. We granted certiorari to consider that reasoning, 600 U. S. _____(2023), and we now reject it.

Smith's confrontation claim can succeed only if Rast's statements came into evidence for their truth. As earlier explained, the Clause applies solely to "testimonial *hearsay*." *Davis*, 547 U. S., at 823 (emphasis added)

….

If Rast's statements came in to establish the truth of what she said, then the Clause's alarms begin to ring; but if her statements came in for another purpose, then those alarms fall quiet. Where the parties disagree, of course, is in answering that purpose question. Smith argues that the "for the truth" condition is satisfied here, just as much as in *Melendez-Diaz* or *Bullcoming*…. In his view, Rast's statements were conveyed, via Longoni's testimony, to establish that what she said happened in the lab did in fact happen.

….

The State sees the matter differently…. the State argues that Rast's statements came into evidence not for their truth, but instead to "show the basis" of the in-court expert's independent opinion.

….

Evidentiary rules, though, do not control the inquiry into whether a statement is admitted for its truth. That inquiry, as just described, marks the scope of a federal constitutional right. See *supra*, at 11. And federal constitutional rights are not typically defined—expanded or contracted— by reference to non-constitutional bodies of law like evidence rules… The confrontation right is no different, as *Crawford* made clear. "Where testimonial statements are involved," that Court explained, "the Framers [did not mean] to leave the Sixth Amendment's protection to the vagaries of the rules of evidence."

….

But truth is everything when it comes to the kind of basis testimony presented here. If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts. How could it be otherwise? "The whole point" of the prosecutor's eliciting such a statement is "to establish—*because of the [statement's] truth*—a basis for the jury to credit the testifying expert's" opinion. *Stuart*, 586 U. S., at _____(GORSUCH, J., dissenting from denial of certiorari) (slip op., at 3) (emphasis in original). Or said a bit differently, the truth of the basis testimony is what makes it useful to the prosecutor; that is what supplies the predicate for— and thus gives value to—the state expert's opinion. So "[t]here is no meaningful distinction between disclosing an out-of-court statement" to "explain the basis of an expert's opinion" and "disclosing that statement for its truth." *Williams*, 567 U. S., at 106 (THOMAS, J., concurring in judgment). A State may use only the former label, but in all respects the two purposes merge.

….

Longoni could opine that the tested substances were marijuana, methamphetamine, and cannabis only because he accepted the truth of what Rast had reported about her work in the lab—that she had performed certain tests according to certain protocols and gotten certain results. And likewise, the jury could credit Longoni's opinions identifying the substances

only because it too accepted the truth of what Rast reported about her lab work (as conveyed by Longoni). If Rast had lied about all those matters, Longoni's expert opinion would have counted for nothing, and the jury would have been in no position to convict. So the State's basis evidence—more precisely, the truth of the statements on which its expert relied—propped up its whole case. But the maker of those statements was not in the courtroom, and Smith could not ask her any questions.

….

Here, the State used Longoni to relay what Rast wrote down about how she identified the seized substances. Longoni thus effectively became Rast's mouthpiece.

….

What remains is whether the out-of-court statements Longoni conveyed were testimonial…To implicate the Confrontation Clause, a statement must be hearsay ("for the truth") and it must be testimonial—and those two issues are separate from each other. See *supra*, at 3. The latter, this Court has stated, focuses on the "primary purpose" of the statement, and in particular on how it relates to a future criminal proceeding. See *ibid.* (noting varied formulations of the standard)… A court must there- fore identify the out-of-court statement introduced, and must determine, given all the "relevant circumstances," the principal reason it was made. *Bryant*, 562 U. S., at 369. But that issue is not now fit for our resolution. The question presented in Smith's petition for certiorari did not ask whether Rast's out-of-court statements were testimonial.

….

But we offer a few thoughts, based on the arguments made here, about the questions the state court might usefully address if the testimonial issue remains live. First, the court will need to consider exactly which of Rast's statements are at issue. In this Court, the parties disputed whether Longoni was reciting from Rast's notes alone, or from both her notes and final report… In Arizona's view, everything Longoni testified to came from Rast's notes; although he at times used the word "report," a close comparison of the documents and his testimony reveals (the State says) that he meant only the notes.

….

Our holding today follows from all this Court has held about the Confrontation Clause's application to forensic evidence. A State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. See *Crawford*, 541 U. S., at 68; *Melendez-Diaz*, 557 U. S., at 311. Neither may the State introduce those statements through a surrogate analyst who did not participate in their creation. See *Bullcoming*, 564 U. S., at 663. And nothing changes if the surrogate—as in this case—presents the out-of-court statements as the basis for his expert opinion. Those statements, as we have explained, come into evidence for their truth because only if true can they provide a reason to credit the substitute expert. So a defendant has the right to cross-examine the person who made them. That means Arizona does not escape the Confrontation

Clause just because Rast's records came in to explain the basis of Longoni's opinion. The Arizona Court of Appeals thought otherwise, and so we vacate its judgment. To address the additional issue of whether Rast's records were testimonial (including whether that issue was forfeited), we remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

THOMAS, J., concurring

…

[A] question remains whether that analyst's statements were testimonial. I agree with the Court that, because the courts below did not consider this question, we should remand for the Arizona Court of Appeals to answer it in the first instance. *Ante*, at 19–20. But, I disagree with the Court's suggestion that the Arizona Court of Appeals should answer that question by looking to each statement's "primary purpose."… Rather than attempt to divine a statement's "primary purpose," I would look for whether the statement is "similar in solemnity to the Marian examination practices that the Confrontation Clause was designed to prevent." *Williams*, 567 U. S., at 112 (opinion of THOMAS, J.). In my view, the Arizona Court of Appeals should consider on remand whether the statements at issue have the requisite formality and solemnity to qualify as testimonial. If they do not, the Confrontation Clause poses no barrier to their admission.

GORSUCH, J. Concurring

….

I cannot join, however, the Court's discussion in Part III about when an absent analyst's statement might qualify as "testimonial." See *ante*, at 19–21. As the Court says, "that issue is not now fit for our resolution." *Ante*, at 19. It was not part of the question presented for our review, nor was it the focus of the decision below. *Ante*, at 19–20. In fact, the State devoted so little attention to the "testimonial" issue in the Arizona courts that any argument it might make on the subject on remand may be forfeited. *Ante*, at 20. Further, the Court's thoughts on the subject are in no way necessary to the resolution of today's dispute. What makes a statement testimonial, the Court notes, is an entirely "separate" issue. *Ante*, at 19.

….

I am concerned, as well, about the confusion a "primary purpose" test may engender. Does it focus, for example, on the purposes an objective observer would assign to a challenged statement, see *ante*, at 3 (referencing the "'objective witness'"), the declarant's purposes in making it, see *ante*, at 21 (asking "why Rast created the report or notes"), the government's purposes in "'procur[ing]'" it, see *ante*, at 3, or maybe still some other point of reference? Even after we figure out a statement's purposes, how do we pick the primary one out of the several a statement might serve? Or determine in exactly what way that purpose must "relat[e] to a future criminal proceeding"? *Ante*, at 19. And if we fail to find some foothold in text and historical practice for resolving these questions, how can judges answer them without resort to their own notions of what would be best?

ALITO, J., Concurring

Today, the Court inflicts a needless, unwarranted, and crippling wound on modern evidence law. There was a time when expert witnesses were required to express their opinions as responses to hypothetical questions. But eventually, this highly artificial, awkward, confusing, and abuse- laden form of testimony earned virtually unanimous condemnation. More than a century ago, judges, evidence scholars, and legal reform associations began to recommend that courts abandon the required use of hypotheticals, and more than 50 years ago, the Federal Rules of Evidence did so. Now, however, the Court proclaims that a prosecution expert will frequently violate the Confrontation Clause when he testifies in strict compliance with the Federal Rules of Evidence and similar modern state rules. Instead, the Court suggests that such experts revert to the form that was buried a half-century ago. *Ante,* at 18. There is no good reason for this radical change.

….

Rule 703 provides that an expert's opinion may be based on "facts or data in the case that the expert has been made aware of or personally observed." And "[u]nless the court orders otherwise," Rule 705 permits the expert to "state an opinion—and give the reasons for it—without first testifying to the underlying facts or data." These facts or data need not be "admissible" in evidence, and they are not admitted for the truth of what they assert. Fed. Rule Evid. 703... Today's decision vacates the Arizona court's judgment because the testifying expert's testimony was hearsay. I agree with that bottom line, but not because of the majority's novel theory that basis testimony is always hearsay. Rather, I would vacate and remand because the expert's testimony is hearsay under any mainstream conception, including that of the Federal Rules of Evidence. To understand why, begin with the facts.

….

Under Rules 703 and 705, Longoni could have offered his expert opinion that, based on the information in Rast's report and notes, the items she tested contained marijuana or methamphetamine. In so answering, he would acknowledge that he relied on Rast's report and lab notes to reach his opinion.

….

But he could not testify that any of the information in the report was correct—for instance, that Rast actually performed the tests she recorded or that she did so correctly. Nor could he testify that the items she tested were the ones seized from Smith. Longoni did not have personal knowledge of any of these facts, and it is unclear what "reliable" scientific "methods" could lead him to intuit their truth from Rast's records. Fed. Rule Evid. 702(c) (defining a permissible expert opinion).

….

… I agree with the Court that Longoni stepped over the line and at times testified to the truth of the matter asserted. The prosecution asked Longoni on several occasions to describe the

tests that Rast performed or to swear to their accuracy, and Longoni played along. He stated as fact that Rast followed the lab's "typical intake process" and that she complied with the "policies and practices" of the lab.

….

For more than a half-century, the Federal Rules of Evidence and similar state rules have reasonably allowed experts to disclose the information underlying their opinion. Because the Court places this form of testimony in constitutional doubt in many cases, I concur only in the judgment.

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.'"

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B. Prior Inconsistent Statements Made Under Oath

State v. Feliciano, 146 Haw. 118, 456 P.3d 191 (Ct. App. 2020). Defendant Feliciano was charged with assault after his wife (victim) sustained stab wounds during a domestic dispute. In her grand jury testimony, victim claimed that Feliciano had stormed into the shed, grabbed her, pushed her onto the couch, accused her of adultery and when she tried to struggle away, stabbed her. At trial, she testified that she had pinned Feliciano to the couch and pressed her forearm against his throat prior to being stabbed. Feliciano claimed he stabbed victim in self-defense. At trial, the prosecution questioned victim about her prior statements to the grand jury, and she testified that she remembered making them, but denied having given certain answers. Defense did cross examine her, though it was brief. Victim's prior grand jury testimony was admitted as evidence of inconsistency under HRE Rule 613(b), because it was a prior inconsistent statement which she was given the opportunity to explain at trial. Victim's grand jury testimony was also found admissible for the truth of the matter asserted under Hawaii's equivalent to FRE 801(d)(1) *(HRE Rule 802.1(1)(A))* because the prior inconsistent statements were given under oath in a grand jury proceeding.

C. Prior Consistent Statements: Rule 801(d)(1)(B)

State v. Fontenot, 958 N.W.2d 549 (Iowa 2021). Fontenot was charged with sexual abuse and indecent contact with a child after his brother's partner's eleven year-old daughter, H.N., reported that Fontenot had been touching her inappropriately for several years. After H.N.. initially reported the conduct to her mother, a local child protection center (CPC) recorded an interview with H.N. in which she described the contact with Fontenot. Then during trial preparations Fontenot's defense counsel deposed H.N. while Fontenot was present. At trial, H.N.'s testimony on the stand differed somewhat from the deposition and from her recorded CPC interview. The defense counsel emphasized the discrepancies, citing her deposition and recorded testimony with the CPC. Because the defense brought up the CPC interview during H.N.'s cross examination, and emphasized the discrepancies with her trial testimony, the trial court found that the defense had implied H.N.'s testimony on the stand was a recent fabrication, and therefore her CPC testimony could be admitted into evidence under 801(d)(1)(b)(i). The Iowa Supreme Court upheld the trial court's finding, holding that the timing requirement was satisfied because the defense had implied H.N.'s trial testimony was fabricated on the stand. Therefore H.N.'s CPC statement was prior to the time of fabrication charged, and admissible. Additionally, the Iowa supreme court observed that while there were some differences between H.N.'s testimony on the stand and her CPC interview, they were not conflicting, and so the consistency requirement of 801(d)(1)(b) was satisfied.

United States v. Portillo, 969 F.3d 144 (5th Cir. 2020). John Portillo, president of the Texas outlaw biker gang "The Bandidos" ordered the murder of Anthony Benesh, who was trying to set up a Hell's Angels chapter in Austin, Texas. Johnny and Robbie Romo were the gunmen in the killing. The Romo brothers had already been cooperating with the government for narcotics offenses when they were confronted and confessed to the murder of Benesh. At trial the Romo Brothers implicated Portillo in Benesh's murder. On cross examination, the defense suggested that the brothers had fabricated Portillo's involvement to receive a benefit from the government. The Federal district court allowed the prosecution to admit Johnny Romo's recorded confession into evidence on the grounds that it was a prior consistent statement, under 801(d)(1)(B). The 5th circuit court of appeals however noted that the Romo's relationship with the government, and therefore their motive to fabricate, predated their confession, so the allegation of fabrication could not be countered by their prior consistent statements under 801(d)(1)(B)(i). For that reason, the appeals court found that the district court had abused its discretion in allowing the confession into evidence. Nevertheless, the appeals court ultimately affirmed the district court's guilty finding against Portillo because it concluded that the error was harmless.

D. Statements of Identification: Rule 801(d)(1)(c)

State v. Echols, 2021-Ohio-4193, 180 N.E.3d 1260 (Ct. App.). On June 9th 2017, Tyanna West was driving her car through her neighborhood with her boyfriend, Damon Waddell, and a third person when West saw David Echols 10 feet from her car. West believed that Echols had murdered her brother two months earlier, though he had not been charged. According to West, on June 9th, she and Echols greeted each other with "what's up" and then Echols pulled a gun and began shooting into West's car. West was shot in the hand

and the leg, and Damon Waddell was killed. The third person was not injured and could not be located to testify at trial. West immediately fled, driving six blocks to her grandmother's house, where the police were called. West repeatedly screamed that "David" had shot them, and that he had also shot and killed her brother D'ante two months earlier. Later, at the hospital, West identified David Echols from a lineup of photos presented by detectives. Echols was convicted at trial for Damon Waddel's murder and Tyanna West's shooting, and appealed. Echols was not charged for the murder of Tyanna's brother, D'ante West. On appeal Echols' defense argued that West's statements should be inadmissible because they were not "excited utterances", since West was able to drive six blocks, and thus had time to reflect. The appellate court held that regardless of their status as excited utterances, her statements were admissible as an identification of her shooter under Ohio Rule 801(D)(1)(c) because she did testify and was subject to cross examination, and because the statements both at her grandmother's house and at the hospital were made "'soon after perceiving the person' under 'circumstances [that] demonstrate the reliability of the prior identification'". (The requirement that "Circumstances demonstrate the reliability of the prior indication" is a requirement of Ohio's Rules of Evidence but not the Federal Rules.)

E. Party-Opponent Statements: Rule 801(d)(2)

Walsh v. Fusion Japanese Steakhouse, Inc., No. 2:19-CV-00496-CCW, 2022 U.S. Dist. LEXIS 23608 (W.D. Pa. Feb. 9, 2022). The United States Department of Labor (DOL), under Secretary of Labor, Marty Walsh brought a lawsuit against the Fusion Japanese Steakhouse chain for willfully failing to pay employees an overtime premium. A DOL investigator interviewed multiple employees including cooks, servers, and dishwashers who gave statements to the DOL. Fusion Steakhouse argued that those statements are hearsay, and that the Rule 801(d)(2)(D) exception should not apply because those employees are not authorized to speak on behalf of the corporation, and so were not speaking within the "scope of their relationship" with the Steakhouse chain. The court held that Rule 801(d)(2)(D)'s requirement that a statement must be "within the scope of [the agent/employee] relationship" does not mean that the employee must be authorized to speak on the corporation's behalf, but rather it means the statements must merely "concern[] matters within the scope of employment." *quoting United States DOL v. United Serv. Corp., (D.N.H. Nov. 17 2021)*. The PA Western District Court found that employee statements relating to each employee's (1) Identity, (2) job title and responsibilities; (3) hours worked; (4) rates and methods of pay; (5) supervision; and (6) timekeeping practices are all within the scope of employment and are therefore admissible under Rule 801(d)(2)(D). The District court however also found that "'(7) [statements on] other similarly situated employees subject to the same employment practices' – is not within a kitchen employee's scope of employment, and therefore such statements do not fall within Rule 801(d)(2)(D)'s hearsay exclusion."

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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*).

2022 Cases

A. The Rule Allowing Present Sense Impressions: Rule 803(1)

Brooks v. Avancez, No. 21-1933, 2022 U.S. App. LEXIS 18539 (7th Cir. July 6, 2022). Linda Brooks was an assembly line worker for Avancez, which assembles components for the automotive industry. Brooks claims she was wrongfully terminated after a meeting with an Avancez HR representative, Chad Pieper and her supervisor, Steve McGuire. In the meeting, Brooks sought to address disparaging comments about her age that her coworkers had allegedly been making. In the meeting, Brooks disclosed that she is a veteran and suffers from service related PTSD. Pieper and McGuire then claim that Brooks threatened McGuire by saying "I have PTSD and anything can happen." Brooks claims she did not threaten McGuire, but rather that she simply mentioned her PTSD as an exacerbating factor to the harassment she sought to address with HR. Both parties agree however that immediately thereafter, Pieper accused Brooks of threatening McGuire, by saying "You just threatened Steve… You said you had PTSD and that anything could happen." Although the content of Brook's statement is disputed, the court held that Pieper's undisputed accusation of a threat constituted a present sense impression under Rule 803(1), and thus was especially trustworthy because "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." (*Citing* Advisory Committee's Notes on Fed. Rule Evid. 803(1)).

B. The Rule Allowing Excited Utterances: Rule 803(2)

Munn v. State, 313 Ga. 716, 873 S.E.2d 166 (2022). Mark Munn was convicted of murder for the death of Kalliber Chambers. On March 3rd, 2018, residents' children were playing on the grounds of the Birch Landing Apartment complex, when Mark Munn drove into the parking lot close by some of the children at high speed, and parked. Kalliber Chambers, disturbed by his neighbor's reckless driving, approached Munn and asked him not to drive so quickly around the kids. Munn replied "F*** them kids" and pointed a 9mm pistol at Chambers. Chambers asked "you going to shoot me?" and without hesitation Munn fired four rounds into Chambers, and escaped the scene. Shortly after the shooting, Deputy Michael Long and another deputy arrived at the scene. While the other deputy attended to the dying victim, Deputy Long secured the crime scene with his body camera running. In Deputy Long's body camera footage two witnesses who also testified at trial can be heard making unsolicited comments, saying "he shot him for no reason" and "he did that s**t for no reason." The Georgia Supreme Court found that Deputy Long's body camera recordings were admissible hearsay as excited utterances under Rule 803(2) because they were made approximately ten minutes after the shooting occurred, while the victim lay actively bleeding to death in front of

them. Though ten minutes had elapsed, the Georgia Supreme Court held that excited utterances need not be made contemporaneously with the exciting event, but may be made anytime while the declarant is still under the stress or excitement caused by the event. Since the witnesses can be heard screaming and crying in the recording, the court found that the recorded statements ten minutes after the shooting were still excited utterances and therefore admissible.

C. The Rule Allowing Statements of Then-Existing Personal Physical and Mental Conditions: Rule 803(3)

Smith v. State, 2022 Ark. 95. On July 7th, 2018, cousins Robert Smith III and Tacori Mackrell murdered 72 year old Elvia Fragstein and stole her Honda CR-V crossover, which Mackrell referred to in text messages as the "truck." Fragstein's body was found four days later, decomposed, and with signs of severe trauma and asphyxiation. At trial, the prosecution presented evidence of text messages between Mackrell and his girlfriend, Eniya Evans, the most significant of which stated: "[C]ause we not finna park this truck there and don't you got eniya unless she coming." Smith argued on appeal to the Arkansas supreme court that these text messages was unfairly prejudicial hearsay, and should have been excluded, presumably because Smith's parking concerns indicated his fear that the stolen truck would be found, and therefore indicated his guilt. (There is no explanation in the Arkansas Supreme Court's judicial opinion of why Mackrell's parking concerns were significant). The Supreme Court affirmed the trial court's admission of the text message, holding that it is excluded from the rule against hearsay by Rule 803(3), because it indicates a state of mind, namely Mackrell's intent not to park the truck there.

D. The Rule Allowing Statements Made When Seeking Diagnosis or Treatment: Rule 803(4)

State v. Schmelmer, 2022-Ohio-57 (Ct. App.). L.P., an Oklahoma beauty pageant winner, was awarded a fitness coach, Keri Schmelmer, to prepare her for the Miss Ohio beauty pageant. On May 24th 2018, L.P. attended a fundraising event at a barn event space along with Keri and Keri's ex-husband, Erik. Keri and Erik were the only other people L.P. knew at the event. Early in the evening, Keri and Erik had an argument, and Keri left the fundraiser. Later, L.P. was shivering due to the cold, and Erik offered her a blanket, which was in a loft area of the barn. He brought her to the loft and raped her. After the rape, L.P. managed to leave the event and drove herself immediately to a police station. She then was taken to a hospital where a Sexual Assault Nurse Examination (SANE) was conducted by Nurse Amy Zoller. At Erik's trial, Nurse Zoller testified to the results of the exam which included questions answered by L.P. identifying the perpetrator as Erik Schmelmer. On appeal, Erik argued that Nurse Zoller had improperly given conclusory expert testimony as to the cause of L.P.'s rape-related injuries. The court found that under Rule 803(4), "information about 'the identity of the perpetrator, [and] the age of the perpetrator… were all for medical diagnosis" quoting State v. Arnold, 126 Ohio St.3d 290. Therefore, Nurse Zoller's identification of Erik Schmelmer as the person whom L.P. reported as her rapist was admissible under Rule 803(4).

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.

2022 Cases

A. Out of Court Assertions When Memory Fails: Rule 803(5)

State v. Abduleh, 2021-Ohio-4495 (Ct. App.). On November 21st, 2018, an incident occurred between Abdullahi Abduleh and his uncle, Abdurahman Mohamed. The

incident developed into a physical altercation which resulted in Mohamed losing a tooth, as well as sustaining cuts and bruises. A few days after the altercation, Mohamed conducted a videotaped interview with police. In the course of the trial, the issue of Abduleh's mental competency developed, and the court held a hearing to determine it. His uncle Mohamed, the victim of the altercation, testified at the hearing, saying that he remembered an incident had occurred on November 21st, 2018, but he could not remember what had happened because it had been a long time ago. He was shown his recorded police interview but he stated that it had not refreshed his recollection. Over defendant's objection, the court allowed the police interview to be played in court as a recorded recollection under Rule 803(5). On appeal, the defense argued that the admission of the police interview was an error which had resulted in a violation of the defendant's due process rights. Specifically, the defense argued that there was not evidence that the police interview accurately reflected Mohamed's knowledge at the time, under Rule 803(5)(C). At the hearing, the prosecution had not asked Mohamed if his recorded statements were accurate or if he had told the truth when he had spoken to the police. Despite the lack of evidence for 803(5)(C), the Ohio Court of Appeals held that Rule 803(5)(C) only fails when the witness gives affirmative testimony that the recorded recollection does not accurately reflect their prior knowledge. Mohamed properly adopted the police interview as his own words, and so because there was no indication that he was untruthful in that interview, the court held that the 803(5) exception could apply, and thus the admission of the police interview was not an error.

B. Records of Regularly Conducted Activity (formerly Business Records): Rule 803(6)

Arrowood Indem. Co. v. Fasching, 369 Or. 214, 503 P.3d 1233 (2022). Douglas Fasching took out three student loans from Citibank - one in 1999, a second in 2000, and a third in 2001. Citibank insured those loans with Arrowood Indemnity Corp., and later in 2011 sold the loans to Discover. Then in 2013 Fasching defaulted on the loans. Arrowood paid out an insurance claim to Discover, and sued Fasching "in the shoes of Discover" for breach of contract. Arrowood presented numerous business records from Discover and Citibank under Rule 803(6) as evidence for the existence of the contract and the breach. In light of the extensive documentation, the trial court granted summary judgment for Arrowood. Fasching appealed, arguing that 803(6)(D) had not been satisfied, because no custodian of records from Citibank or Discover had testified to the record keeping. The appeals court held that the documents were admissible because, although the Citibank and Discover records were not entitled to the same presumption of reliability as Arrowood's own records, they did still carry with them "comparable indicia of reliability", in part because Arrowood had adopted them as their own records. Fasching appealed again to the Oregon Supreme Court, and the Supreme Court granted certiorari. At argument, Arrowood pointed to Federal Court holdings which have found that 803(6) business records can be transferred from one business to another (the 'adopted records' approach, *see* Bayview Loan Servicing LLC v. Wicker, 651 Pa. 545, 557). The Oregon Supreme court did not find Federal holdings persuasive for Oregon law however. Ultimately, it found that the Oregon legislature's intent was to have an 803(6)(D) custodian testimony for each record's original source, and not to allow insurance companies the expediency of offering only their own certification to validate records adopted from other companies. To satisfy the Oregon rule 803(6), then, Arrowood would have had to procure as

witnesses the custodians of record from both Citibank and Discover, and have them testify to the accuracy of their respective company's record keeping.

C. "Invisible" Hearsay – It's Not There: Absence of a Record of a Regularly Conducted Activity: Rule 803(7)

Miller v. Union Pac. R.R. Co., 972 F.3d 979 (8th Cir. 2020). Around September 2015, there was a burglary at an Amtrak Rail building near Oklahoma City, and several track switching keys, called "102 keys" were stolen. Sometime prior to September 20th, 2015, a 102 key was used to partially open a track swi+tch near Enid, Oklahoma from a main railroad track onto a disused "siding" track. Railroad spikes anchoring the switch were also removed. At 8:00pm on September 20th, Gary Miller, a Union Pacific Engineer, along with a conductor, were operating a train approaching the compromised switch. Miller noticed that the switch was set to the siding track and he slammed on the train's braking mechanisms 800 feet from the switch, but the train could not stop in time. The first locomotive made the switch, but the second derailed, pulling the first locomotive to a stop and piling up the rest of the train behind the two lead locomotives. Miller was injured in the accident and sued Union Pacific for negligence in allowing the accident to take place. In the lawsuit, Miller presented some evidence suggesting that at an unspecified time prior to September 20th, Union Pacific had used the siding track during maintenance. Miller argued that this suggested it was Union Pacific's failure to secure the track that caused his injuries, not a criminal act by a third party. On appeal, the 8th Circuit rejected Miller's argument, pointing out that a train had passed safely over the switch the day before the accident. The lack of any evidence of a Union Pacific employee near the switch between the time of the safe passage and the accident therefore constituted affirmative evidence under Rule 803(7) that the accident was not Union Pacific's fault.

D. Government Reports: Rule 803(8)

United States v. Fuentes-Lopez, 994 F.3d 66 (1st Cir. 2021). Three men, including Nelson Alexander Fuentes-Lopez were pulled over in New Hampshire by a state trooper. None of the three men had drivers' licenses, but all held Guatemalan identification cards. The trooper transported the men to a nearby police station and notified Immigration and Customs Enforcement (ICE). ICE then charged Fuentes-Lopez with illegal reentry into the United States after deportation. At trial, ICE offered an "I-296 form" under Rule 803(8) as a record of Fuentes-Lopez' prior deportation. Fuentes-Lopez challenged the admission of the form claiming ICE Agent Sotoro Cepeda, who had certified his I-296 form, was untrustworthy, and that therefore the trustworthiness requirement of the Rule (803(8)(B)) was not satisfied. Fuentes-Lopez' claim was founded on the fact that Agent Cedepa had been arrested and charged with forgery and theft in 2001. Cepeda's charges were dropped, however, and he was never convicted. The court held that under 803(8), merely being arrested and charged, without being convicted, is "not sufficiently probative of untrustworthiness as to warrant disregard of a record verified by [the arrested person]." Therefore, the I-296 ICE record was admissible evidence under 803(8).

E. The Absence of an Entry in Government Records: Rule 803(10)

Naval Sys. v. United States, 153 Fed. Cl. 166 (2021). On September 2nd, 2020, the United States Department of the Navy solicited proposals from military contractors for the development and maintenance of naval logistics-related software. The Navy set October 19th as the due date for contractor proposals. Naval Systems, Inc. (NSI) prepared a proposal, and attempted to submit it on October 19th via the Department of Defense's "DoD SAFE" online system, allegedly receiving a submission confirmation. The following day, a representative from the DoD contacted NSI asking why NSI had decided not to submit a proposal. NSI maintained that it had submitted a proposal, and the issue was escalated several times within the DoD. NSI also attempted to both mail and hand deliver physical copies of its proposal, but the DoD did not accept these. After an internal investigation, the DoD concluded that no proposal from NSI had been submitted, that NSI could not submit its proposal late, and that NSI could therefore not participate in the competition for the government contract. NSI then filed a complaint, alleging that the DoD improperly rejected its proposal. The Court of Federal Claims held that Rule 803(10) was by itself sufficient to end the case in the government's favor, because no record of NSI's proposal was found in the DoD SAFE system, and because an expert for the government, Todd Edgell, testified that NSI could only have received the submission confirmation if it had successfully submitted its proposal. Thus, under 803(10), and contrary to the testimony of two NSI employees, the absence of a government (public) record of submission was sufficient to prove that the submission had never occurred.

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."
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> "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*.
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> "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."

2022 Cases

A. Unavailability – The Rule: Rule 804(a)

Commonwealth v. Roark, 641 S.W.3d 94 (Ky. 2021). Steven Roark, Alvin Coach and several others were arrested in 2015 for manufacturing methamphetamine in their trailer. Coach was tried first and pled guilty, testifying that he acted alone in producing the methamphetamine. Roark attempted to offer Coach's prior testimony into evidence, but was denied because the trial court found that Coach, who was in a detention center 51 miles from the courthouse, was not "unavailable" under rule 804(a), since no evidence beyond defense counsel's word was provided to show that the defense had tried in good faith to get Coach to testify. The appeals court reversed the trial court, holding that since the Commonwealth's own representations of unavailability are sufficient under 804(a), then the defendant's own representations should also be sufficient, and the defense should not need to show other evidence to have a declarant found unavailable. The Supreme Court reversed the appeals court, observing that it is normal practice for a party seeking the testimony of an individual in custody to obtain a transport order signed by the trial judge. The Supreme Court found that transport orders "fit comfortably within the 'other reasonable means' contemplated by [Rule 804(a)(5)]'" and so Couch could not be found unavailable as a witness.

B. Prior Testimony and the Unavailable Witness: Rule 804(b)(1)

State v. Sims, 250 N.J. 189, 271 A.3d 288 (2022). On the evening of April 9th, 2014, P.V. was sitting in his car, parked in the driveway, talking on the phone, when he noticed a man crouched down pointing a gun at him. The man began shooting and left P.V. severely wounded and bleeding. P.V.'s grandmother found him, and immediately asked him who had shot him. P.V. replied that it was "Sims". P.V. sustained twelve bullet wounds to his torso, leg and arm, but managed to survive the shooting. Anthony Sims was charged with attempted murder and weapons offenses. In a pretrial hearing, P.V. stated that he had no recollection of knowing who had shot him at the time, and that he had no recollection of telling investigators that Sims had shot him. When the defense cross examined P.V., he stated that he had learned the details later in conversations with his mother. He also stated that he feared the police and prosecutor's office. Around this time, P.V. himself allegedly committed and was indicted for the murder of Sim's brother. At Sim's trial for P.V.'s attempted murder, P.V. refused to testify, invoking his 5th amendment right despite a state offer of immunity. The trial court allowed P.V.'s

former testimony into evidence under Rule 804(b)(1), finding that invoking the 5th amendment did qualify P.V. as unavailable, and because Sim's defense counsel did have an opportunity to cross examine P.V. After some dispute on appeal, mostly about an unrelated issue, the New Jersey Supreme Court affirmed the trial court's application of 804(b)(1).

C. Dying Declarations and the Unavailable Witness: Rule 804(b)(2)

State v. Williamson, 246 N.J. 185, 249 A.3d 478 (2021). Victim A.B. was shot five times outside her apartment complex by Kanem Williamson. After the shooting, A.B.'s heart stopped, but paramedics were able to restart her heart. They transported her to a hospital where she awoke two hours later. Doctors explained the severity of her condition: one of the bullets had entered A.B.'s neck and severed her spinal cord, leaving her a quadriplegic, unable to breathe without a tube. In the doctor's words, A.B. was "at imminent risk of death." Upon hearing of her condition, A.B. became visibly upset and cried. Hours later, detectives acquired a photo of Williamson and brought it to the hospital, where they taped a video asking A.B. if the photo of Williamson was a photo of her shooter. Unable to speak, A.B. nodded her head in confirmation. A.B. died of her injuries eleven months later, and Williamson's charges were upgraded from aggravated assault to first-degree murder. Williamson argued before the New Jersey Supreme Court that the videotape was not a dying declaration under 804(b)(2) because A.B. lived for almost a year after the video was taken. The supreme court rejected Williamson's objective standard, holding that that the videotape was admissible as an 804(b)(2) dying declaration because A.B.'s identification was given the same day she had been shot five times, she had just discovered she was a quadriplegic and she could not breathe on her own thus she reasonably "believed in the imminence of [her own] impending death" *N.J.R.E.* 804(b)(2); and she had a "settled hopeless expectation that death [was] near at hand." *quoting Shepard v. United States*, 290 U.S. 96, 54 S. Ct. 22 (1933).

D. Statements Against Interest of Unavailable Declarant: Rule 804(b)(3)

United States v. Miller, 954 F.3d 551 (2d Cir. 2020). Breanne Wynter along with Dominque Mack and thirty-two others were indicted for some unspecified crimes. Authorities were unable to locate Mack, and so they turned to Wynter for help because Wynter's boyfriend, Ian Francis, was a close friend of Mack's. Facing a ten-year mandatory minimum sentence, Wynter agreed to help police locate Mack. Wynter and Francis assumed that Mack knew his arrest was inevitable, and so proposed paying him $1,500 to tell them where he would be at a particular time so that the police could arrest him there. Mack never gave Francis and Wynter the information. Mack then conspired to kill Francis to avoid being arrested. On December 21st, 2010, Mack's associate, Keronn Miller, was driving with Francis when Miller asked Francis to pull over on Sigourney Street so he could urinate. After Miller exited the vehicle, a masked gunman fired multiple shots into Francis' car. Francis initially survived the shooting, but died from his injuries a month later. Sometime after the shooting, Keronn Miller told Brendyn Farmer that he had intentionally lured Francis to the location of the shooting; that he had been present when the shooting occurred; and that Mack himself had been the shooter. Farmer was permitted by the trial court to testify to Miller's statements under Rule 804(b)(2). Mack challenged the testimony on appeal, arguing that it was in Miller's interest to

implicate him, and therefore Miller's statements were not against his own interest under 804(b)(2). The court held that Miller's statements that he saw Mack pull the trigger, combined with his statements that he lured Francis to Sigourney Street so that Mack could shoot him did tend to show Miller's participation in a criminal conspiracy which caused the death of Ian Francis. Therefore, Miller's statements to Farmer were against his interest, and they did tend to expose Miller to criminal liability, thus making Farmer's hearsay admissible under Rule 804(b)(2).

E. Statements by Unavailable Declarants Admissible Due to Forfeiture: Rule 804(b)(6)

State v. Jako, 245 W. Va. 625, 862 S.E.2d 474 (2021). In August 2018 Gerald Jako, his girlfriend Samantha England and another man robbed a West Virginia gambling hall at gunpoint, tying up the clerk and stealing $6,000. Initially, England agreed to a plea deal and gave a statement at a pretrial hearing, which the prosecution recorded. After the hearing, however, Jako, who was in jail, acquired a third party to connect phone calls between himself and England who was also in jail. During the phone calls Jako told England that he wanted to marry her, but that he would break up with her if she testified against him. England then withdrew her plea agreement and refused to testify against Jako. When asked by her attorney and the assistant prosecutor if she was afraid of Jako, she responded that she was. The court found that England's recorded pretrial hearing testimony was admissible under 804(b)(6) because her unavailability had been caused by Jako's persuasion. On appeal, Jako argued that his conversations with England did not qualify as wrongdoing under 804(b)(6) because he had not threatened or intimidated her. The appeals court found that purposeful emotional manipulation could be wrongdoing for purposes of 804(b)(6), and the West Virginia Supreme Court agreed, adding that while Jako had not overtly threatened England, he had "intimated the possibility" of violence. Specifically, Jako told England "that he could 'reach out to different people [who could harm her] and sh*t,' but that he did not want to talk to people other than Ms. England because he did not 'ever want to be the reason that [she] shed tears.'" The West Virginia Supreme Court affirmed Jako's trial court sentence of 100 years in prison for first degree robbery.

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.'"
>
> "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.
>
> **(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.

2022 Cases

A. Layers of Hearsay: Rule 805

**Researcher's note: the following example of rule 805 comes from footnote 11 of the case. The email found admissible under rule 805 was not ultimately material to the issues of the complaint. Nevertheless, the Western District of PA wrote a concise analysis of the email in footnote 11 which clearly and systematically shows the application of rule 805. Tbe details of the case below are sourced from the main body of the opinion.*

Thomas v. Bronco Oilfield Servs., 503 F. Supp. 3d 276, 291 n.11 (W.D. Pa. 2020). Carlo Thomas, who is African-American, was the target of several incidents of racial harassment during his employment with Bronco Oilfield Services, namely uses of the n-word directed at Thomas. Bronco's director of HR, Stan Brouillette investigated the incidents and interviewed Michael Segers, who was the district manager for Thomas' work district. Segers reportedly told Brouillette that he felt bad for one of the perpetrators of the harassment, Seth Krenzelak, because Krenzelak had had a "string of bad luck." Brouillette reported Segers' statement in an email to HR Counsel, Tonja King. The district court found Brouillette's email to King, referring to Segers' statement was

admissible as 805 hearsay-within-hearsay, because both layers of hearsay satisfied an exception the rule against hearsay. In the first layer, Segers' statement to Brouillette was admissible as a party-opponent statement, because they were his thoughts on firing Krenzelak, whom he supervised. The court reasoned that therefore they were statements made within the scope of his employment relationship with the defendant corporation, and were admissible under rule 801(d)(2)(D). In the second layer, Brouillette's email to King was admissible under the business records exemption, satisfying all five requirements of rule 803(6). Ultimately the court found the statement admissible, but immaterial because despite his sympathy, Segers did later fire Krenzelak when asked to do so by HR.

B. Attacking the Credibility of a Non-Testifying Hearsay Declarant: Rule 806

Bowden v. State, 317 So. 3d 1039 (Ala. Crim. App. 2020). Sometime in 2017 Jon Bowden and Theresa Miller entered into a "toxic" relationship. Sometime in early 2018 a fight between the couple resulted in Miller stabbing Bowden in the arm with a knife. She put a tourniquet on the wound and brought Bowden to a hospital where she told hospital staff that Bowden's stabbing was the result of "drug deal gone bad." After the incident, she told her mother, Barbara Snider, that she had stabbed Bowden in self-defense. A few weeks later, in March 2018, another altercation between Bowden and Miller resulted in Miller's death by blunt force trauma inflicted by Bowden with an aluminum baseball bat. Bowden attempted suicide by heroin overdose but failed and fled the area. Miller's family discovered her body in her home a few days later. Bowden claimed that Miller had attacked him with a knife, and that he had killed her in self-defense. At trial, the court allowed Snider to testify to her daughter's statements that she had stabbed Bowden in self-defense. In response, Bowden tried to impeach the declarant (Miller) with medical records of her statements to hospital staff that his wounds were the result of "a drug deal gone bad." The trial court refused to allow the impeaching hospital records into evidence. The Alabama Appeals Court reversed the trial court, holding that if Snider could testify to Miller's statement about the stabbing, then under rule 806, Bowden had a right to attack Miller's credibility by offering her prior inconsistent statement made to the hospital staff into evidence.

C. A Hearsay "Catch-All" Provision: Rule 807

State v. Hamilton, 308 Ga. 116, 839 S.E.2d 560 (2020). In 2010, a tumultuous relationship between Marlina Hamilton and her ex-husband, Christopher Donaldson ended in Hamilton fatally shooting Donaldson in her home. At the trial, Hamilton testified to years of abuse, and stated that she had acted in self-defense because Donaldson had been attacking her with his fists. The jury found Hamilton innocent of malice murder, but guilty of felony murder, and weapons offenses, and she was sentenced to life in prison. Hamilton moved for a new trial, arguing ineffective assistance of counsel because her lawyers did not seek immunity under Georgia's self-defense statutes. Hamilton got a new trial in 2019 before the same judge, and there during a hearing and for immunity, Hamilton sought to offer the testimonies from nearly thirty witnesses who had testified to Donaldson's abuse in her initial trial in 2011. The judge admitted the old testimonies under rule 807, and after appeal to the Georgia Supreme Court, the supreme court agreed, holding that it would require an unreasonable effort to ask all nearly thirty

witnesses to testify to the same matters again, and that even if they could be procured for the new trial, their testimonies eight years later "'would not likely be any more reliable' than their hearsay statements."

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.

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.
>
> …
>
> 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.
>
> …
>
> 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[.]"

Diaz v. United States

144 S. Ct. 1727 (2024)

JUSTICE THOMAS delivered the opinion of the Court.

Federal Rule of Evidence 704(b) prohibits expert witnesses from stating opinions "about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." In this drug-trafficking prosecution, petitioner argued that she lacked the mental state required to convict because she was unaware that drugs were concealed in her car when she drove it across the United States-Mexico border. At trial, the Government's expert witness opined that most drug couriers know that they are transporting drugs. Because the expert witness did not state an opinion about whether petitioner herself had a particular mental state, we conclude that the testimony did not violate Rule 704(b). We therefore affirm.

I

In August 2020, Delilah Diaz, a United States citizen, attempted to enter the United States from Mexico. When Diaz drove into the port of entry, a border patrol officer asked her to roll down the car's rear driver-side window. The officer left his inspection booth and tried to roll down the window himself. The officer "felt some resistance" and then heard "a crunch-like sound in the door." App. 25. Aware from experience that car doors are a common hiding spot for contraband, the officer investigated further with a "buster," a handheld tool that measures an object's density. After the buster detected an abnormal density in the doors, officers brought in a narcotics detection canine and sent the car through an X-ray machine. They discovered 56 packages of methamphetamine tucked inside the car's door panels and underneath the carpet in the trunk. The methamphetamine weighed just over 54 pounds and had an estimated retail value of $368,550.

Diaz was arrested and, after waiving her *Miranda* rights, agreed to an interview. See *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Diaz claimed that she had no idea drugs were hidden in the car.…. Diaz explained that she was driving her boyfriend's car. Contradictorily, she also told officers that she had seen her boyfriend only "two, three times tops," did not know his phone number, and did not know where he lived…. Diaz's story grew even more dubious when officers questioned her about two cellphones discovered inside the car. She acknowledged that she

owned one of the phones. But, she maintained the other phone had been "given to [her]" by a friend—whom she would "rather not" identify…. And, she insisted that the phone was "locked" and that she did not "have access to it."….

Diaz was charged with importing methamphetamine in violation of 21 U. S. C. §§952 and 960. The charges required the Government to prove that Diaz "knowingly" transported drugs. In response, Diaz asserted what is known colloquially as a "blind mule" defense: she argued that she did not know that there were drugs in the car. Before trial, the Government gave notice that it would call Homeland Security Investigations Special Agent Andrew Flood as an expert witness. Agent Flood would testify about the common practices of Mexican drug-trafficking organizations. Specifically, he planned to explain that drug traffickers "generally do not entrust large quantities of drugs to people who are unaware they are transporting them."….

Diaz objected to Agent Flood's proffered testimony under Federal Rule of Evidence 704(b). Diaz argued that if Agent Flood testified that drug traffickers *never* use unknowing couriers, that would be functionally equivalent to an opinion about whether Diaz knowingly transported drugs. The District Court granted Diaz's motion in part and denied it in part. The court agreed with Diaz that Agent Flood could not testify in absolute terms about whether all couriers knowingly transport drugs. But, insofar as Agent Flood planned to testify only that most couriers know they are transporting drugs, the court concluded that his testimony was admissible. At trial, Agent Flood testified that "in most circumstances, the driver knows they are hired . . . to take the drugs from point A to point B." App. to Pet. for Cert. 15a. To use an unknowing courier, Agent Flood explained, would expose the drug-trafficking organization to substantial risk. The organization could not guarantee where, if at all, the drugs would arrive.

Agent Flood acknowledged on cross-examination that drug-trafficking organizations sometimes use unknowing couriers. The jury found Diaz guilty, and the District Court sentenced her to 84 months' imprisonment. On appeal, Diaz again challenged Agent Flood's testimony under Rule 704(b). The Court of Appeals held that Rule 704(b) prohibits only "an 'explicit opinion' on the defendant's state of mind." 2023 WL 314309, *2 (CA9, Jan. 19, 2023). Because Agent Flood did not opine about whether Diaz knowingly transported methamphetamine, the court concluded that the testimony did not violate Rule 704(b). *Ibid.* We granted certiorari, 601 U. S. — (2023), and now affirm.

Federal Rule of Evidence 704 addresses "Opinion[s] on an Ultimate Issue." Rule 704(a) sets out a general rule that "[a]n opinion is not objectionable just because it embraces an ultimate issue." Rule 704(b) adds one caveat: "EXCEPTION: In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone." Rule 704 departed from the once-prevailing common-law practice. Prior to Rule 704, many States applied what was known as the "ultimate issue" rule. That rule categorically barred witnesses from "stat[ing] their conclusions on" any "ultimate issue"—*i.e.*, issues that the jury must resolve to decide the case. *United States* v. *Spaulding*, 293 U. S. 498,….

For example, in a medical malpractice suit, an ultimate issue may be "whether [the] plaintiff 's condition resulted solely from malpractice." *De Groot* v. *Winter*, 261 Mich. 660, 671, 247 N. W. 69 (1933). In a murder case, by way of comparison, an ultimate issue may be who fired the gun

that killed the victim. See *State* v. *Carr*, 196 N. C. 129, 131–132, 144 S. E. 698, 700 (1928). Under the common-law rule, a witness could not provide his answer to those ultimate issues. Witnesses remained free, however, to offer related testimony, even testimony that directly helped the jury resolve an ultimate issue…. The logic underpinning the ultimate-issue rule was that it prevented witnesses from taking over the jury's role…. If a witness gave an opinion "covering the very question which was to be settled by the jury," some feared that the jury would be left with "no other duty but that of recording the finding of [the] witnes[s]." *Chicago & Alton R. Co.* v. *Springfield & N. W. R. Co.*, 67 Ill. 142, 145(1873).

….

Rule 704 made clear that the ultimate-issue rule did not apply in federal courts. When Rule 704 was originally adopted in 1975, it had no exceptions: All ultimate-issue opinions were permitted. 88 Stat. 1937. About nine years later, in the wake of the John Hinckley, Jr., trial, Congress created the exception now found in Rule 704(b).

….

As Rule 704(b) now reads, "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." By its terms, Rule 704(b)'s exception covers a narrow set of opinions. The exception does not apply in civil cases or affect lay witness testimony. And, it exclusively addresses mental states and conditions that are "element[s] of the crime charged or of a defense." Rule 704(b) thus proscribes only expert opinions in a criminal case that are about a particular person ("the defendant") and a particular ultimate issue (whether the defendant has "a mental state or condition" that is "an element of the crime charged or of a defense").

III

Rule 704(b) applies only to opinions about the defendant. Because Agent Flood did not express an opinion about whether Diaz herself knowingly transported methamphetamine, his testimony did not violate Rule 704(b). Agent Flood instead testified about the knowledge of *most* drug couriers. Specifically, he explained that "in most circumstances, the driver knows they are hired . . . to take the drugs from point A to point B." App. to Pet. for Cert. 15a. That opinion does not necessarily describe Diaz's mental state. After all, Diaz may or may not be like most drug couriers. Diaz herself made this point at trial. She argued that another person, an alleged boyfriend, had deceived her into carrying the drugs. During opening statements, Diaz's counsel explained that Diaz met her boyfriend while she was "broken-hearted over the death of her mother" and recovering from "a debilitating back injury."… Diaz's boyfriend "took advantage" of those circumstances to lure Diaz to Mexico.

….

The jury was thus well aware that unknowing couriers exist and that there was evidence to suggest Diaz could be one of them. It simply concluded that the evidence as a whole pointed to a different conclusion: that Diaz knowingly transported the drugs. The jury alone drew that

conclusion. While Agent Flood provided evidence to support one theory, his testimony was just that—evidence for the jury to consider or reject when deciding whether Diaz in fact knew about the drugs in her car. Because Agent Flood did not give an opinion "about whether" Diaz herself "did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense," his testimony did not violate Rule 704(b). Diaz's counterarguments, echoed by the dissent, are not persuasive. Diaz and the dissent argue that Agent Flood "functional[ly]" stated an opinion about whether Diaz knowingly transported drugs when he opined that couriers generally transport drugs knowingly…. That argument mistakenly conflates an opinion about *most* couriers with one about *all* couriers.

….

Here… Agent Flood asserted that Diaz was part of a group of persons that *may or may not* have a particular mental state. Of all drug couriers—a group that includes Diaz—he opined that the majority knowingly transport drugs. The jury was then left to decide: Is Diaz like the majority of couriers? Or, is Diaz one of the less-numerous-but-still-existent couriers who unwittingly transport drugs? The ultimate issue of Diaz's mental state was left to the jury's judgment. As a result, Agent Flood's testimony did not violate Rule 704(b). Diaz and the dissent next zero in on the word "about" in Rule 704(b). They rely on dictionary definitions of "about" to argue that Rule 704(b)'s prohibition includes all testimony that "'concerns' or is 'in reference to' whether the defendant possessed a particular state of mind."

….

A crucial part of that context is the other words in the sentence. See *FCC* v. *AT&T Inc.*, 562 U. S. 397, 405 (2011). The words surrounding "about" make clear that Rule 704(b) addresses a far narrower category of testimony than Diaz and the dissent posit. To begin, the Rule targets "opinion[s]." In other words, the testimony must be more than a general reference, and it must reach a particular conclusion. See Black's Law Dictionary 1244 (rev. 4th ed. 1968) (defining opinion evidence as "what the witness thinks, believes, or infers in regard to facts in dispute"). Moreover, the Rule does not preclude testimony "about" mental-state ultimate issues in the abstract. Instead, it targets conclusions "about whether" a certain fact is true: "[T]he defendant did or did not have a mental state or condition." The language as a whole thus conveys that Rule 704(b) is limited to conclusions as to the defendant's mental state.

….

The reading offered by Diaz and the dissent would have the exception swallow the rule. If Rule 704(b) were as broad as they suggest, it would be a standalone prohibition broader than Rule 704(a)—or even the original ultimate-issue rule. Even though the ultimate-issue rule and Rule 704(a) address opinions that include the ultimate issue itself, Rule 704(b) would prohibit all opinions even related to the ultimate issue of a defendant's mental state. Rule 704's text does not support such an expansion. The Rule as a whole makes clear that an opinion is "about" the ultimate issue of the defendant's mental state only if it includes a conclusion on that precise topic, not merely if it concerns or refers to that topic.

IV

An expert's conclusion that "most people" in a group have a particular mental state is not an opinion about "the defendant" and thus does not violate Rule 704(b). Accordingly, the judgment of the Court of Appeals is affirmed. *It is so ordered*.

JACKSON, J. Concuring

….

I write separately to emphasize that, as Congress designed it, Rule 704(b) is party agnostic. Neither the Government nor the defense can call an expert to offer her opinion about whether the defendant had or did not have a particular mental state at the time of the offense. See *ante,* at 7. But a corollary is also true. Both the Government and the defense are permitted, consistent with Rule 704(b), to elicit expert testimony "on the likelihood" that the defendant had a particular mental state, "based on the defendant's membership in a particular group." Brief for John Monahan et al. as *Amici Curiae* 1 (Evidence Professors Brief). Indeed, the type of mental-state evidence that Rule 704(b) permits can prove essential not only for prosecutors, but for defendants as well. This very case illustrates the significance of mental-state evidence to both parties in a criminal trial. The Government expert opined (based on his almost 30 years of experience as a special agent) that, "in most circumstances," drug couriers know that they are transporting drugs. App. To Pet. for Cert. 10a, 15a. Diaz challenged this testimony, and, today, the Court holds that the Government did not violate Rule 704(b). See *ante,* at 7. Notably, however, the Government was not the only party that relied on this type of mental-state evidence during the trial. Diaz called an automobile specialist who testified that a driver of her particular car would almost certainly *not* know that it contained drugs.

….

All that said, I fully acknowledge that there are serious and well-known risks of overreliance on expert testimony—risks that are especially acute in criminal trials. See NAFD Brief 21–22, 24–25; see also *United States* v. *Alvarez*, 837 F. 2d 1024, 1030 (CA11 1988) ("When the expert is a government law enforcement agent testifying on behalf of the prosecution about participation in prior and similar cases, the possibility that the jury will give undue weight to the expert's testimony is greatly increased"). But there are also safeguards outside of Rule 704(b) to prevent the misuse of expert testimony. Nothing in the Court's opinion today should be read to displace those important checks and limitations.

….

District court judges also have a role to play. They should be protective of Congress's intent to preserve the jury's core duty, by providing specific admonitions and instructions when expert testimony about a relevant mental state is introduced. See Evidence Professors Brief 27–29; see also *United States* v. *Smart*, 98 F. 3d 1379, 1388–1389 (CADC 1996) (requiring that district courts sometimes use jury instructions to prevent expert testimony from violating Rule 704(b)). With this understanding of both the important uses and the potential misuses of Rule 704(b), I join the Court's opinion.

GORSUCH, J. Dissenting

Federal Rule of Evidence 704(b) prohibits an expert witness from offering an opinion "about whether the defendant did or did not have [the] mental state" needed to convict her of a crime. "Those matters," the Rule instructs, "are for the trier of fact alone." Following the government's lead, the Court today carves a new path around that command. There's no Rule 704(b) problem, the Court holds, as long as the government's expert limits himself to testifying that *most* people like the defendant have the mental state required to secure a conviction. The upshot? The government comes away with a powerful new tool in its pocket. Prosecutors can now put an expert on the stand—someone who apparently has the convenient ability to read minds—and let him hold forth on what "most" people like the defendant think when they commit a legally proscribed act. Then, the government need do no more than urge the jury to find that the defendant is like "most" people and convict. What authority exists for allowing that kind of charade in federal criminal trials is anybody's guess, but certainly it cannot be found in Rule 704.

…..

At trial, deciding whether a criminal defendant acted with a culpable mental state is a job for the jury.

….

Reflecting the centrality of *mens rea* to criminal punishment and the jury's role in finding it, Rule 704(b) of the Federal Rules of Evidence provides that, "[i]n a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." As the Rule continues: "Those matters are for the trier of fact alone."

….

For a long stretch, many courts barred experts from offering opinions on so-called ultimate issues like *mens rea*…. The Federal Rules of Evidence are no longer so strict, see Fed. Rule Evid. 704(a), except in one respect: *mens rea*. On that particular issue, Congress has concluded that jurors need no help from experts. They are fully capable of drawing reasonable inferences from the facts and deciding whether the defendant acted with the requisite *mens rea.* And in criminal trials that is their job alone. The government violated that Rule in this case. Proceedings began when prosecutors charged Ms. Diaz with importing a controlled substance into this country. See 21 U. S. C.§§952, 960(a)(1). At the trial that followed, Ms. Diaz did not dispute that she had transported drugs across the border. The only question concerned her *mens rea*. If, as the government charged, she transported the drugs "knowingly," she faced a potential sentence of up to life in prison. See §§960(a)(1), (b)(1)(H). If, however, Ms. Diaz acted with some lesser *mens rea* (say, negligence), or perhaps innocently (as what some call a "blind mule"), she was entitled to an acquittal. To help prove that Ms. Diaz "knowingly" imported drugs, the government called to the stand Andrew Flood, one of its own employees, an agent with the Department of Homeland Security. Ms. Diaz had made no admissions to him about her mental state, nor had Agent Flood

even interviewed her. Instead, prosecutors called Agent Flood as an expert on the minds of drug couriers (yes, really)

….

And in response to the government's questions, Agent Flood testified that, "in most circumstances, the driver knows they are hired . . . to take the drugs from point A to point B." App. to Pet. for Cert. 15a. That was a violation of Rule 704(b), plain as day. Just walk through its terms. The government called Agent Flood as an "expert witness" to address the question "whether the defendant did or did not have . . . a mental state . . . that constitutes an element of the crime charged." After all, whether Ms. Diaz acted "knowingly" was the only question at trial, all that separated her from a conviction. And Agent Flood proceeded to do just as he was asked, offering an "opinion about" that very question. To be sure, prosecutors thought they had a clever way around the problem. They did not ask Agent Flood to testify explicitly about Ms. Diaz's mental state. Instead, they asked the agent to testify about the mental state of people exactly like Ms. Diaz, drivers bringing drugs into the country.

…..

The Rule does not only prohibit an expert from stating a *definitive* opinion about the defendant's mental state (or, as the government concedes, the mental state of a class that includes her). It prohibits an expert from offering *any* opinion on the subject. Return, once more, to the Rule's terms. It bars an expert from stating an opinion "*about* whether the defendant" had "a mental state . . . that constitutes an element of the crime charged." (Emphasis added.) The word "about" means "[c]oncerning, regarding, with regard to, in reference to; in the matter of." Oxford English Dictionary (3d ed., June 2024); see Brief for Petitioner 18; see also American Heritage Dictionary 5 (def. 4a) (5th ed. 2011). So whether an expert's opinion happens to be definitive or probabilistic makes no difference. An expert may not state any opinion concerning, regarding, or in reference to whether the defendant, while committing a charged criminal act, had the requisite mental state to convict. Period. Lest any doubt remain, the Rule takes pains to emphasize, "[t]hose matters are for the trier of fact alone."

….

Observe, as well, where today's tiptoeing around the Rule promises to lead.

….

In this case, Agent Flood said "most" people in the defendant's shoes have the requisite *mens rea*. But what if he said, as the government initially proffered, that drivers "generally" know? ECF Doc. 30, at 7. Or that they "almost always" know? Or perhaps an expert puts a finer point on it: "In my experience, 99% of drug couriers know." When cases like those come to us, likely one of two things will happen. We will draw some as-yet unknown line and say an expert's probabilistic testimony went too far. Or we will hold anything goes and eviscerate Rule 704(b) in the process. Rather than face either of those prospects, how much easier it would be to follow where the Rule's text leads.

…..

None of this serves our criminal justice system well. A criminal conviction is "the gravest" condemnation we as a society "permit ourselves to make." Wechsler 528. Allowing into our proceedings speculative guesswork about a defendant's state of mind diminishes the seriousness due them. It risks the reliability of the outcomes they produce…. undermines our historic commitment that *mens rea* is a necessary component of every serious crime by turning the inquiry into a defendant's mental state from an exacting one guided by hard facts and reasonable inferences into a competing game of "I say so." It diminishes our respect for the presumptively free person, his free will and individuality, by encouraging the lazy assumption that he thinks like "most." And it reduces the vital role juries are meant to play in criminal trials. Yes, they can still decide whether the defendant thinks like "*most*" people. *Ante*, at 9. But that role hardly matches Rule 704(b)'s promise that "matters" of *mens rea* at trial belong to the jury "alone."

….

Persuaded that today's decision is mistaken, but hopeful that it will ultimately prove immaterial in practice, I respectfully dissent.

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."

Samia v. United States

599 U.S. 635 (2023)

JUSTICE THOMAS delivered the opinion of the Court.

Here, we must determine whether the Confrontation Clause bars the admission of a nontestifying codefendant's confession where (1) the confession has been modified to avoid directly identifying the nonconfessing codefendant and (2) the court offers a limiting instruction that jurors may consider the confession only with respect to the confessing codefendant. Considering longstanding historical practice, the general presumption that jurors follow their instructions, and the relevant precedents of this Court, we conclude that it does not.

I

Petitioner Adam Samia traveled to the Philippines in 2012 to work for crime lord Paul LeRoux. While there, LeRoux tasked Samia, Joseph Hunter, and Carl Stillwell with killing Catherine Lee, a local real-estate broker who LeRoux believed had stolen money from him. Lee was found dead shortly thereafter, shot twice in the face at close range. Later that year, LeRoux was arrested by the U. S. Drug Enforcement Administration (DEA) and became a cooperating witness for the Government. Hunter, Samia, and Stillwell were arrested thereafter…. Later, during a postarrest interview with DEA agents, Stillwell waived his rights under *Miranda* v. *Arizona*, 384 U. S. 436 (1966), and gave a confession. Stillwell

admitted that he had been in the van when Lee was killed, but he claimed that he was only the driver and that Samia had shot Lee.

The Government charged all three men in a multicount indictment…. While Hunter and Stillwell admitted that they had participated in the murder, Samia maintained his innocence.

Prior to trial, the Government moved *in limine* to admit Stillwell's confession. But, because Stillwell would not testify and the full confession inculpated Samia, the Government proposed that an agent testify as to the content of Stillwell's confession in a way that eliminated Samia's name while avoiding any obvious indications of redaction. The District Court granted the Government's motion but required further alterations to ensure consistency with its understanding of this Court's Confrontation Clause precedents, including *Bruton*.

At trial, the Government's theory of the case was that Hunter had hired Samia and Stillwell to pose as real-estate buyers and visit properties with Lee. The Government also sought to prove that Samia, Stillwell, and Lee were in a van that Stillwell was driving when Samia shot Lee. During its case in chief, in accordance with the court's ruling on its motion *in limine*, the Government presented testimony about Stillwell's confession through DEA Agent Eric Stouch. Stouch recounted the key portion of Stillwell's confession implicating Samia as follows:

> "Q. Did [Stillwell] say where [the victim] was when she was killed?
> "A. Yes. He described a time when the *other person* he was with pulled the trigger on that woman in a van that he and Mr. Stillwell was driving." App. 76 (emphasis added).

Other portions of Stouch's testimony also used the "other person" descriptor to refer to someone with whom Stillwell had traveled and lived and who carried a particular firearm. During Stouch's testimony, the District Court instructed the jury that his testimony was admissible only as to Stillwell and should not be considered as to Samia or Hunter. The District Court later provided a similar limiting instruction before the jury began its deliberations.

The jury convicted Samia and his codefendants on all counts, and the District Court subsequently denied Samia's post-trial motions. The District Court then sentenced Samia to life plus 10 years' imprisonment.

Samia appealed to the Second Circuit. On appeal, and as relevant here, he argued that the admission of Stillwell's confession—even as altered and with a limiting instruction—was constitutional error because other evidence and statements at trial enabled the jury to immediately infer that the "other person" described in the confession was Samia himself. He noted that, during opening statements, the Government had asserted that Stillwell drove the van while Samia "was in the passenger seat," and that Samia pulled out a gun, "turned around, aimed carefully and shot [Lee]." *Id.*, at 52. He also pointed out that the Government had stated that "Stillwell admitted to driving the car while the man he was with turned around and shot [Lee]." *Id.*, at 58. So, even though Samia's position in the van and shooting of Lee were relevant to the Government's theory of the case with or without Stillwell's confession, Samia argued that those statements would allow the jury to infer that he was the

"other person" in Stillwell's confession…. The Second Circuit rejected Samia's view, holding that the admission of Stillwell's confession did not violate Samia's Confrontation Clause rights….

We granted certiorari to determine whether the admission of Stillwell's altered confession, subject to a limiting instruction, violated Samia's rights under the Confrontation Clause. 598 U. S. ___ (2022).

II

The Sixth Amendment's Confrontation Clause guarantees the right of a criminal defendant "to be confronted with the witnesses against him." As we have explained, this Clause forbids the introduction of out-of-court "testimonial" statements unless the witness is unavailable and the defendant has had the chance to cross-examine the witness previously. See *Crawford* v. *Washington*, 541 U. S. 36, 53– 54 (2004). Because Stillwell's formal, Mirandized confession to authorities, which the Government sought to introduce at trial, is testimonial, it falls within the Clause's ambit…. Nonetheless, the Confrontation Clause applies only to witnesses "against the accused." *Crawford*, 541 U. S., at 50. And, "[o]rdinarily, a witness whose testimony is introduced at a joint trial is not considered to be a witness 'against' a defendant if the jury is instructed to consider that testimony only against a codefendant." *Richardson*, 481 U. S., at 206. This general rule is consistent with the text of the Clause, historical practice, and the law's reliance on limiting instructions in other contexts….

For most of our Nation's history, longstanding practice allowed a non-testifying codefendant's confession to be admitted in a joint trial so long as the jury was properly instructed not to consider it against the nonconfessing defendant. While some courts would omit the defendant's name or substitute a reference to "another person" (or the like), it is unclear whether any courts considered such alterations to be necessary as a categorical matter. In any event, the combination of such alterations and an appropriate limiting instruction was generally sufficient to permit the introduction of such confessions….

Notably, none of the early treatises or cases to which the parties have referred, or that we have discovered, suggests that a confession naming a codefendant *must* in *all* cases be edited to refer to "another person" (or something similar) such that the codefendant's name is not included in the confession. Accordingly, while it is unclear whether alteration of any kind was necessary, historical practice suggests at least that altering a nontestifying codefendant's confession not to name the defendant, coupled with a limiting instruction, was enough to permit the introduction of such confessions at least as an evidentiary matter….

This historical evidentiary practice is in accord with the law's broader assumption that jurors can be relied upon to follow the trial judge's instructions. Evidence at trial is often admitted for a limited purpose, accompanied by a limiting instruction. And, our legal system presumes that jurors will "'attend closely the particular language of [such] instructions in a criminal case and strive to understand, make sense of, and follow'" them. *United States* v. *Olano*, 507 U. S. 725, 740 (1993)….

II

In *Bruton* v. *United States*, this Court "recognized a narrow exception to" the presumption that juries follow their instructions, holding "that a defendant is deprived of his Sixth Amendment right of confrontation when the facially incriminating confession of a nontestifying codefendant is introduced at their joint trial," even with a proper instruction. *Richardson*, 481 U. S., at 207. In *Richardson* v. *Marsh*, the Court "decline[d] to extend [*Bruton*] further" to "confessions that do not name the defendant." *Id.*, at 211. *Gray* v. *Maryland*, 523 U. S. 185, 194 (1998), later qualified *Richardson* by holding that certain obviously redacted confessions might be "directly accusatory," and thus fall within *Bruton*'s rule, even if they did not specifically use a defendant's name. Thus, the Court's precedents distinguish between confessions that directly implicate a defendant and those that do so indirectly. Under these precedents, and consistent with the longstanding historical practice discussed above, the introduction here of Stillwell's altered confession coupled with a limiting instruction did not violate the Confrontation Clause….

Gray … confronted a question *Richardson* expressly left open: whether a confession altered "by substituting for the defendant's name in the confession a blank space or the word 'deleted'" violated the Confrontation Clause. 523 U. S., at 188; see also *Richardson*, 481 U. S., at 211, n. 5…. At trial, the prosecution had a police detective read the confession aloud to the jury verbatim, substituting the words "deleted" or "deletion" for Gray's or Vanlandingham's names.3 *Ibid.* "Immediately after" the detective finished reading the confession, "the prosecutor asked, 'after he gave you that information, you subsequently were able to arrest Mr. Kevin Gray; is that correct?' The officer responded, 'That's cor- rect.'" *Id.*, at 188–189. In instructing the jury at the close of trial, the judge specified that Bell's confession was evidence only against Bell, admonishing the jury not to use the confession as evidence against Gray. *Id.*, at 189. The jury convicted Bell and Gray.

This Court held that the confession was inadmissible under *Bruton*…. The Court… concluded that, when a redacted confession "simply replace[s] a name with an obvious blank space or a word such as 'deleted' or a symbol or other similarly obvious indications of alteration," the evidence "so closely resemble[s] *Bruton*'s unredacted statements that . . . the law must require the same result."

…

Here, the District Court's admission of Stillwell's confession, accompanied by a limiting instruction, did not run afoul of this Court's precedents. Stillwell's confession was redacted to avoid naming Samia, satisfying *Bruton*'s rule. And, it was not obviously redacted in a manner resembling the confession in *Gray*; the neutral references to some "other person" were not akin to an obvious blank or the word "deleted." In fact, the redacted confession is strikingly similar to a hypothetical modified confession we looked upon favorably in *Gray*, where we posited that, instead of saying "'[m]e, deleted, deleted, and a few other guys,'" the witness could easily have said "'[m]e and a few other guys.'" 523 U. S., at 196. Accordingly, it "fall[s] outside the narrow exception [*Bruton*] created." *Richardson*, 481 U. S., at 208….

The Confrontation Clause ensures that defendants have the opportunity to confront witnesses against them, but it does not provide a freestanding guarantee against the risk of

potential prejudice that may arise inferentially in a joint trial. Here, the Clause was not violated by the admission of a nontestifying codefendant's confession that did not directly inculpate the defendant and was subject to a proper limiting instruction. We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

KAGAN, J., dissenting

> *"Imagine a criminal case involving two defendants—John and Mary. John and Mary are arrested for robbing Bill. Before trial, John confesses to the robbery in an interview with police. But John does more than admit his own involvement; he also points a finger at Mary. John says to the police: "Mary and I went out Saturday night and robbed Bill." Mary, on the other hand, never confesses to the robbery. She maintains that she wasn't involved—in fact, that she never left her home on the night in question. The government tries John and Mary together. At trial, it introduces a copy of John's confession into evidence, and has it read to the jury by the interviewing officer. But John elects not to take the stand, leaving Mary's attorney without an opportunity to cross-examine him about his confession."* (italicized for emphasis)
>
> ...

Start with *Bruton*, the foundation of this Court's precedent on the introduction of confessions at joint trials. The government, we held in that case, cannot introduce a confession by a non-testifying defendant that names a codefendant as an accomplice. Admitting the confession against the co-defendant would violate her Sixth Amendment right to cross-examine witnesses. See 391 U. S., at 126. And an instruction to the jury to disregard the confession when assessing the co-defendant's guilt cannot remove the constitutional problem. That is because of the effect that such a "powerfully incriminating extrajudicial statement[]" is likely to have on a jury. *Id.*, at 135–136. In this context, "the risk that the jury will not, or cannot, follow [the instruction] is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Id.*, at 135. The *Bruton* rule applies even when an accusatory confession does not expressly name the co-defendant. *Bruton*, we have held, bars the use of confessions "that replace[] a name with an obvious blank space or symbol or word such as 'deleted.'" *Gray*, 523 U. S., at 189.…

Until today, *Bruton*'s application turned on the effect a confession is likely to have on the jury, as a comparison of two of our decisions shows. In *Richardson* v. *Marsh*, 481 U. S. 200, 211 (1987), we approved the admission of a confession "redacted to eliminate not only [a co-defendant's] name, but any reference to his or her existence." Despite that complete redaction, the confession served to incriminate the co-defendant later in the trial, when her own testimony placed her in a car ride that the confession described. See *id.*, at 206, 208. But we thought that a confession that incriminated only "by connection" with subsequent evidence was neither so "vivid" nor so "powerful[]" as a confession that "incriminat[ed] on its face." *Id.*, at 208–209. For that reason, we thought, the jury was more "likely [to] obey the instruction" to disregard the confession as to the co-defendant. *Id.*, at 208. But we held in *Gray* that the calculus is different when a confession "refers directly to the 'existence' of the nonconfessing defendant," even though not by name. 523 U. S., at 192. Such a confession

itself points a finger at a co-defendant, so that the jury can "immediately" and "vivid[ly]" grasp how it implicates her. *Id.*, at 196. The impact is so similar to naming the defendant that "the law must require the same result." *Id.*, at 192. In both situations, the confession's "powerfully incriminating" effect "creates a special, and vital, need for cross-examination"—just as if "the codefendant pointed directly to the defendant in the courtroom." *Id.*, at 194….

So how does the majority reach a contrary result? The nomenclature it adopts isn't the problem: In describing *Bruton*'s scope, the majority distinguishes "between confessions that directly implicate a defendant and those that do so indirectly." *Ante*, at 10, 14–15. That distinction roughly tracks the one this Court has recognized between confessions that themselves incriminate a co-defendant (directly implicate) and those that become incriminating only when linked with later-introduced evidence (indirectly implicate). See *supra*, at 4–5. But the majority distorts that distinction beyond recognition when applying it to the facts of this case. In one blink-and-you-miss-it paragraph of analysis, the majority holds that Stillwell's confession does not "directly" implicate Samia for two reasons. It "was redacted to avoid naming Samia." *Ante*, at 15. And the redaction was "not akin to an obvious blank or the word 'deleted.'" *Ibid.* That analysis altogether fails to capture what our *Bruton* cases care about. This Court has already made clear that the first fact relied on—that Stillwell's confession did not use Samia's name—is not dispositive. See *supra*, at 3–4. A confession redacted with a blank space, after all, also avoids naming the defendant; yet *Gray* held that it falls within *Bruton*'s scope. So today's decision must rest on the second feature of the confession: that the placeholder used (*e.g.*, "the other person") was neither a blank space nor the word "deleted." But that distinction makes nonsense of the *Bruton* rule.

Bruton's application has always turned on a confession's inculpatory impact. See, *e.g.*, *Cruz* v. *New York*, 481 U. S. 186, 193 (1987) (considering "the likelihood that [a limiting] instruction will be disregarded" and "the prob- ability that such disregard will have a devastating effect"). And as the John-and-Mary examples make clear, a confession that swaps in a phrase like "the other person" for a defendant's name may incriminate just as powerfully as one that swaps in a blank space…. the majority points to a passage in which the Court described how a confession in the case could have been further redacted: Instead of saying "[m]e, deleted, deleted, and a few other guys," the witness could have said "[m]e and a few other guys." *Id.*, at 196. But on *Gray*'s particular facts, the latter version was unproblematic. The crime was a gang assault involving six perpetrators, while only one other person was on trial with the confessing defendant…. Courts have long considered those basic factors when applying *Bruton*. And the Government has proved unable to cite a single case—including in Circuits applying *Bruton* to confessions like Stillwell's—in which doing so created "administrability" issues, much less "fewer joint trials."…

The majority correctly describes that presumption; it just forgets that the presumption does not apply when the evidence at issue is an accusatory co-defendant confession. *Bruton* could not have been clearer on the point: "[W]e cannot accept limiting instructions as an adequate substitute for [a defendant's] constitutional right of cross-examination." 391 U. S., at 137; see *Gray*, 523 U. S., at 192 (stating that co-defendant confessions are "so prejudicial that limiting instructions cannot work"); *Richardson*, 481 U. S., at 208 (noting "the overwhelming probability of [jurors'] inability" to follow instructions to disregard co-defendant confessions); see *supra*, at 3.

Smith v. Arizona
144 S. Ct. 1785 (U.S. 2024)

JUSTICE KAGAN delivered the opinion of the Court.

….

The question presented here concerns …a case in which an expert witness restates an absent lab analyst's factual assertions to support his own opinion testimony. This Court has held that the Confrontation Clause's requirements apply only when the prosecution uses out-of-court statements for "the truth of the matter asserted." *Crawford*, 541 U. S., at 60, n. 9. Some state courts, including the court below, have held that this condition is not met when an expert recites another analyst's statements as the basis for his opinion. Today, we reject that view. When an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements come into evidence for their truth. As this dispute illustrates, that will generally be the case when an expert relays an absent lab analyst's statements as part of offering his opinion. And if those statements are testimonial too—an issue we briefly address but do not resolve as to this case—the Confrontation Clause will bar their admission.

I

A

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." In operation, the Clause protects a defendant's right of cross-examination by limiting the prosecution's ability to introduce statements made by people not in the courtroom. For a time, this Court held that the Clause's "preference for face-to-face" confrontation could give way if a court found that an out-of-court statement bore "adequate indicia of reliability." *Ohio* v. *Roberts*, 448 U. S. 56, 65–66 (1980). But two decades ago, the Court changed course, to better reflect original understandings. In *Crawford* v. *Washington*, the Court deemed it "fundamentally at odds with the right of confrontation" to admit statements based on judicial determinations of reliability. 541 U. S., at 61.

….

The Clause's prohibition "applies only to testimonial hearsay"—and in that two-word phrase are two limits. *Davis* v. *Washington*, 547 U. S. 813, 823 (2006). First, in speaking about "witnesses"—or "those who bear testimony"—the Clause confines itself to "testimonial statements," a category whose contours we have variously described.'

….

Second and more relevant here, the Clause bars only the introduction of hearsay—meaning, out-of-court statements offered "to prove the truth of the matter asserted." *Anderson* v. *United States*, 417 U. S. 211, 219 (1974). When a statement is admitted for a reason unrelated to its truth, we have held, the Clause's "role in protecting the right of cross-examination" is not implicated. *Tennessee* v. *Street*, 471 U. S. 409, 414 (1985); see *Anderson*, 417 U. S., at 220. That is because the need to test an absent witness ebbs when her truthfulness is not at issue. See *ibid.*; *Street*, 471 U. S., at 414; *infra*, at 13–14, 17. Not long after *Crawford*, the Court made clear that the Confrontation Clause applies to forensic reports. In *Melendez-Diaz* v. *Massachusetts*, state prosecutors introduced "certificates of analysis" (essentially, affidavits) stating that lab tests had identified a substance seized from the defendant as cocaine. 557 U. S., at 308. But the State did not call as witnesses the analysts who had conducted the tests and signed the certificates. We held that a "straightforward application" of *Crawford* showed a constitutional violation. 557 U. S., at 312.

….

We again underscored that the Confrontation Clause commanded not reliability but one way of testing it—through cross-examination. See *ibid.* And we thought that method might have plenty to do in cases involving forensic analysis. After all, lab tests are "not uniquely immune from the risk of manipulation" or mistake. *Id.*, at 318.

….

Two years later, the Court relied on *Melendez-Diaz* to hold that a State could not introduce one lab analyst's written findings through the testimony of another.' [*Melendez-Diaz* v. *Massachusetts,* 557 U. S. 305].

…..

Like *Melendez-Diaz*, this case involves drugs. In December 2019, Arizona law enforcement officers executed a search warrant on a property in the foothills of Yuma County. Inside a shed on the property, they found petitioner Jason Smith. They also found a large quantity of what appeared to be drugs and drug-related items. As a result, Smith was charged with possessing dangerous drugs (methamphetamine) for sale; possessing marijuana for sale; possessing narcotic drugs (cannabis) for sale; and possessing drug paraphernalia. He pleaded not guilty, and the case was set for trial. In preparation, the State sent items seized from the shed to a crime lab run by the Arizona Department of Public Safety (DPS) for a "full scientific analysis."… The State's request identified Smith as the individual "associated" with the substances, listed the charges against him, and noted that "[t]rial ha[d] been set."… Analyst Elizabeth Rast communicated with prosecutors about exactly which items needed to be examined, and then ran the requested tests…. Rast prepared a set of typed notes and a signed report, both on DPS letterhead, about the testing. The notes documented her lab work and results.

….

After listing the eight items, the report stated that four "[c]ontained a usable quantity of methamphetamine," three "[c]ontained a usable quantity of marijuana," and one "[c]ontained a usable quantity of cannabis."… The State originally planned for Rast to testify about those matters at Smith's trial. But with three weeks to go, the State called an audible, replacing Rast with a different DPS analyst as its expert witness. In the time between testing and trial, Rast had stopped working at the lab, for unexplained reasons. And the State chose not to rely on the now-former employee as a witness. So the prosecutors filed an amendment to their "final pre trial conference statement" striking out the name Elizabeth Rast and adding "Greggory Longoni, forensic scientist (substitute expert)."… Longoni had no prior connection to the Smith case, and the State did not claim otherwise. Its amendment simply stated that "Mr. Longoni will provide an independent opinion on the drug testing performed by Elizabeth Rast." *Ibid.* And it continued: "Ms. Rast will not be called. [Mr. Longoni] is expected to have the same conclusion."

…..

And when Longoni took the stand, he referred to those materials and related what was in them, item by item by item.

….

After thus telling the jury what Rast's records conveyed about her testing of the items, Longoni offered an "independent opinion" of their identity.

….

After Smith was convicted, he brought an appeal focusing on Longoni's testimony. In Smith's view, the State's use of a "substitute expert"—who had not participated in any of the relevant testing—violated his Confrontation Clause rights…. The real witness against him, Smith urged, was Rast, through her written statements; but he had not had the opportunity to cross examine her…. The State disagreed. In its view, Longoni testified about "his own independent opinions," even though making use of Rast's records.

….

The Arizona Court of Appeals affirmed Smith's convictions, rejecting his Confrontation Clause challenge. It relied on Arizona precedent (similar to the Illinois Supreme Court's decision in *Williams*) stating that an expert may testify to "the substance of a non-testifying expert's analysis, if such evidence forms the basis of the [testifying] expert's opinion." App. to Pet. for Cert. 11a–12a (quoting *State ex rel. Montgomery* v. *Karp*, 236 Ariz. 120, 124, 336 P. 3d 753, 757 (App. 2014)). That is because, the Arizona courts have said, the "underlying facts" are then "used only to show the basis of [the in-court witness's] opinion and not to prove their truth." *Ibid.*, 336 P.3d, at 757. On that view, the Court of Appeals held, Longoni could constitutionally "present[] his independent expert opinions" as "based on his review of Rast's work." App. to Pet. for Cert. 11a. We granted certiorari to consider that reasoning, 600 U. S. _____(2023), and we now reject it.

Smith's confrontation claim can succeed only if Rast's statements came into evidence for their truth. As earlier explained, the Clause applies solely to "testimonial *hearsay*." *Davis*, 547 U. S., at 823 (emphasis added)

….

If Rast's statements came in to establish the truth of what she said, then the Clause's alarms begin to ring; but if her statements came in for another purpose, then those alarms fall quiet. Where the parties disagree, of course, is in answering that purpose question. Smith argues that the "for the truth" condition is satisfied here, just as much as in *Melendez-Diaz* or *Bullcoming*…. In his view, Rast's statements were conveyed, via Longoni's testimony, to establish that what she said happened in the lab did in fact happen.

….

The State sees the matter differently…. the State argues that Rast's statements came into evidence not for their truth, but instead to "show the basis" of the in-court expert's independent opinion.

….

Evidentiary rules, though, do not control the inquiry into whether a statement is admitted for its truth. That inquiry, as just described, marks the scope of a federal constitutional right. See *supra*, at 11. And federal constitutional rights are not typically defined—expanded or contracted— by reference to non-constitutional bodies of law like evidence rules… The confrontation right is no different, as *Crawford* made clear. "Where testimonial statements are involved," that Court explained, "the Framers [did not mean] to leave the Sixth Amendment's protection to the vagaries of the rules of evidence."

….

But truth is everything when it comes to the kind of basis testimony presented here. If an expert for the prosecution conveys an out-of-court statement in support of his opinion, and the statement supports that opinion only if true, then the statement has been offered for the truth of what it asserts. How could it be otherwise? "The whole point" of the prosecutor's eliciting such a statement is "to establish—*because of the [statement's] truth*—a basis for the jury to credit the testifying expert's" opinion. *Stuart*, 586 U. S., at _____(GORSUCH, J., dissenting from denial of certiorari) (slip op., at 3) (emphasis in original). Or said a bit differently, the truth of the basis testimony is what makes it useful to the prosecutor; that is what supplies the predicate for— and thus gives value to—the state expert's opinion. So "[t]here is no meaningful distinction between disclosing an out-of-court statement" to "explain the basis of an expert's opinion" and "disclosing that statement for its truth." *Williams*, 567 U. S., at 106 (THOMAS, J., concurring in judgment). A State may use only the former label, but in all respects the two purposes merge.

….

Longoni could opine that the tested substances were marijuana, methamphetamine, and cannabis only because he accepted the truth of what Rast had reported about her work in

the lab—that she had performed certain tests according to certain protocols and gotten certain results. And likewise, the jury could credit Longoni's opinions identifying the substances only because it too accepted the truth of what Rast reported about her lab work (as conveyed by Longoni). If Rast had lied about all those matters, Longoni's expert opinion would have counted for nothing, and the jury would have been in no position to convict. So the State's basis evidence—more precisely, the truth of the statements on which its expert relied—propped up its whole case. But the maker of those statements was not in the courtroom, and Smith could not ask her any questions.

….

Here, the State used Longoni to relay what Rast wrote down about how she identified the seized substances. Longoni thus effectively became Rast's mouthpiece.

….

What remains is whether the out-of-court statements Longoni conveyed were testimonial…To implicate the Confrontation Clause, a statement must be hearsay ("for the truth") and it must be testimonial—and those two issues are separate from each other. See *supra*, at 3. The latter, this Court has stated, focuses on the "primary purpose" of the statement, and in particular on how it relates to a future criminal proceeding. See *ibid.* (noting varied formulations of the standard)… A court must there- fore identify the out-of-court statement introduced, and must determine, given all the "relevant circumstances," the principal reason it was made. *Bryant*, 562 U. S., at 369. But that issue is not now fit for our resolution. The question presented in Smith's petition for certiorari did not ask whether Rast's out-of-court statements were testimonial.

….

But we offer a few thoughts, based on the arguments made here, about the questions the state court might usefully address if the testimonial issue remains live. First, the court will need to consider exactly which of Rast's statements are at issue. In this Court, the parties disputed whether Longoni was reciting from Rast's notes alone, or from both her notes and final report… In Arizona's view, everything Longoni testified to came from Rast's notes; although he at times used the word "report," a close comparison of the documents and his testimony reveals (the State says) that he meant only the notes.

….

Our holding today follows from all this Court has held about the Confrontation Clause's application to forensic evidence. A State may not introduce the testimonial out-of-court statements of a forensic analyst at trial, unless she is unavailable and the defendant has had a prior chance to cross-examine her. See *Crawford*, 541 U. S., at 68; *Melendez-Diaz*, 557 U. S., at 311. Neither may the State introduce those statements through a surrogate analyst who did not participate in their creation. See *Bullcoming*, 564 U. S., at 663. And nothing changes if the surrogate—as in this case—presents the out-of-court statements as the basis for his expert opinion. Those statements, as we have explained, come into evidence for their truth because only

if true can they provide a reason to credit the substitute expert. So a defendant has the right to cross-examine the person who made them. That means Arizona does not escape the Confrontation Clause just because Rast's records came in to explain the basis of Longoni's opinion. The Arizona Court of Appeals thought otherwise, and so we vacate its judgment. To address the additional issue of whether Rast's records were testimonial (including whether that issue was forfeited), we remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

THOMAS, J., concurring

…

[A] question remains whether that analyst's statements were testimonial. I agree with the Court that, because the courts below did not consider this question, we should remand for the Arizona Court of Appeals to answer it in the first instance. *Ante*, at 19–20. But, I disagree with the Court's suggestion that the Arizona Court of Appeals should answer that question by looking to each statement's "primary purpose."… Rather than attempt to divine a statement's "primary purpose," I would look for whether the statement is "similar in solemnity to the Marian examination practices that the Confrontation Clause was designed to prevent." *Williams*, 567 U. S., at 112 (opinion of THOMAS, J.). In my view, the Arizona Court of Appeals should consider on remand whether the statements at issue have the requisite formality and solemnity to qualify as testimonial. If they do not, the Confrontation Clause poses no barrier to their admission.

GORSUCH, J. Concurring

….

I cannot join, however, the Court's discussion in Part III about when an absent analyst's statement might qualify as "testimonial." See *ante*, at 19–21. As the Court says, "that issue is not now fit for our resolution." *Ante*, at 19. It was not part of the question presented for our review, nor was it the focus of the decision below. *Ante*, at 19–20. In fact, the State devoted so little attention to the "testimonial" issue in the Arizona courts that any argument it might make on the subject on remand may be forfeited. *Ante*, at 20. Further, the Court's thoughts on the subject are in no way necessary to the resolution of today's dispute. What makes a statement testimonial, the Court notes, is an entirely "separate" issue. *Ante*, at 19.

….

I am concerned, as well, about the confusion a "primary purpose" test may engender. Does it focus, for example, on the purposes an objective observer would assign to a challenged statement, see *ante*, at 3 (referencing the "'objective witness'"), the declarant's purposes in making it, see *ante*, at 21 (asking "why Rast created the report or notes"), the government's purposes in "'procur[ing]'" it, see *ante*, at 3, or maybe still some other point of reference? Even after we figure out a statement's purposes, how do we pick the primary one out of the several a statement might serve? Or determine in exactly what way that purpose must "relat[e] to a future criminal proceeding"? *Ante*, at 19. And if we fail to find some foothold in text and historical

practice for resolving these questions, how can judges answer them without resort to their own notions of what would be best?

ALITO, J., Concurring

Today, the Court inflicts a needless, unwarranted, and crippling wound on modern evidence law. There was a time when expert witnesses were required to express their opinions as responses to hypothetical questions. But eventually, this highly artificial, awkward, confusing, and abuse- laden form of testimony earned virtually unanimous condemnation. More than a century ago, judges, evidence scholars, and legal reform associations began to recommend that courts abandon the required use of hypotheticals, and more than 50 years ago, the Federal Rules of Evidence did so. Now, however, the Court proclaims that a prosecution expert will frequently violate the Confrontation Clause when he testifies in strict compliance with the Federal Rules of Evidence and similar modern state rules. Instead, the Court suggests that such experts revert to the form that was buried a half-century ago. *Ante,* at 18. There is no good reason for this radical change.

….

Rule 703 provides that an expert's opinion may be based on "facts or data in the case that the expert has been made aware of or personally observed." And "[u]nless the court orders otherwise," Rule 705 permits the expert to "state an opinion—and give the reasons for it—without first testifying to the underlying facts or data." These facts or data need not be "admissible" in evidence, and they are not admitted for the truth of what they assert. Fed. Rule Evid. 703... Today's decision vacates the Arizona court's judgment because the testifying expert's testimony was hearsay. I agree with that bottom line, but not because of the majority's novel theory that basis testimony is always hearsay. Rather, I would vacate and remand because the expert's testimony is hearsay under any mainstream conception, including that of the Federal Rules of Evidence. To understand why, begin with the facts.

….

Under Rules 703 and 705, Longoni could have offered his expert opinion that, based on the information in Rast's report and notes, the items she tested contained marijuana or methamphetamine. In so answering, he would acknowledge that he relied on Rast's report and lab notes to reach his opinion.

….

But he could not testify that any of the information in the report was correct—for instance, that Rast actually performed the tests she recorded or that she did so correctly. Nor could he testify that the items she tested were the ones seized from Smith. Longoni did not have personal knowledge of any of these facts, and it is unclear what "reliable" scientific "methods" could lead him to intuit their truth from Rast's records. Fed. Rule Evid. 702(c) (defining a permissible expert opinion).

….

… I agree with the Court that Longoni stepped over the line and at times testified to the truth of the matter asserted. The prosecution asked Longoni on several occasions to describe the tests that Rast performed or to swear to their accuracy, and Longoni played along. He stated as fact that Rast followed the lab's "typical intake process" and that she complied with the "policies and practices" of the lab.

….

For more than a half-century, the Federal Rules of Evidence and similar state rules have reasonably allowed experts to disclose the information underlying their opinion. Because the Court places this form of testimony in constitutional doubt in many cases, I concur only in the judgment.