

## EVIDENCE OUTLINE

Non-Hearsay – 801(d)(1)	Hearsay Exceptions –Availability immaterial-803	Hearsay Exceptions – Declarant Unavailable – Rule 804(b)
<b>Prior Statement by the Witness (declarant must be available)</b>	(1) – Present Sense Impression	(1) – Former Testimony
(a) Inconsistent – given under oath	(2) – Excited Utterance	(2) – Statement Under belief of impending death
(b) Consistent – offered to rebut	(3) – Then existing mental, emotional or physical condition	(3) – Statement against interest
(c) Identification –after perception	(4) – Statemtns of medical diagnosis or treatment	
(d)(2)Admission	(5) – past recollection recorded	
(a) – own statement	(6) – business records	
(b) - adoption	(8) – Public records	
(c) – Authorization	(12) – Marriage, Baptism, similar certificates	
(d) – Agent or servant	(13) – family records	
(e) - coconspirator	(18) – Learned Treatises	
	(22) – Judgment of previous conviction	

### A. Introduction

- a. Federal Rules of Evidence (FRE): Introduction
  - i. Federal Rules came into being in 1975. Before that, the courts relied on common law.
  - ii. An appeal is an argument in front of a three judge panel arguing a mistake in the lower court. Many times the contention is regarding FRE.
  
- b. Generally speaking, reasons to object are:
  - i. Want to keep harmful evidence out of trial.
  - ii. Want to preserve the right to appeal a certain issue (called preserving appellate right.)
  - iii. If a party fails to object to evidence, it does not mean they cannot appeal – the review is held to a different standard.
  
- c. What are you objecting to? There are two kinds of evidence
  - i. Oral Testimony
    1. 611(c) – On direct examination, leading questions are prohibited – on cross they are permitted.
    2. A leading question is a question that suggests what the answer should be.
    3. Why is there a rule 611(c)? Why are leading questions not allowed?
      - a. Even if a witness swears to tell the truth, leading questions will lead the witness in a way that taints or suggests the answer.
      - b. However, it may be acceptable to lead on preliminary matters.

- c. ≅'s attny may stipulate to given facts in the opening remarks. However, they may object on the grounds that it is an affront to the defense.
  - d. When a matter is not in dispute, you may use leading questions (theoretically).
  - e. When you get to a contested fact, leading questions are forbidden.
4. Can leading questions be asked to a witness for the defense who is not the defendant?
- a. On direct, an attny cannot lead their own witness when that witness is sympathetic to the ≅'s case.
  - b. However, attnys can sometimes ask leading questions if the witness is a child (especially if it is a delicate situation) or elderly witnesses who have trouble communicating.
  - c. May also be able to ask leading questions of a hostile witness.
  - d. Generally, leading is not allowed on direct because the witness will be sympathetic to the cause and will allow themselves to be led and the testimony will therefore be biased.
- ii. Real Evidence (Physical Evidence)
1. **Hypo:** There was a murder and the ≅'s house is searched and a gun, a cap and a Q-tip are all found. How could any or all of these objects get into the trial as evidence?
- a. There needs to be a foundation to prep the evidence. If possible, call the person who executed the search warrant as a witness.
  - b. Could the other side object? – Yes
    - i. The other side could object based on the chain of custody. I.e. – the way evidence is collected is very formal and if the formal proceeding breaks down, the chain may be damaged.
    - ii. If the chain is damaged it could be recovered by identifying marks, serial number, etc.
    - iii. If authentication can be shown, the chain of custody can be preserved – i.e. – can show that it is the same evidence as that which was recovered.
  - c. What about with the Q-tip?
    - i. The Q-tip could probably only get in to trial through proper chain of custody because there would be no way to show or prove its uniqueness.

- iii. Demonstrative Evidence (Physical)
  - 1. Demonstrative Evidence is not admitted for any purposes but to show it to the jury. E.G. – a map, aerial view, drawing, time line, etc. The jury cannot see demonstrative exhibits during deliberation.
  - 2. What if a search found a letter admitting to a robbery (next to a gun) does the letter get in?
    - a. ≅ may object that the letter was the ≅s – not that it was recovered at the scene.
    - b. Prosecution may authenticate it through a handwriting expert.
    - c. May also call a witness who saw the letter being written.
    - d. Maybe the ≅'s mom could be familiar with the letter or with her son's writing.
- iv. Objections
  - 1. Objections have got to be timely to be relevant – must be quick.
  - 2. When you object, you cannot narrate, but if the court allows long objections – go for it.
  - 3. If the ≅ is acquitted the last thing an attorney can do is poll the jury to see how they voted.

## B. Relevance

- a. **Rule 401 – “Relevant Evidence” means 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.**
- b. **Two aspects of Relevance:**
  - i. **Probative Relationship: Evidence must make a factual proposition more or less likely than it would be without the evidence.**
  - ii. **Materiality: There must be a link between the factual proposition which the evidence tends to establish and the substantive law.**
  - iii. **I.E. – Evidence must have a tendency to prove or disprove an element of the case.**
- c. **Hypo:** John Smith robs a bank in DC. The Prosecution puts on its case and rests. The ≅ calls someone from Los Angeles as its 1<sup>st</sup> witness and hands them an LA phone book as exhibit A. The witness was then asked to read all the Smiths in the phone book – is this allowed?
  - i. The prosecution may object on the grounds of relevance. What could be the relevance? It would have to be linked to the crime in some way, but what if a business card was dropped?

- ii. The next witness is from Provo, Utah, then Baltimore, Richmond, etc. All the witnesses are going to testify based on the phone book – i.e. – how many John Smiths there are in their respective cities. To this the prosecution also may object on the grounds of timeliness – it would take too long.
- iii. What if Mrs. Anduso, FBI special agent is a witness and asked to identify her badge and then the badge is admitted as evidence – is there an objection?
  - 1. May not object if all the ground work is laid to get it in, but also may object on relevance.
- iv. Does the definition of relevant evidence help or hurt the Smith case?
- v. Does the definition of relevant evidence help or hurt the Badge Example?
- vi. The suspects house is searched and a green ski mask is found. The Prosecution moves to admit the ski mask into evidence – Do they get it in?
  - 1. Not relevant if the bank robber was not wearing a green ski-mask.
  - 2. What if the robber was wearing a white ski mask and both a green and white were found in the search?
  - 3. Maybe they couldn't admit the green one but would admit the white.
  - 4. What if 3 white ski masks were found?
  - 5. Maybe admit all 3 – but only admit the white ones –the other colors are irrelevant.
  - 6. What if money, a demand note and map of WDC were all found?
  - 7. 1,000 was stolen and 487 was found but the serial #s didn't match up.
  - 8. Map was not marked up
  - 9. Demand note said “act natural”
  - 10. The court admits the evidence and the jury has to weigh the relevance.
  - 11. All the items could probably have been admitted as rule 401 is generally construed very liberally.
  - 12. Every piece of evidence does not have to be incriminating
  - 13. The note doesn't have to be identified, the money doesn't have to have all the serial numbers so long as all have a tendency to make more or less probable (Rule 401) – Evidence is treated as a brick building a wall. No one piece represents the whole wall.
  - 14. What if a witness testified that John Smith said “I am going to hit a home run today” What if the statement was followed by a wink?

- a. It may be allowed in order to show mood, attitude, state of mind, etc. (This would vary from court-to-court and judge-to-judge)
  - 15. All evidentiary matters are appealable – so long as they are objected to.
  - 16. What if a friend of the ≅ from childhood testifies that as kids they always played cops and robbers and the ≅ always wanted to be the robber.
    - a. This is probably not admissible
- d. **Knapp v. State** (pg. 71)
  - i. Knapp was accused of killing the sheriff under the belief that the officer had killed someone else during an arrest. ≅ said he didn't know where he heard it.
  - ii. The prosecution wanted to prove that the Marshall didn't kill the 1<sup>st</sup> guy but that he died from senility and alcoholism.
  - iii. The court bases judgment on what ≅ believed not what actually happened.
  - iv. Should the prosecutor be allowed to admit this?
    - 1. It may have a tendency to prove or disprove.
  - v. The court in this case indicates that if even a slight inference can be made, then the court should admit the evidence of a collateral fact. Therefore, the fact that the cop didn't kill anyone would come in.
- e. **Sherrod v. Berry** (pg. 72)
  - i. The officer shot a passenger thinking that the passenger went for a weapon – even though he didn't have one. The trial judge allowed in the info but the 7<sup>th</sup> Circ court overturned it on the grounds that what the officer thought was all that was relevant.
  - ii. Should the court allow the evidence that there were in fact no weapons? Why do they want to admit it?
  - iii. Are the two above cases at odds with each other? Are they in conflict?
  - iv. They are comparable even though they have different holdings.

### C. Probative Value v. Prejudicial Effect

- a. **Rule 403**
  - i. *has to be a significant difference between prejudicial and probative value.*
  - ii. **Rule 403- Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.**
  - iii. *Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by*

*considerations of undue delay, waste of time, or needless presentation of cumulative evidence.*

- iv. Unfair prejudice within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, and emotional one.
- v. In considering whether to exclude on grounds of unfair prejudice availability of other means of proof may be an appropriate factor.

b. **Old Chief v. US** (pg. 73)

- i. Old Chief served a year for a crime. Once released he was charged with a gun violation (felons cannot have guns)
- ii. ≅ feared that 1988 case would prejudice the jury in a later '93 case. The prosecutor refused to stipulate not to mention the previous case and Old chief was convicted.
- iii. 9<sup>th</sup> circuit court of appeals upheld the trial court.
- iv. The S.C. went to the legislative history of 18 USC and determined that the jury could know that he was convicted but didn't have to know why.
  - v. Was the previous crime relevant?
  - vi. Why did the government want to introduce the earlier crime?
  - vii. Gov't had to show the guy was a felon to because it was an element of the case.
- viii. How did the government want to prove this?
  - 1. Showing prior conviction.
- ix. Why would this prosecution not stipulate to what shouldn't be allowed.
  - 1. Because they wanted to bring in the conviction.
- x. Why did the ≅ want to stipulate.
  - 1. Because it would end the issue.
- xi. The prosecution has to prove all elements beyond a reasonable doubt. (It is presumed that a jury will follow the judges instructions.)
- xii. The ≅ does not want a jury to hear the statement even if they are told to disregard it because the damage is done. (Hard to disregard what you already heard.)
- xiii. What elements did the prosecution have to prove in this state?
- xiv. That the ≅ was a felon
- xv. He possessed a firearm
- xvi. His activity was in or affected interstate commerce
- xvii. This element can be proved by showing the gun traveled in interstate commerce.
- xviii. What if ≅ stipulated to the elements above – what can the prosecution do?
- xix. The prosecution may feel slighted in that actually presenting the evidence will have more affect than simply stipulating won't have.

- xx. What is the difference b/w the required stipulation and that of possession or interstate commerce?
- xxi. Prejudicial evidence of that not stipulated is not too prejudicial.
- xxii. Government did have to stipulate to the evidence
- xxiii. What determines prejudicial evidence? What is the test?

c. **Ballou v. Henri Studios, Inc.** (pg. 83)

- i. **Facts:** Ballou was killed in a collision between his vehicle and a truck driven by an employee for Henri Studios, Inc. (≅). His survivors, the Ballous ( ), sued, claiming the death was caused by ≅'s employee's negligence. Before trial, s moved for exclusion of any evidence that Jesse was intoxicated when the collision occurred. A blood alcohol test performed on the deceased gave a result of .24. The judge held a hearing on the motion at which s produced a nurse who had removed stitches from Jesse's hand shortly before the collision. She testified that Jesse did not have alcohol on his breath and was not intoxicated. The judge granted the motion to exclude because the test results lacked credibility and would be too prejudicial. won a judgment after trial and ≅ appeals.
- ii. **Issue:** May a judge exlude evidence under Federal Rule 403 because he finds the evidence is not credible?
- iii. **Held:** No. Judgment reversed.
  - 1. Federal Rule 403 permits exclusion of relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. A trial court's ruling under Federal Rule 403 may be overturned only upon a showing of abuse of discretion.
  - 2. The trial court made a credibility choice between the test results and the nurse's testimony. This was a mistake because the probative value to be considered under Fedral Rule 403 is the probative value with respect to a material fact if the evidence is believed, not the degree the court finds it believable. The jury's role is to assess the credibility of the evidence.
  - 3. Proof of Jesse's intoxication is highly relevant to the issue of his contributory negligence. Although the results of the test may be prejudicial, it was not "unfair": it did not have an undue tendency to suggest a decision on an improper basis.
  - 4. The court chose to believe one piece of evidence over another which is for the jury not the judge. The court simply believed one over another – the nurse over the blood test.

d. **Hypothesis #1 (pg. 86):**

- Even though X stipulated, the intoxication is relevant
- Is there an argument that both aren't relevant?
  - The  $\cong$  already admitted liability so, they may object on grounds of relevancy.
  - Drunkenness may be relevant based on law – i.e.- in VA can collect punitive damages for drunk driving. Once you stipulate liability, with the exception of damages, the intoxication and the thrower 80 ft, may not be admissible.
  - The actual objection may be a waste of time and therefore not admissible.

**Hypothesis #3 (pg. 86):**

- Argument for relevancy is that the police are retaliating against a false arrest charge.
- Under R 401 – if a piece of evidence makes a fact more or less probable, than it is relevant. Is that right? – if the rule is applied liberally as it is supposed to be.
- Does there need to be a tie?
- R 403 if proffered evidence can confuse the jury, then it should be excluded.
- If the  $\cong$  being charged w/ selling drugs. The more links and information allowed, the greater the risk we run of confusing the jury (confusing issues if you admit a bunch of stuff about a possible frame up.)

**Rule 401: Definition of Relevant Evidence**

*“Relevant Evidence” means 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*

**Class Hypo:**

- Bank teller says they are positive that the robber was 5’10” – then there is all kinds of evidence as to the suspect being 5’6” – can all that get in? (6 witnesses – mom, brother, girlfriend, etc.)
  - Probably not because of a huge needless waste of time under rule 403.

e. Relevance (Part II)

- i. Relevance generally means “is the evidence relevant to proving or disproving one of the elements of the case?”
- ii. Under Rule 401, if any evidence can prove or disprove an element, it is relevant.
- iii. R 403, deals with relevant evidence – it says that evidence may be relevant but will still be excluded because it is prejudicial, cumulative, or a waste of time.

f. **Hypothesis 4 (pg. 87):**

- i. Could the testimony be irrelevant?
- ii. Pro-Relevance Not Relevant
  - Bolsters  $\cong$ 's testimony
  - Has a tendency to support alibi.

Rule 401 is loose and might allow the testimony. Many courts would look at this as a weight vs admissibility issue where the court allows it and the jury decides how much weight to give it.

- g. Hypothesis 5 (pg. 87)
 

<u>Pro-Relevance</u>	<u>Not Relevant</u>
- If used as an admission	- No – because it is being used to make himself look better – does not prove or disprove either way.
- If intent is an element, then the information is relevant in that he may have thought he was authorized – but later realized he was not, thus returning the money.	

**D. BURDEN OF PROOF:**

- a. In civil and criminal matters, we assign burdens of proof to prove a case. I.e. – persuasion always rests with the  $\cong$  in a civil matter, and the government/prosecution in criminal cases. Someone has to have the burden to persuade the trier of facts regarding the matter.
- b. The burden of persuasion:
  - i. Criminal Case – Beyond a reasonable doubt
  - ii. Civil Case – Preponderance of the evidence
- c. In order to persuade, you will need to show evidence. From this comes the burden of production
  - i. If you do not show evidence in a civil case there may be a directed verdict.
  - ii. May also do in a criminal case. (Cannot direct a guilty verdict.)
  - iii. In a criminal case, the  $\cong$  can usually only have production burden with certain defenses. In fact, they do not have to do anything. If  $\cong$  does argue a certain theory before the government – they will have to produce some evidence.
  - iv. In a civil suit, sometimes production burden jumps back and forth
    - 1. **Example:** Americans With Disability Act Case:  $\cong$ , who brings a discrimination suit, needs to show they are a member of a protected class, qualified for the job, that they applied for the job, and that someone else not in the

protective category got the job. Once the plaintiff shows these 4 factors, the burden switches to the defense to show a legitimate non-discriminatory reason for why the other person got the job. Then if the defense comes up with a legitimate defense the burden again switches to the plaintiff to show that their defense is invalid.

d. **Smith v. Rapid Transit** (pg. 741)

- i. **Facts:** Smith (P) sued Rapid Transit, Inc. (D) for personal injuries from negligent operation of a bus allegedly owned by D. D was run off the road into a parked car by a “great big bus” on Main Street at 1:00a.m. D operated a bus on Main Street pursuant to a certificate of authority at about that time. Another bus operated in the city, but not on Main Street. The trial court directed a verdict for D at the close of P’s evidence. P appeals.
- ii. **Issue:** May a plaintiff make a prima facie case when one of the basic facts (here, the ownership of the bus) is a matter of conjecture? (Whether there was evidence for the jury that the plaintiff was injured by a bus of the D that was operated by one of the employees in the course of his employment.)
- iii. **Held:** No. Judgment affirmed.
  1. The fact the D’s bus line schedule would place a bus operated by D’s driver at the accident scene did not preclude any other bus from hitting P.
  2. It is not enough that mathematically the chances somewhat favor a proposition to be proved. A proposition is proved by a preponderance of the evidence if it is more likely or probable than not. In other words, the fact finder must actually believe it, despite any lingering doubts.
  3. Here, the only “proof” is that perhaps the mathematical chances somewhat favor P’s contention that D’s bus caused the accident. That is not enough.
- iv. **Class Notes:**
  1. Plaintiff had burden of persuasion and production.
  2. Ct held that the plaintiff did not meet production requirement.
  3. The evidence seemed to be over 51% and met the requisite 51%.
  4. Why don’t we let this go to the jury?
  5. If any bus could have done it, are we setting the bar too high?
  6. Would it make a difference if the plaintiff was indigent and lacked many resources? In that case, would the judge be more inclined to let it get to the jury?

e. **Presumption:** If a jury finds certain facts are proven, then they can presume something happened.

- i. There are two kinds of presumption:

1. Rebuttable Presumption
  2. If A and B → Shall find C
- ii. Rebuttable
1. If A and B → Maybe C but jury can rebut.

f. **Leginne v. Dann** (pg. 753)

- i. **Facts:** Legille ( s), patent applications, sued Dann (≅), the Commissioner of Patents, to obtain US rights for their foreign patents. The filing in the US must be made within 12 months of a foreign filing date. The patents were mailed on March 1, 1973, but not received by the patent office until March 8, 1973, which was two days after the 12 month period from the date of foreign filing. s relied on a presumption that when they proved that the mail was properly addressed, stamped, and deposited, it is presumed that delivery has occurred within the normal two day period. ≅ demonstrated that its normal procedure provided for stamping the incoming mail on the date it was in fact received, which also raised a presumption that, in fact, the mail was received on the date it was stamped. The trial court ruled that the positive presumption that the mail was delivered timely by the post office was stronger than the presumption that it was regularly handled by the patent office and stamped the proper date. The trial court entered summary judgment for s and ≅ appeals.
- ii. **Issue:** May a court permit a presumption to stand when evidence contrary to the presumption is admitted?
- iii. **Held:** No. Judgment reversed.
  1. Presumptions are not evidence. They disappear in the sunshine of actual facts.
  2. A presumption does not remain viable in the face of antithetical evidence.
  3. When an opponent offers evidence to the contrary sufficient to satisfy the judge's request for some evidence, the presumption disappears as a rule of law, and the case is in the jury's hands free from any rule or presumption.
  4. This rule has been referred to as the "bursting bubble." Even if nobody believes the evidence admitted to rebut the presumption, its receipt is sufficient to kill any inference raised by the presumption.
- iv. **Class Notes:**
  1. 1<sup>st</sup> presumption → when something is mailed it will get there in due time.

2. 2<sup>nd</sup> presumption → When patent office gets a package, it gets a time stamp.
3. 3 of 4 packages were late.
4. When there are two conflicting presumptions – the presumptions burst and they cannot be read into jury instructions which may sometimes deal w/ presumptions.
5. Why did the district court reach this result?
  - a. Maybe the court tried to do what it thought was right.

v. **Atkinson v. Hall** (pg. 760)

1. **Facts:** Hall (≅) dated Atkinson ( ) for about a year, during which time they engaged in sexual intercourse. They did not see each other after early October because ≅ was in jail. visited ≅ there and told him she was going to marry Marshall and was pregnant with Marshall's child. ≅ did marry Marshall, the baby was given Marshall's name, and Marshall was listed as the father on the birth certificate. A few months after the baby was born and Marshall were divorced. Marshall paid only one support payment. sued ≅ for child support, claiming that the baby was ≅'s and that she had told ≅ she was pregnant with ≅'s child when she visited him in the jail. By the time of trial the child was 15 years old. submitted blood tests that showed a 98.27% probability of ≅'s paternity. No tests of Marshall's blood were submitted. Disregarding the competing presumptions regarding blood tests and legitimacy, the judge instructed the jury that had the burden of proving ≅'s paternity by a preponderance of the evidence. The jury found for ≅, and appeals.
2. **Issue:** When one competing presumption is not clearly founded on weightier considerations of policy and logic than another, should both presumptions be disregarded?
3. **Held:** Yes. Judgment affirmed.
  - a. State law provides that when a blood test shows a 97% or higher probability of paternity, the alleged father is presumed to be the father and the presumption may be rebutted only by clear and convincing evidence. However, Maine Rule of Evidence 302 provides that whenever a child is born to a married woman, the party asserting the illegitimacy of the child has the burden of proof and persuasion beyond a reasonable doubt. These two presumptions conflict in this case.
  - b. Maine Rule of Evidence 301(c) provides that if two conflicting presumptions arise, the court must apply the presumption that is founded on the weightier

considerations of policy and logic. In this case, the logic of the blood test is weightier than the logic of presuming legitimacy from the mere fact of marriage, but the policy behind the latter presumption is more significant than the policy behind the blood test presumption. The legitimacy presumption also requires a higher standard of proof for rebuttal.

- c. because the blood test presumption is not founded on weightier considerations than the legitimacy presumption, the court did not err in requiring to prove her case under the ordinary civil standard of a preponderance of the evidence, and probably should have instructed the jury on the presumption of legitimacy.
- d. **Comment:** The court noted that Maine did not adopt a provision of the Uniform Act on Paternity that provided that a child born out of wedlock includes a child born to a married woman by a man other than her husband. This raised a question whether the paternity statute even permitted an action to establish that the father of a child born during marriage is someone other than its mother's husband, but the parties did not address the issue.
- e. **Class Notes:**
  - i. Presumption – a child conceived during a marriage presumed to be the husband's.
  - ii. There was a conflicting presumption w/ a blood test that another person was the father.
  - iii. The court did not instruct the jury on either one and simply said the jury needs to be convinced beyond a preponderance.

vi. **People v. Roder** (pg. 763)

- 1. **Facts:** Roder ≅ was a coproprietor of a secondhand store. A complainant told the police that several items stolen from her home were in ≅'s store. The police searched the store and found 60 stolen items. ≅ was tried for receiving stolen property. The jury could agree only that a used clarinet had been stolen. The owner of the clarinet testified that he had described it to ≅ and other secondhand store owners when it was stolen, but he had never heard back from ≅. ≅ testified that he did not purchase the clarinet, that it was already part of the store inventory when he first saw it, that he could not remember speaking with owner, and that he did not know that the clarinet was stolen property. In accordance with a state statute, the court instructed the jury that if ≅ was a

secondhand merchandise dealer, and bought or received stolen property under suspicious circumstances but did not make a reasonable inquiry about the seller's legal right to sell it, then they should presume that he knew it was stolen unless they had a reasonable doubt that he knew. The court later explained to the jury that they should presume that  $\cong$  knew the property was stolen unless  $\cong$  raised a reasonable doubt that he knew.  $\cong$  was convicted.  $\cong$  appeals, claiming the presumption of guilty knowledge was unconstitutional.

2. **Issue:** May the law require a jury to presume guilt based on specific facts unless the defense produces evidence to raise a reasonable doubt?
3. **Held:** No. Judgment reversed
  - a. In *Ulster County Court v. Allen*, the Court held that although presumptions may be used in criminal cases, they must not undermine the fact finders responsibility at trial, based on the States evidence, to find the ultimate facts beyond a reasonable doubt.
  - b. permissive presumption or inference does not place a burden on the defense. It merely allows the fact finder to infer the elemental fact from proof by the prosecutor of the basic facts. Such presumptions can be used in criminal cases.
  - c. A mandatory presumption, however, does place a burden on the defense, because it limits the jury's freedom to assess the evidence and requires the defense to come forward with rebuttal evidence to raise a reasonable doubt. Mandatory presumptions are unconstitutional because they shift the burden of proof to the defendant.
  - d. In assuming the constitutionality of a presumption in a criminal case, the nature of the presumption must be ascertained. The statute on which the judge's instruction was based creates a mandatory presumption because it requires the jury to assume the element of guilty knowledge if the basic facts are proved. The instruction as given was not quite so strongly worded, but it was sufficiently ambiguous that the jury may have concluded that the prosecution did not have to prove guilty knowledge beyond a reasonable doubt.
  - e. It is reasonable and feasible to transform the statutory rebuttable presumption into a permissible inference. The statute should be so construed in the future.
4. Class Notes:

- a. Roder and colleagues ran a thrift store and got accused of receiving stolen property.
- b. The trial court judge describes a rebuttable presumption. This is a problem because the burden shifts from the prosecution to the defendant who now has to raise a reasonable doubt. (This is a problem because the  $\cong$  does not have to do anything.)
- c. Is there something in a criminal case short of a presumption?
- d. We would call them inferences, falls short of presumption.
- e. Inferences can be read into jury instruction; i.e. – you may infer, but don't have to, that since the  $\cong$  fled from the police that he may have had a guilty mind (fight instruction)

#### E. HEARSAY

- a. **HEARSAY** (pg. 88)
  - i. When you cross-examine someone you may do it to supplement a witness testimony. Other times you might challenge the witnesses perception of events.
  - ii. Maybe we could let anyone testify about anything and let the jury weigh it. But sometimes we let people testify to what other people said.
  - iii. We do not want to allow a hearsay statement into evidence if it is not reliable.
- b. What is Hearsay
  - i. **Rule 801(c): “Hearsay” is a statement, other than one made by the declarant while testifying at trial or hearing, offered in evidence to prove the truth of the matter asserted.**
  - ii. Something has to qualify as hearsay before one can consider the exceptions found in Rules 803 and 804.
- c. To qualify as hearsay, you need:
  - i. A statement
    1. Oral
    2. Written
    3. Non-verbal conduct
- d. **State v. English** (pg. 90)
  - i. **NATURE OF THE CASE:** This is an appeal of a second-degree murder conviction.
  - ii. **FACTS:** Locke was arrested for the murder of English's (D) wife. Locke confessed and gave the police details about the house, the murder, and the condition of the body. Locke was arrested and later released. Subsequently, D was charged with the murder. At his trial, all evidence regarding Locke's confession was excluded. D appeals the conviction.

- iii. **ISSUE:** Is the voluntary confession of a third party competent evidence in behalf of a defendant?
- iv. **RULE OF LAW:** The voluntary confession of a third party is not competent evidence in behalf of a third party.
- v. **HOLDING AND DECISION:** (Brogden, J.) Is the voluntary confession of a third party competent evidence in behalf of a defendant? No. Such a confession is mere hearsay, since it is not spoken on oath, and may not be admitted. D's exceptions are not sustained, as there was no error in excluding the evidence.
- vi. **LEGAL ANALYSIS:** At the time this case was decided, authority as to the admissibility of a confession of a third party to the same crime for which the defendant was being tried was split. The court notes that the majority of states would exclude the evidence. In a case such as this, a minority of states would admit the description of the house, since it was being offered as circumstantial evidence of the fact that the declarant had been in the house, rather than being probative of the appearance of the house.

vii. **Class Notes:**

1. English was convicted of murder. He asserted evidence that Locke made statements to cops which were relevant, that he committed murder.
2. He appealed on grounds that statements were kept out as hearsay.
3. Are Locke's statements relevant? – Yes, relevance is a broad term.
4. The court relies on precedent and does not allow the statement.
5. The appeals court agrees with the trial court.
6. What are Locke's statements at issue?
  - a. Locke confessed
  - b. Accurately described the crime scene and the death
  - c. Accurately described the condition of the body.
7. Do these statements qualify as hearsay?
8. How can we get these statements out of hearsay?
  - a. We could admit it to show that there are other suspects out there, not to show that he killed her. (This seems to get around the "truth of the matter asserted") Not introducing for the truth but to show that somebody else was in the house.

e. **Estate of Murdock** (pg. 96)

- i. **NATURE OF THE CASE:** This case involves a will contest.
- ii. **FACTS:** Arthur and Sarah Murdock, husband and wife, each had children from previous marriages. Arthur executed a will in which he left his entire estate to Sarah, if she should survive him. If

Sarah predeceased him, his entire estate was to go to his children from his previous marriage. Sarah executed a will with a similar provision with respect to her children. The Murdocks later died in a plane crash. Whether the estate went to Sarah's children or Arthur's children thus depends on which of the spouses died first (the jurisdiction had not adopted the Uniform Simultaneous Death Act). A deputy sheriff testified that upon his arrival at the scene, Sarah was already dead. He also wished to testify that at about the same time, he heard Arthur whisper, "I'm still alive." The trial judge excluded this testimony as hearsay.

- iii. **ISSUE:** Is a decedent's statement that he is still alive at the scene of an accident, offered to prove the fact that he was still alive at the time he made it, properly excluded as hearsay?
  - iv. **RULE OF LAW:** A decedent's statement that he is still alive at the scene of an accident is not hearsay, and is not properly excludable as such.
  - v. **HOLDING AND DECISION:** Is a decedent's statement that he is still alive at the scene of an accident, offered to prove the fact that he was still alive at the time he made it, properly excluded as hearsay? No. In essence, the hearsay rule precludes reliance on the credibility of an out-of-court declarant. It precludes the admission of statements when offered to prove the truth of the substance of the statement. Here, the probative value of the statement does not rely on the memory, perception, or credibility of the declarant. Its probative value lies in the fact that, if the declarant was able to speak, he must have been alive at the time he made the statement. The statement should have been admitted, and the judgment is reversed.
  - vi. **LEGAL ANALYSIS:** A statement is considered hearsay when it is uttered out of court, and offered to prove the truth of the matter asserted therein. An out-of-court statement may also be considered hearsay when its probative value depends on the credibility of the person who made it.
- f. **Hypo:** During a child custody hearing, a mom wants to put on a witness who will say the kid said "dad tried to kill me." The dad's lawyer objects to this statement as hearsay. Is there a way the statement could get in?
- i. If the mother tried to show that dad tried to kill the kid then it would be considered hearsay, but if its to show that Jr. is scared of dad, then it may not be hearsay.
  - ii. What if the statement was "Dad tried to kill me and then went to his friend Tim McVeighs house – Does it get in?"
  - iii. Again, maybe it would be hearsay if admitting it for proof.
    1. Rule 403 is always hovering, even if a statement is not hearsay – 403 still applies to the evidence.

2. The court may excise out what is unfairly prejudicial – i.e. – may replace Tim McVeigh with a “friends” house.
  3. **Rule 403 – Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time: Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.**
- g. **Hypo:** In a medical malpractice suit, the plaintiff puts someone in the operating room on the stand who testified she heard a nurse say “ the sponge count came out wrong” Is this hearsay?
- i. How could this be introduced in a non-hearsay fashion?
    1. To show that the Dr. should have been aware the there is a problem.
- h. **Subramaniam v. Public Prosecutor** (pg. 97)
- i. **NATURE OF THE CASE:** This is an appeal from a conviction for unlawful possession of ammunition.
  - ii. **FACTS:** Subramaniam (D) was wounded by security forces. They searched him and discovered 20 rounds of ammunition on him. He was tried on a charge of being in possession of ammunition without lawful authority. His defense was that he had been captured by terrorists and was acting under duress. At trial, D attempted to present evidence of certain things the terrorists had said to him. The trial judge ruled the statements inadmissible. D was convicted and appealed.
  - iii. **ISSUE:** Where a statement is offered to establish the fact that it was made, and not the truth of the matter contained in it, is the statement hearsay?
  - iv. **RULE OF LAW:** A statement which is offered not to establish the truth of the statement, but to establish the fact that it was made is not hearsay.
  - v. **HOLDING AND DECISION:** Where a statement is offered to establish the fact that it was made, and not the truth of the matter contained in it, is the statement hearsay? No. In this case, the statements were offered to establish the fact that D was acting under duress, and to establish D's state of mind. The truth of the statements is irrelevant: their probative value lies in the fact that they were made, and the effect they had on D. Therefore, the statements should have been admitted.
  - vi. **LEGAL ANALYSIS:** This is the state of mind exception to the hearsay rule. There are so many exceptions to the hearsay rule that some commentators honestly and rightfully believe that there is no hearsay rule.

- i. **Vinyard v. Vinyard Funeral Home, Inc.** (pg. 98)
  - i. **NATURE OF THE CASE:** This was a personal injury action. Appealed.
  - ii. **FACTS:** Mrs. Vinyard (P) slipped and fell in the parking lot of her father-in-law's funeral home (D) while the parking lot was wet. In an effort to prove that D knew that the parking lot got slippery when it was wet, P attempted to introduce evidence that people had complained to D about the condition of the parking lot.
  - iii. **ISSUE:** Are statements which are offered to prove the knowledge of the person to whom they are made considered hearsay?
  - iv. **RULE OF LAW:** A statement offered to prove the knowledge of the person to whom the statement was made is not hearsay.
  - v. **HOLDING AND DECISION:** (Clemens, Commissioner) Are statements which are offered to prove the knowledge of the person to whom they are made considered hearsay? No. The statements in this case were not offered to prove that the lot was slick, but the D knew that it was slick. *Regardless of the truth or falsity of a statement, where the fact that it has been made is relevant, the hearsay rule does not apply, but the statement may be shown.* The statements in this case were properly admitted.
  - vi. **LEGAL ANALYSIS:** Once again another example of a hearsay exception.
  - vii. **Class Note:**
    1. ≅'s objected to statements because the statements were what the officer and employee heard. The court held the statements would be allowed in because the statements went to show knowledge of complaints not proof of slickness.
    2. The ≅ complained of the statements because they did not want the intent of the statement to be confused.
    3. ≅ argued that was trying to admit these statements as to the truth of what actually happened - was merely introducing that ≅ knew that there "was a problem"
    4. If it was used to show the truth of the matter then it would be hearsay.
    5. Why is notice a valid argument in a negligence case?
      - a. Because duty is an element and if they knew or should have known there was a problem it is relevant.
      - b. The s tried to show the ≅s knew about a problem and did nothing about it.
      - c. A question is not evidence but an answer "is" evidence.

- j. **Johnson v. Misericordia Community Hospital** (pg. 99)
- i. **NATURE OF THE CASE:** This was a negligence action. Appealed.
  - ii. **FACTS:** Johnson (P) sued Misericordia Community Hospital (D) for negligently hiring Dr. Salinsky and allowing him to perform surgery on P's hip. P sought to introduce records and testimony regarding the refusal of other hospitals to allow Dr. Salinsky on staff. The trial court allowed the evidence over D's objection. D appeals.
  - iii. **ISSUE:** Are records and testimony regarding a doctor's professional credentials, introduced to show that a hospital should have been aware of the doctor's incompetence, inadmissible hearsay?
  - iv. **RULE OF LAW:** Records and testimony regarding a doctor's professional credentials, when offered to show that a hospital should have been aware of the doctor's incompetence, are not hearsay.
  - v. **HOLDING AND DECISION:** Are records and testimony regarding a doctor's professional credentials, introduced to show that a hospital should have been aware of the doctor's incompetence, inadmissible hearsay? No. The evidence at issue in this case was introduced not to establish the truth of the opinions contained in the records, but to show that such opinions regarding Dr. Salinsky did exist, had been acted upon at other hospitals in the area, and were available to D when it made its decision to hire Dr. Salinsky. The evidence is therefore admissible. If D suspected that the evidence was being used for an improper purpose, they could have requested a limiting instruction.
  - vi. **LEGAL ANALYSIS:** As the foregoing cases illustrate, statements which are offered to prove a party's state of mind or knowledge of the matter contained in the statement are not hearsay, and are admissible insofar as they are not offered to prove the truth of the substance of the statement. Where admission of the statement might have an incidental effect of tending to show the truth of the matter contained in the statement, limiting instructions regarding the proper use of the evidence are usually given to the jury. Of course such instructions are of questionable value.
  - vii. **Class Notes:**
    1. This was a negligence in hiring case.
    2. The court found evidence to be admitted not for the truth of the matter.
    3. Two kinds of evidence:
      - a. Oral



4. The     wants to introduce the statement to show that they relied upon it, not that what was said was actually true.
5. If you have language which creates or defines a legal relationship, it is not hearsay.
6. If an oral contract is made, one party cannot object on the grounds of hearsay because it could not be taken to trial – statements which create a legal relationship, they must be allowed. (for practical purposes.)

1. **UNITED STATES V. HERNANDEZ** (pg. 104)

- i. **FACTS:** Hernandez (D) was convicted of possession and distribution of cocaine. He was targeted for arrest by the DEA because he had been identified as a drug smuggler by U.S. Customs. When the agent who made the arrest testified, the prosecutor asked her how the DEA had heard of D, she stated that they had received a referral from Customs. The trial court admitted the testimony over D's objection. On appeal, the Government argued that the testimony was relevant to show the officer's state of mind.
- ii. **ISSUE:** Is testimony regarding a referral of a suspected drug smuggler from one Government agency to another hearsay?
- iii. **RULE OF LAW:** Testimony regarding the referral of a suspect from one Government agency to another is hearsay.
- iv. **HOLDING AND DECISION:** (Alvin B. Rubin, Circuit Judge) Is testimony regarding a referral of a suspected drug smuggler from one Government agency to another hearsay? Yes. Testimony regarding the referral of a suspect from one Government agency to another is hearsay. In this case, the testimony was used to prove the truth of the statement. Although the government argues that the testimony was relevant to the declarant's state of mind, this was not an issue in the case. Instead, it was introduced because it was probative of D's guilt, and is therefore inadmissible.
- v. **LEGAL ANALYSIS:** Statements which would otherwise be hearsay will be admissible if they are introduced for a purpose other than that of proving the truth of the statement. Often, such statements will be admissible if there is another legitimate purpose for introducing them. Such a purpose would be a showing of probable cause for a search warrant etc.
- vi. **CLASS NOTES:**
  1. At issue is the statement by a special agent who said “customs told us he was a drug smuggler”
  2. The trial court allowed it in, circ, court threw it out. Prosecution also used it in their closing argument.
  3. Prosecutor claims they are using it for a non-hearsay purpose which is to show why they are investigating or to

prove the state of mind of the agent. (Why they started the investigation.)

4. They should have merely admitted that they were tipped off by customs.
5. If the gov't said "we had a referral from customs" w/out saying the ≅ was know as a drug smuggler, it would probably be admissible.

m. Hypo (pg. 105) #2:

- i. Is B's statement hearsay?
- ii. Might be able to admit it not as to the truth but might argue that if a really heard this, a would not have gone to the apartment.
- iii. Not hearsay because your not showing there was a threat, but only that A was fearful and apprehensive.

n. Hypo #1 (pg. 105):

- i. X is on trial for assault w d  
80)

- i. **FACTS:** Government agents were searching Zenni's (D) premises pursuant to a valid search warrant. While conducting the search, the agents answered the telephone several times for several unidentified callers placing bets. At trial, the Government attempted to introduce evidence of the calls to show that the callers believed that the premises were used for bookmaking. This, in turn, was to be used to prove that the premises were in fact so used. D objected to the evidence as hearsay.
- ii. **ISSUE:** Are implied assertions excludable hearsay?
- iii. **RULE OF LAW:** Implied assertions are not excludable hearsay.
- iv. **HOLDING AND DECISION:** (Bertelsman, District Judge) Are implied assertions excludable hearsay? No. Implied assertions are not excludable hearsay. At common law, the hearsay rule applied only to out-of-court statements offered to prove the truth of the matter asserted. However, not all out-of-court statements were considered hearsay: statements whose significance lay in the fact that they were made, and were not being offered for the truth of the words, did not clearly fall under the hearsay rule, and treatment of such statements varied. Under the Federal Rules of Evidence, however, such statements- implied assertions- are admissible. The first reason for this is that the declarant of such assertions is communicating a belief without expressly stating it. The declarant's sincerity with respect to the belief is therefore not in question, and one of the main purposes of the hearsay rule- that of excluding statements which cannot be tested on cross-examination- does not apply. The second reason is that such statements are self-verifying: had the declarant not believed the truth of the implied assertion, he would not be performing the act which gives rise to it.

Accordingly, Comment (c) in the Advisory Committee Notes for Rule 810 states, "The effect of the definition of 'statement' is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one." The statements which the Government wishes to introduce in this case are not assertions. Rather, they are properly classified as nonassertive verbal conduct from which the declarant's belief may be inferred. The hearsay rule therefore does not apply, and the statements may be admitted.

- v. **LEGAL ANALYSIS:** The statements at issue in this case are admissible because they are not being offered directly to prove the truth of what they contain. The declarants are not making direct assertions: their statements can be characterized as a type of conduct which they are engaged in because they believed that the matter which the Government seeks to prove is true. Their conduct rests upon an implied assumption of the truth of what the government is trying to prove. Even in cases such as these, there is a danger that the declarant is not sincere, but such a danger is not sufficient to justify exclusion of the statements.
- vi. **The bettors who were placing their bets were not intending to make a factual statement about whether the premises were to be used for betting, so their words were not an "assertion."**
- vii. **CLASS NOTES:**
  1. The court ultimately admits the statements.
  2. Facts: while executing a search, cops answered calls of people wanting to place bets.
  3. We are concerned about "assertion" because it is listed in 801.
  4. An assertion is when one says, does, or writes something w/the expectation it will be accepted as the truth.
  5. When prosecution offers these statements into evidence, does the asserters think they are asserting anything?
  6. Probably not, they are just stating what they heard, not whether what was heard was true.
  7. Why did the government want to use the statement?
  8. To show the place was used for betting.
  9. Hearsay theory state if an assertion is not used for the truth of the matter, then influences, bias, and truthfulness are not a matter of concern.
  10. The phone calls were directives (not statements or assertions.)

p. **Hypo (Cook):**

- i. Bank teller on stand says a person before the robber asked for the time. – Is that hearsay?
- ii. Probably not hearsay
- iii. It's a question, so probably not asserting anything.
- iv. ≅ came to teller station pointed a gun, handed a note and ran to the door before leaving said, yabadabadoo? Is that hearsay?
- v. ≅ goes to teller and coughs, is this hearsay?
- vi. No, it is not an assertion.
- vii. We are not having class because I am going to see the Ravens at the Superbowl.
- viii. Yes, this is an assertion.
- ix. Same hypo as above, but with the redskins.
- x. Probably not an assertion because “everyone” knows that the redskins are not going to the superbowl. Not concerned with its veracity because it is so preposterous.
- xi. The test for whether or not a statement is an assertion is what the declarant hopes or expects will be believed.

q. **Silver v. New York Central Railroad** (pg. 115)

- i. **FACTS:** Silver (P) was a passenger on a train. During the trip, her car was detached and left in the yard to await connection to the next train going to her destination. The temperature in the car went down, and P, who suffered from a circulatory disease, got sick. P sued the railroad company. At trial, the train's porter was allowed to testify to the temperature of the car, but was not permitted to testify that none of the other passengers complained about it being too cold. The testimony regarding the other passengers was offered as evidence that, because nobody else complained, it could be inferred that the car was not too cold. D appeals.
- ii. **ISSUE:** Is evidence regarding the absence of complaints subject to exclusion under the hearsay rule?
- iii. **RULE OF LAW:** Evidence regarding the absence of complaints is not subject to exclusion under the hearsay rule.
- iv. **HOLDING AND DECISION:** (Wilkins, J.) Is evidence regarding the absence of complaints subject to exclusion under the hearsay rule? No. Evidence regarding the absence of complaints is not subject to exclusion under the hearsay rule. In this case, testimony by the porter regarding the absence of complaints from other passengers is admissible provided that it can be established that it was part of the porter's job to receive such complaints, and that the other passengers had the opportunity to complain. In such a case, a clear inference may be drawn from the absence of complaints that the car was not too cold. D's exceptions are sustained.

- v. **LEGAL ANALYSIS:** Where nonassertive conduct is introduced despite the hearsay rule, the party seeking to introduce the evidence must lay a foundation for it such that the inference to be drawn may be clearly made.
- vi. **Class Notes:**
  1. Porter testified that the temperature was fine and no one else complained of the temperature which was objected to.
  2. Were passengers asserting to the temperature by not saying anything?
  3. According to Cook, the people on the train were not asserting the temperature of the train one way or another.

r. **United States v. Jaramillo-Suarez** (pg. 117) (1991)

- i. **FACTS:** Government agents found a ledger sheet for drug transactions in an apartment frequented by Suarez (D). The ledger was introduced as evidence against him at trial. D appeals his conviction, arguing that the ledger was inadmissible hearsay.
- ii. **ISSUE:** Does the hearsay rule bar admission of documents as circumstantial evidence of the character and use of the place where they are found?
- iii. **RULE OF LAW:** Drug-related documents may properly be admitted to prove the character and use of the place where they are found.
- iv. **HOLDING AND DECISION:** (Canby, Circuit Judge) Does the hearsay rule bar admission of documents as circumstantial evidence of the character and use of the place where they are found? No. Drug-related documents may properly be admitted to prove the character and use of the place where they are found. Although drug ledgers may not be used to prove the truth of their contents, they are also probative of whether the place where they were found was being used for drug activity. In this case, this was the Government's purpose in introducing the ledgers, and the trial court properly admitted the evidence with a limiting instruction regarding this purpose.
- v. **LEGAL ANALYSIS:** This case is an example of the application of the hearsay rule to documentary evidence. It also illustrates the fact that the same piece of evidence may be inadmissible hearsay if introduced for one purpose, but admissible for other purposes. Where this is the case, as the opinion notes, the trial court should give a limiting instruction to the jury to avoid misuse of the evidence. Of course the limitation instructions make all these types of hearsay rulings a farse.
- vi. **Class Notes:**
  1. The prosecution claimed they were admitting the ledger to show business transactions occur out of this place.
  2. The document is asserting what it says.

- s. **United States v. Rhodes** (pg. 119) (1958)
- i. **FACTS:** Rhodes (D) was accused of espionage and two of D's alleged coconspirators were Col Rudolph Ivanovich Abel and Lt. Col. Reino Hayhanen of the Soviet Secret Police. The evidence showed that Abel had transmitted to Hayhanen written information about D whose code name was Quebec. The information was hidden in a hollowed out bolt and found in the home of Hayhanen in Peekskill, New York. The information found was offered as evidence during D's court martial and D objected to on grounds of hearsay.
  - ii. **ISSUE:** Should the evidence presented be admitted at trial?
  - iii. **RULE OF LAW:** No rule of law was given.
  - iv. **HOLDING AND DECISION:** No holding was given.
  - v. **LEGAL ANALYSIS:** The truth of the matter asserted is that D was involved in espionage. The evidence shows evidence of such a crime. This case is an example of the application of the hearsay rule to documentary evidence. Espionage-related documents may properly be admitted to prove the character and use of the place where they are found. Although this document may not be used to prove the truth of its contents, it is probative of whether the place where they were found was being used for espionage activity. It looks like D may have been involved with the GRU which is a lot more ruthless and more powerful than the KGB. However, testimony based on the out-of-court statements of third parties is not admissible under the hearsay rule. In this case, the information which the FBI obtained may be admitted but with limiting instructions as to the purpose for which it is being used.
  - vi. **Class Notes:**
    1. One Colonel sent another a document regarding a spy (who was on trial)
    2. How would the  $\cong$  argue that this is hearsay?
    3. The document speaks to the matter asserted.
    4. The prosecution argues that it only goes to show that the Russians are very interested. (May excise out some things to beat prejudice.).
- t. **UNITED STATES V. BROWN** (pg. 121) (1977)
- i. **NATURE OF THE CASE:** This was a criminal prosecution for counseling, procuring and advising the preparation and presentation of fraudulent and false Income Tax Returns. Appealed.
  - ii. **FACTS:** Brown (D) was charged with preparing false Income Tax returns. The Government's evidence included the testimony of IRS agent Peacock that between 90 and 95% of the returns prepared by D which Peacock audited contained overstated itemized

deductions. The testimony was offered for the sole purpose of proving the willfulness of D's actions. It was apparent, however, that Peacock's belief that D's actions were willful could not have been based solely on the returns themselves. The record indicates that she arrived at that belief through conversations with taxpayers on whose behalf the returns were prepared.

- iii. **ISSUE:** Is testimony which is based on the out-of-court statements of others inadmissible under the hearsay rule?
- iv. **RULE OF LAW:** Testimony based on the out-of-court statements of third parties is not admissible under the hearsay rule.
- v. **HOLDING AND DECISION:** (John R. Brown, Chief Judge) Is testimony which is based on the out-of-court statements of others inadmissible under the hearsay rule? Yes. Testimony based on the out-of-court statements of third parties is not admissible under the hearsay rule. In this case, the information which Peacock obtained as a result of her interviews with the taxpayers is essential to her conclusion that D fraudulently prepared the returns. Without the opportunity to hear cross-examination of the taxpayers in court, the jury had no way to assess the credibility of Peacock's testimony. It is therefore covered under the hearsay rule, and may not be admitted. D's conviction is reversed and the case is remanded for a new trial.
- vi. **DISSENT:** (Gee, Circuit Judge) Peacock's testimony is clearly not hearsay, since it was based on things she knew firsthand from auditing returns prepared by D. The majority is not able to identify any particular statements made to Peacock which amount to hearsay.
- vii. **THE DISSENT WAS PROBABLY CORRECT IN THAT THE AUDITOR DIDN'T RELY ON 3<sup>RD</sup> PARTY STATEMENTS.**
- viii. **LEGAL ANALYSIS:** This case addresses situations where a person's testimony in court is based on statements made by third parties who are not available for cross-examination. Here, the court found that the evidence was excludable under the hearsay rule, rather than allowing the jury to assess the credibility of the witness' testimony.

## **F. HEARSAY EXCEPTIONS**

### **a. Dying Declaration: Rule 804(b)(2)**

#### **i. Soles v. State (pg. 137)**

1. **Facts:** Soles (D) was convicted for manslaughter. During the trial, the following statement was admitted as a dying declaration by the victim: "Oh Daddy! Carl Soles shot me with a .22 rifle. I have got to die." The trial judge had determined that the statement was made with consciousness of impending death in order to admit the

statement. However, D requested that the jury be instructed that should they find from the evidence that the statement admitted as a dying declaration was made “without consciousness on the part of the deceased of impending death,” then the jury should not consider it as a dying declaration. The trial court refused to give the instruction and D appeals, claiming the failure to give the instruction was prejudicial error.

2. **Issue:** May the jury be instructed to decide if a statement offered as a dying declaration was actually made with consciousness of impending death?
3. **Held:** No, it is for the trial judge alone to make this preliminary determination. The jury decides only the weight to be given the evidence after it is admitted. In other words, the court determines admissibility, and the jury determines credibility.
4. **Rationale:** The rationale for this exception is more religious and psychological than it is legal – it stems from the belief that “the dying declarant, knowing that he is about to die, would be unwilling to go to his maker with a lie on his lips.”
5. **Class Notes:**
  - a. A dying declaration has to concern the cause or circumstances of surrounding the potential impending death.
  - b. The statement must be made with the belief of impending death, although the declarant does not have to die.
  - c. Can only use dying declaration in a homicide case or a civil action.
  - d. The declarant has to be unavailable at the time of trial, but not necessarily dead.

b. **Excited Utterance – 803 (2)**

i. **Truck Insurance Exchange v. Michling** (pg. 148)

1. **Facts:** Mrs. Michling (Plaintiff) brought suit for death benefits under the state workers’ compensation act. P’s evidence consists of P’s testimony that her husband left for work in good health. When he returned home that afternoon, he stumbled and caught himself, and when he came into the house he said that his head hurt badly. He was batting his eyes and was very pale. He told P that he had hit his head on the iron bar across the seat of the bulldozer he operated. He told P his head hurt so badly that he couldn’t do anything else but come home. He died a month later. P prevailed at trial and upon the first appeal. Truck Insurance Exchange (D) appeals.

2. **Issue:** May a statement concerning a traumatic injury, made by an out-of-court declarant on the same day that the declarant suffered the injury but some time after the incident occurred, be admitted as evidence to prove the source of the injury.
3. **Held:** No. A statement made within the res gestae of a significant experience may be admitted as an exception to the hearsay rule. This exception is based on the idea that an utterance made under the immediate and uncontrolled domination of the senses, and before reasoned reflection is possible, should be considered trustworthy. Of course, there must be some startling occurrence that makes the utterance spontaneous and unreflecting.
4. Before an excited utterance can be used as an exception to the hearsay rule, there must be independent evidence of the occurrence of the incident that gave rise to the utterance.
5. **Under 803(2), the declaration or the excited utterance need not explain or refer to the startling event. It is sufficient that the utterance is one relating to a startling event or condition.** However, state courts are split on this issue.
6. **Class Notes:**
  - a. It is theoretically possible that a hearsay statement can be enough proof that the event occurred.
  - b. In order to be admissible, the statement must relate to the startling event.

c. **Present Sense Impression: 803(1)**

i. **Booth v. State** (pg. 150)

1. **Facts:** Harrison telephoned Ross, who related that he was getting ready to prepare his dinner and was going to ask Brenda, his guest, to leave. Over the phone, Harrison heard
- 2.
- 3.
4. acts against a defect in memory and precludes formulation of deliberate or conscious misrepresentation. The
5. ~~Nebraska is not a federal rule of evidence jurisdiction, the present state impression exception under the 803(a) defines the exception as applying to a "statement describing or explaining an event or condition made while~~

the declarant was perceiving the event or condition, or immediately thereafter.”

6. The exception applies only to statements made within a short time interval after observation. Under any given circumstances, there must not be sufficient time for reflective thought before speaking. There must also be evidence that the declarant spoke from personal knowledge. In some cases, the content of the statement itself may suffice to demonstrate that it is more likely than not the product of personal perception; in other cases, extrinsic evidence may be necessary. The statement may include opinions of the observer.
7. Nothing in the federal rules requires corroboration by an independent and equally percipient observer. The states are divided on the issue. The federal approach is the better one. In certain cases, however, extrinsic evidence may be needed to show that the statement was contemporaneous or that the declarant had a personal perception of the event.
8. In this case, the sounds Harison heard in the background sufficed to show that Ross was describing contemporaneous events he was personally witnessing. The statements were properly admitted ad evidence.

ii. **Lira v. Albert Einstein Medical Center** (pg. 158)(1989)

1. **Facts:** Lira (P) sued the Albert Einstein Medical Center (D) for medical malpractice in inserting a nasogastric tube into P’s throat. During the trial, P’s husband testified that when he and P, complaining of a sore throat and difficulty breathing, visited Silberman, a throat specialist not employed by D, Silberman looked in P’s throat and asked, “Who’s the butcher who did this!” D objected, but the judge overruled the objection. P’s counsel used the statement in closing argument, and the court sustained D’s objection at that time. After a verdict for P, the trial court awarded D a new trial on the ground that Silberman’s statement had been erroneously admitted. P appeals.
2. **Issue:** May a non-testifying physician’s statement of surprise at a patient’s medical condition be admitted as an excited utterance or present sense impression exception to the hearsay rule?
3. **Held:** No. Judgment Affirmed
  - a. P used Silberman’s out-of-court statement to prove the truth of the matter asserted, that P had been butchered. It was clearly hearsay.
  - b. P claims the statement was an excited utterance, but this exception applies to a spontaneous declaration

by someone affected by an overpowering emotion triggered by an unexpected and shocking event. Silberman, a throat specialist, could not be shocked in this sense by the abnormal condition of a patient's throat.

- c. The present sense impression exception requires spontaneity, as the reflex product of immediate sensual impressions. Silberman's expression was one of opinion based on his medical training and experience, not a spontaneous reaction.
- d. The hearsay rule bars testimony such as Silberman's, but there is a separate prohibition on expressions of medical opinion unless the declaring physician is available for cross examination.

4. **Class Notes:**

- a. Cooke does not think that this fits with in the present sense impression because it is not describing an event or the situation.

5. **Rule: 803(1) – Present Sense Impression - A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.**

iii. **State v. Jones** (pg. 160)

1. **Facts:** Jones (D), a state trooper, stopped a car because the license plate light was burned out. He spoke with the female complainant who was driving and her male passenger, Hooks. The complainant alleged that D had her enter his cruiser, where he handcuffed her and sexually assaulted her. She protested, D released her, and she went back to her car and told Hooks to get D's license plate number. Hooks noticed that the complainant's belt buckle was loose and her jeans were unzipped. D drove off with his lights, and Hooks chased him but did not catch up. They stopped at the first emergency phone and reported the incident to the police. At D's trial for sexual assault, D testified that the complainant entered his cruiser while he was writing a warning ticket and became upset when he told her that Hooks would have to drive because she had an out-of-state learner's permit. He gave the complainant a warning ticket and followed their car into traffic before passing it, his lights on at all times. A separate trooper testified that he overheard a CB radio transmission between two speakers to the effect that a "Smokey Bear" was driving fast with no lights on and a little car was trying to catch up with him. This testimony was admitted over D's

objection under the present sense impression exception. D was convicted of sexual assault. The court of special appeals reversed for lack of corroborative witnesses and evidence sufficient to show relevance. The court of appeals granted certiorari.

2. **Issue:** May contemporaneous statements of present sense impression by unknown declarants be admitted as evidence?
3. **Held:** Yes. Judgment reversed.
  - a. The trooper who testified about the CB conversation related the statements themselves at an evidentiary hearing, but when the jury was present, he summarized the statements in his own language in terms that raised questions about their spontaneity. However, D's counsel did not object to the different language and therefore did not preserve this variance in testimony as an issue.
  - b. To come in under an exception to the hearsay rule, a statement of present sense impression must be essentially contemporaneous with the event it describes. The reliability of the statement is presumed from the fact of spontaneity, meaning the time interval between observation and utterance is too short to permit reflective thought. The statements in this case, "Look at Smokey Bear southbound with no lights on at a high rate of speed," and "Look at that little car trying to catch up with him," are self-evidently contemporaneous.
  - c. The declarant must speak from personal knowledge, which the unknown speakers in this case did as evidenced by their statements. D also claims that the identity of the declarant is critical. While such extrinsic evidence may be required in some cases to establish that he or she was a percipient witness, the declarant's identity need not be proved when the statement itself, or other circumstantial evidence, demonstrates the percipiency of the declarant.
  - d. Corroboration may be required, depending on the circumstances, and may consist of statements by an equally percipient witness or by circumstantial evidence. D claims the corroboration is necessary to support the truthfulness of the witness instead of the original declarant. The contemporaneous requirement protects against the possibility of fabrication by unknown declarants, and the

witness's oath protects against the possibility that the witness is not truthful.

4. **Class Notes:**

- a. Big difference between **present sense impression** and **excited utterance** – excited utterance is not as limited in time frame. A person can be in shock a longer amount of time and make an excited utterance.
- b. The key thing w/ present sense impressions is not that the identity of the declarant is known, but that the declarant saw or was subject to the occurrence as it happened.

d. **Admissions – 801(d)(2)**

i. **Reed v. McCord 160 N.Y. 330 (Ct. App. 1899) (p.165)**

1. Case involved a negligence action to recover damages for wrongful death. Issue was whether  $\Delta$ 's statements made to the coroner regarding the circumstances and the cause of the action were properly admitted. The official stenographer for the board of coroner testified as to the  $\Delta$ 's statements. Though the statements were clearly presented as hearsay, the court admitted the  $\Delta$ 's statements as "plain admissions of facts and circumstances which attended the intestate's injury."
2. **RULE:** In a civil action, the admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, and to whomsoever made.
3. **RATIONALE:** the theory is that it is highly improbable that a party will admit or state anything against himself or against his own interest unless it is true.
4. **Class Notes:**
5. Rule 801 – admissions are not hearsay and can come in for the truth of the matter.

ii. **United States v. Hoosier, (U.S. Ct. App. 1976) (p.167)**

1. Appellant was convicted by a jury on one count of armed robbery. One witness testified that he had been with the  $\Delta$  before and after the bank robbery and that  $\Delta$  told him he was going to rob the bank. The witness also testified that three weeks after the bank robbery he saw the  $\Delta$  with money and diamond rings and that the  $\Delta$ 's girlfriend said in the  $\Delta$ 's presence and referring to the  $\Delta$ 's affluence, "that ain't nothing, you should have seen the money we had in

the hotel room” and further spoke of “sacks of money.” Δ challenged admission of these statements as hearsay, but the court ruled they were admissible under the admissions exception, because the appellant did not deny his girlfriends statement, and because, “probable human behavior would have been for the appellant to promptly deny his girlfriends statement if it had not been true.”

2. RULE: presence and silence of Δ, combined with surrounding circumstances = admission.
3. **FRE 801(d)(2)(B)**
  - a. (2) Admission by a party-opponent. The statement is offered against a party and is \*\*\*
  - b. B) a statement of which he has manifested his adoption or belief in its truth ...
4. Advisory Committee notes (B): Under established principles an admission may be made by adopting or acquiescing in the statement of another. . . . Adopting or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that a person would, under the circumstances, protest the statement made in his presence if untrue. The decision in each case calls for an evaluation of probable human behavior.”
5. Note: this applies to both civil and criminal cases, but careful attention must be paid to criminal cases (e.g. Δ remains silent where officer has previously told him “anything you say can and will be used against you in a court of law”).
6. **NOTE: 801(d)(2)(A)** (p.975)
  - a. For an admission to work, the statement has to be offered by an OPPOSING PARTY. It doesn’t matter if the statement is harmful or not.

iii. **Mahlandt v. Wild Canid Survival and Research Center, Inc.**  
**(8<sup>th</sup> Cir. 1978) (p.175)**

1. Case involved a civil action for damages arising out of an alleged attack by a wolf on a child. On appeal, the issue relates to exclusion of three conclusory statements, two of which were made by the Δ, and one of which was in the form of a statement appearing in the records of the board meeting of the corporate defendant.
2. The first was a post-it note from an employee (Mr. Poos) of the Δ to the President of the corporate Δ (Mr. Sexton) that Poos had pinned to Sexton’s door, “Owen, would you call me at home ... [the wolf] bit a child that came into our back yard. All has been taken care of. I need to convey what happened to you.”

3. Later statement of Mr. Poos to Mr. Sexton that the wolf “had bit a child” that day .
  4. Minutes of a meeting of the Directors, at which Mr. Poos was not present, state that there was a “great deal of discussion . . . about the legal aspects of the incident of [the wolf] biting the child.”
  5. The court ruled that under FRE 801(d)(2)(D) #1 and #2 are NOT HEARSAY and ARE ADMISSIBLE against Mr. Poos, since the note and the statement are Mr, Poos’ own statements of which he had “manifested his **adoption** or belief in [their] truth.” The note is also admissible against the Corp. b/c **Poos was acting as an agent** and within the scope of his employment.
  6. The third statement is NOT ADMISSIBLE against Mr. Poos, b/c he was not present at the Board meeting. However, the minutes ARE ADMISSIBLE against the corporate Δ.
  7. The court also found no grounds to exclude the statements based on Rule 403.
  8. **NOTE: \*\*\*No personal knowledge necessary for an admission.**
- iv. **Big Mack Trucking Co., Inc. v. Dickerson (1973) (p.179)**
1. Wrongful death action in which Dickerson’s estate seeks damages. Dickerson was crushed between two trucks when another party’s (Leday) unattended truck rolled forward striking Dickerson’s trailer. A jury found that Leday was acting within the scope of his employment at the time of the accident and that Leday was guilty of two acts of negligence. The Texas Supreme court reversed finding no derivative liability and that Leday’s statements regarding brake trouble he’d been having were not vicarious admissions since the statements would not have been authorized by Leday’s employer.
  2. NOTE: Cook noted that this case was decided before the federal rules were enacted and said that this case would have had a different result under the Federal Rule 801(d)(2)(D), because Leday was operating within the scope of his employment with Big Mack.
- v. **Sabel v. Mead Johnson & Co. (1990) (p. 183)**
1. Sabel, a user of an antidepressant medication manufactured by the Δ, brought an action claiming that the medication caused him to develop priapism. One of the issues was whether a tape of a meeting convened by the manufacturer and attended by outside medical experts, was admissible when offered by the π against the Δ under FRE 801(d)(2).

The court did not admit statements made by outside experts, only Mead Johnson employees. In looking to the **agency** relationship, the court identified 3 essential characteristics: 1) the power of the principal to alter the legal relationships between the principal and 3<sup>rd</sup> parties and the principal and himself; 2) the existence of a fiduciary relationship toward the principal with respect to matters within the scope of the agency; 3) the right of the principal to control the agent's conduct with respect to matters within the scope of the agency. The outside experts were not agents of the company.

vi. **United States v. Goldberg (1997) (p. 186)**

1. Conspirators were indicted for federal fraud and tax offense
2. Can stat

ch they owned. Two statements are at issue on appeal. The first was testified to by Meyer, a patron of one of the clubs. It concerned a curtain which had been put up in the patio area of one of the clubs. Meyer testified that Pixley had said that the curtain was ridiculous and "just asking for trouble with the police." The second statement was introduced by Doerr's half-brother, who testified that Doerr essentially said, "I can't believe you don't know what's going on." The statements were admitted at trial under the co-conspirator exception to the hearsay rule. D appealed, arguing that the statements were not made "in furtherance of the conspiracy," as required by the exception. Therefore, while they may have been admissible against Pixley and Doerr, they could not be used against any of the other defendants.

2. ISSUE: Are descriptions of illegal activities made by a declarant "in furtherance" of a conspiracy such that they are admissible as admissions against not only the declarant himself, but also his co-conspirators?
3. RULE OF LAW: Narrative descriptions, mere "idle chatter," and superfluous casual conversations are not statements "in furtherance" of a conspiracy.
4. HOLDING AND DECISION: (Ripple, Circuit Judge) Are descriptions of illegal activities made by a declarant "in furtherance" of a conspiracy such that they are admissible as admissions against not only the declarant himself, but also his co-conspirators? No. Narrative descriptions, mere "idle chatter," and superfluous casual conversations are not statements "in furtherance" of a conspiracy. A co-conspirator's statement is in furtherance of the conspiracy when the statement is part of the information flow between

conspirators and is intended to help each perform his role. Such statements can take many forms, including those made to recruit potential conspirators. The "in furtherance" requirement is satisfied as long as there is some reasonable basis for concluding that the statement furthered the conspiracy. On appeal, the trial court's determination on the issue is reviewed on a clearly erroneous standard. The statements in this case were not made in furtherance of the conspiracy, since neither of them can accurately be characterized as either attempts to induce someone to join the conspiracy, as the government argues in the case of Meyer's testimony; or as part of the normal information flow between conspirators, as is argued in the case of Doerr's half-brother's testimony. Although the court finds that the statements should not have been admitted, it also finds that the error was harmless.

5. LEGAL ANALYSIS: Rule 801(d)(2)(E) of the Federal Rules of Evidence excepts a statement if it is "offered against a party and is...a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." This rule, along with authorized statements made by an employee concerning a matter within the scope of employment, is a variation of the rule regarding admissions by a party opponent.

viii. **BOURJAILY V. UNITED STATES** (pg. 190)

1. NATURE OF THE CASE: This was an appeal of a conviction for a conspiracy to distribute cocaine.
2. FACTS: A United States Government (P) informant identified Bourjaily (D) as a person interested in dealing cocaine. D was charged with conspiracy to distribute cocaine, in violation of 21 U.S.C. sec 846. P attempted to introduce the informant's statements about D, using the co-conspiracy hearsay exemption. D objected, claiming that the court must look at evidence independent of this statement to prove that there was a conspiracy. The court overruled the objection, allowing the statement to be admitted as evidence. D was convicted. The court of appeals affirmed, and the Supreme Court granted review.
3. ISSUE: Can a court consider a statement proof of the existence of a conspiracy and have this statement admitted under the coconspirator exemption?
4. RULE OF LAW: A court can consider a statement as proof of the existence of a conspiracy and can decide to admit it under the coconspirator exemption.

5. **HOLDING AND DECISION:** (Rehnquist, C.J.) Can a court consider a statement proof of the existence of a conspiracy and have this statement admitted under the coconspirator exemption? Yes. A court can consider a statement as proof of the existence of a conspiracy and can decide to admit it under the coconspirator exemption. Existence of a conspiracy, and the satisfaction of the other factual requirements, is decided by the judge. If he finds that these requirements are supported by a preponderance of the evidence, he can admit the statement. This is to be determined by the court. The mere fact that the statement was made during a conspiracy by a member is often sufficient evidence of reliability to justify its inclusion into evidence. Federal Rule of Evidence 104 (a) states that a court, in making a preliminary factual determination on an evidentiary issue, is not bound by evidentiary rules except as to privilege. This Rule reversed a prior rule. D argued that these Rules did not specifically overrule the prior law, so the prior rule should still be acceptable. However, an Act of Congress can overrule prior law without explicitly doing so. Under this Rule, a court may look at a hearsay statement in deciding whether an exemption or exception applies. Affirmed.
6. **CONCURRENCE:** (Stevens, J.) For a hearsay exemption to apply, there also needs to be corroborating evidence that is independent of the statement.
7. **LEGAL ANALYSIS:** This case stated that a trial judge can consider a statement as one of the factors in determining whether or not a conspiracy existed. However, the situation where this statement is the only evidence of the conspiracy was not decided by the Court.

e. **Former Testimony (Rule 804)**

- i. **Under Rule 804(b)(1), in order to introduce former testimony from a hearing or deposition, the declarant must have been available for cross examination and the examiner must have had the similar motive to develop the testimony by direct, cross, or redirect examination. However, in civil cases, it suffices that a predecessor in interest to the adverse party now had chance and motive.**

ii. **TRAVELERS FIRE INSURANCE CO. V. WRIGHT** (pg. 195)

1. **NATURE OF THE CASE:** This was an action to recover under an insurance policy. Appealed.
2. **FACTS:** The Wrights (P) brought this action to recover under two fire insurance policies. Travelers (D) defended

on the ground that the fires had been deliberately set with intent to defraud D. At trial, D called Eppler and Brown to testify as witnesses, but both invoked their constitutional privilege against self-incrimination, and refused. D then attempted to introduce certified transcripts from an earlier criminal trial where P was charged with arson. The transcripts contained testimony by both witnesses that P, with their assistance, deliberately burned the property. The trial court refused to admit the transcripts. D appeals the judgment in P's favor.

3. ISSUE: May testimony in a criminal case be used in a later civil trial when the witness is no longer available?
4. RULE OF LAW: Testimony from a criminal case can be introduced in a subsequent civil case where there is an inability to obtain the testimony of the witness; there was an opportunity to cross-examine the witness by the party against whom the testimony is sought to be used in the civil case, or by one whose motive and interest in cross-examining was the same; and there is an identity of issues.
5. HOLDING AND DECISION: (Jackson, J.) May testimony in a criminal case be used in a later civil trial when the witness is no longer available? Yes. Testimony from a criminal case can be introduced in a subsequent civil case where there is an inability to obtain the testimony of the witness; there was an opportunity to cross-examine the witness by the party against whom the testimony is sought to be used in the civil case, or by one whose motive and interest in cross-examining was the same; and there is an identity of issues. The court finds that the essential question in a situation such as this is whether there is a substantial similarity between what the witness sought to prove in the earlier trial and what is sought to be proven in the present trial. It further notes that it would be impossible to formulate a rule that would fit all situations, and states that former testimony should not be introduced where it would result in a miscarriage of justice. Based on the rule it has articulated, the court holds that it was error for the trial court to refuse to allow the testimony. It finds that it is not material that one of the plaintiffs was not a party to the criminal trial, since the plaintiff who was had the same motive and interest in cross-examining the witnesses at the criminal trial as the absent plaintiff would have had. Therefore, the rule regarding substantial identity of issues and opportunity for cross-examination is satisfied. The court notes that the issue of substantial identity of parties is

important only with regard to the parties against whom the testimony is being offered. Reversed and remanded.

6. LEGAL ANALYSIS: Although where there is substantial identity of issues in two trials, testimony from the earlier trial may be used in the second trial without regard to the hearsay rule, the fact that a similar issue has already been litigated raises other problems. The doctrine of collateral estoppel precludes relitigation of identical issues. If the doctrine applies in a given case, the evidence is not admissible, since the issue has already been decided for purposes of the later trial. There are several exceptions to the doctrine of issue preclusion. Additionally, the doctrine of mutuality of estoppel, which is being abandoned in a growing number of states, precludes the application of collateral estoppel against a person who was not a party to the original action.

iii. **UNITED STATES V. SALERNO** (pg. 201)

1. FACTS: This case involved a number of defendants who allegedly took part in criminal activities in connection with the Genovese Family in New York City. The Government alleged that the Family used its influence over labor unions and its control over the supply of concrete to rig bidding on construction projects, allocating contracts for such projects among a "club" of concrete companies. One of the alleged members of this "club" was the Cedar Park Concrete Construction Corporation. Two of Cedar Park's owners, DeMatteis and Bruno, testified before a grand jury under a grant of immunity that Cedar Park was not involved in the Club. At trial, however, the Government introduced evidence which contradicted this testimony, including tapes of intercepted conversations. In response, Salerno and the other defendants (D) subpoenaed DeMatteis and Bruno as witnesses in the hope that they would present the same evidence as they did before the grand jury. DeMatteis and Bruno invoked their Fifth Amendment privilege against self-incrimination, and refused to testify. D offered the transcripts of DeMatteis and Bruno's grand jury testimony, arguing that it fell within the former testimony exception to the hearsay rule. The District Court refused to admit the transcripts, noting that Rule 804(b)(1) permits the admission of former testimony against a party at trial only where that party had a similar motive to develop the testimony by direct,

cross, or redirect examination. The District Court found that the Government did not have a similar motive, noting that the motive of a prosecutor in questioning a witness before a grand jury is different from the motive in questioning a witness at trial. D appealed their convictions, arguing that the transcripts should have been admitted. The Court of Appeals reversed, finding that the Government's motive in examining the witnesses was irrelevant. It found that, where the Government obtains immunized testimony in a grand jury proceeding from a witness who then refuses to testify at trial, the similar motive requirement of Rule 804(b)(1) should "evaporate" in the interest of adversarial fairness.

2. ISSUE: May a criminal defendant introduce the grand jury testimony of a witness who refuses to testify at trial on Fifth Amendment grounds?
3. RULE OF LAW: A criminal defendant may not introduce the grand jury testimony of a witness who refuses to testify at trial on Fifth Amendment grounds, unless it can be shown that the Government would have a similar motive for examining the witness in both instances.
4. HOLDING AND DECISION: (Justice Thomas) May a criminal defendant introduce the grand jury testimony of a witness who refuses to testify at trial on Fifth Amendment grounds? No. A criminal defendant may not introduce the grand jury testimony of a witness who refuses to testify at trial on Fifth Amendment grounds, unless it can be shown that the Government would have a similar motive for examining the witness in both instances. The United States argues that, unless it had a similar motive for examining the witnesses, the testimony must be excluded. D argues against a literal interpretation of Rule 804(b)(1), stating that "adversarial fairness" requires that the testimony be admitted in this case. D also notes that many courts often depart from the Rules of Evidence to prevent parties from presenting only part of the truth. In this case, D argues, the United States is attempting to use the hearsay rule like a privilege to keep the testimony of DeMatteis and Bruno away from the jury. By introducing evidence at trial which contradicted the grand jury testimony, D argues that the United States waived its right to object to admission of the grand jury testimony at trial. D's arguments fail for several reasons. First, the court notes that nothing in the language of the Rule indicates

that a court may admit former testimony absent satisfaction of each of its elements. Second, the court rejects D's likening the to a testimonial privilege, and notes that even if it were accurate, it would not apply in this case, since the United States did not attempt to introduce any evidence regarding what DeMatteis and Bruno had said before the grand jury. Third, the court rejects D's argument that adversarial fairness may prohibit suppression of exculpatory evidence produced in grand jury proceedings. The case D cited in support of this proposition concerned disclosure of such evidence to the defense, and had nothing to do with the admissibility of evidence. With respect to the question of whether the United States in fact had a similar motive to examine the witnesses at trial as it did in the grand jury proceedings, the court finds that the record was not fully developed, and believes that the issue should be addressed on remand.

5. LEGAL ANALYSIS: As this case illustrates, it is not enough that the testimony which a party attempts to introduce under the prior testimony exception to the hearsay rule was given in an earlier proceeding in the same case. In addition to identity of issues, the Federal Rules require that the party against whom the testimony is being used had a similar motive in examining the witness at the earlier proceeding as he would have in the present proceeding. This motive may not be the same, depending on the nature of the proceedings, and the purpose for which the testimony was introduced in each.

iv. Hypos on pg 206 # 2, 4.

f. **Declarations against Interest (Rule 804(b)(3))**

- i. **The declarant must be unavailable, and the statement has to be so far against self-interest that a reasonable person would not make the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.**

ii. **G.M. MCKELVEY CO. V. GENERAL CASUALTY CO OF AMERICA** (pg. 207) (1957)

1. FACTS: G.M. McKelvey Co. (P) had an insurance policy with General Casualty Co. (D) which insured against losses

to employers on account of defalcations of their employees. The evidence at issue was several written confessions signed by P's employees. The confessions admitted misappropriations of P's funds and were introduced to prove the fact and amount of P's loss. D objected to the evidence as hearsay.

2. ISSUE: May a statement made by a third party which is against his own interest be admitted to evidence despite the hearsay rule?
3. RULE OF LAW: A declaration against interest made by a third party is admissible if 1) the person making such declaration is unavailable as a witness due to sickness, insanity or absence from the jurisdiction; 2) the declarant had peculiar means of knowing the facts which he stated, 3) the declaration was against his pecuniary or proprietary interest and 4) he had no probable motive to falsify the facts stated.
4. HOLDING AND DECISION: (Matthias, J.) May a statement made by a third party which is against his own interest be admitted to evidence despite the hearsay rule? Yes. A declaration against interest made by a third party is admissible if 1) the person making such declaration is unavailable as a witness due to sickness, insanity or absence from the jurisdiction; 2) the declarant had peculiar means of knowing the facts which he stated, 3) the declaration was against his pecuniary or proprietary interest and 4) he had no probable motive to falsify the facts stated. In this case, the witnesses, P's employees, were unavailable, since they were summoned and not found by the sheriff. They had peculiar means of knowing the facts which they stated, because they were the ones who, by embezzling funds, caused the loss complained of. The statements were clearly against their pecuniary interest because, by admitting to the embezzlement, they became civilly liable for the misappropriated funds. Finally, there would be no reason for the employees to falsify the facts contained in the statement, except possibly to minimize the amount. However, this issue was not raised by the parties. The statements were therefore properly admissible despite the hearsay rule, and the lower court's judgment is affirmed.
5. LEGAL ANALYSIS: Like several of the other exceptions to the hearsay rule, the reason for allowing declarations against interest stems at least in part from the belief that such statements are inherently trustworthy, and therefore the declarant need not be subjected to cross-examination.

iii. **Williamson v. US** (pg. 213)

1. D was pulled over with a lot of cocaine in his car. He told the cops that the cocaine belonged to Williamson and that he was just making a delivery – and that Williamson, who was traveling in front of him, noticed he got pulled over and left, not likely to return.
2. D was called by the prosecution to testify at Williamson’s trial, but refused to testify. Prosecution tried to use D’s prior statement, but it was not allowed because it shifted the blame and was not self-inculpatory but self-exculpatory.
3. Can only use statements directly against self-interest.

g. **State of Mind**

- i. **Rule 803(3): A statement of the declarant’s then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant’s will.**

ii. **ADKINS V. BRETT** (1920) (217)

1. **NATURE OF THE CASE:** This was an action for alienation of affection. Appealed
2. **FACTS:** Plaintiff (P) brought this action against the defendant (D) for the alienation of his wife's affections. The evidence against D included statements made to P by his wife, wherein the wife admitted that she had been seeing D, that D was able to give her a good time and D was not, and that she intended to continue seeing D. D objected to this evidence on several grounds, including hearsay. The jury found for P at trial, and D appeals.
3. **ISSUE:** In an alienation of affections action, are statements made by the plaintiff's wife regarding her feelings for the defendant inadmissible hearsay?
4. **RULE OF LAW:** A declarant's statement about her personal feelings are admissible under the "state of mind" exception to the hearsay rule.
5. **HOLDING AND DECISION:** (Olney, J.) In an alienation of affections action, are statements made by the plaintiff's wife regarding her feelings for the defendant inadmissible hearsay? No. A declarant's statement about her personal feelings are admissible under the "state of mind" exception to the hearsay rule. The court initially notes that there was

considerable corroboration regarding the relationship between D and P's wife. It also rejects D's argument that the statements are inadmissible because D was not present when they were made. Although D's presence when the statements were made would be relevant if the admissions exception were at issue here, that is not the case: as it is, the evidence is no less competent because D was not present. The court finds that the statements are admissible: when the intention, feelings or other mental state of a person at a particular time is material to the issues under trial, evidence of such person's declarations, evidence indicative of his then mental state, even though hearsay, is competent within an exception to the hearsay rule. In this case, the wife's feelings and intentions toward both P and D are material, and her statements regarding them are admissible. The court recognizes that the statements also contain information which does not go to the wife's state of mind, and which is damaging to D. However, the fact that evidence tends to prove matters for which it is incompetent does not render it inadmissible, as long as there is a legitimate purpose for introducing it. If this is the case, though, the person against whom the evidence is being offered must be adequately protected from misuse of the evidence by the jury. This can be accomplished by a jury instruction, or by striking portions of the statement. In this case, the court finds that D was not adequately protected against misuse of the statement by the jury instructions given by the trial court. The judgment is reversed.

6. LEGAL ANALYSIS: Rule 105 of the Federal Rules of Evidence provides: "when evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." The evidence in this case was admissible to show the wife's state of mind only, and not anywhere she had gone or anything she had done with the defendant.

iii. **MUTUAL LIFE INSURANCE CO. OF NEW YORK V. HILLMON** (1892) (PG. 221)

1. NATURE OF THE CASE: This was an action to recover the proceeds of two life insurance policies. Appealed.
2. FACTS: The main issue in this case was whether a body that was found was that of Hillmon's (P) husband or that of Walters. To show that the body was that of Walters, the insurance company (D) offered letters written by Walters expressing his intention to go to Colorado, where the body

was found, with P's husband. There was additional testimonial evidence which tended to show that Walters had left for Colorado. The trial court refused to admit the letters into evidence, and D appealed.

3. ISSUE: Where the whereabouts of a declarant are at issue, are letters which contain statements tending to show the declarant's intent to travel admissible under the mental state exception to the hearsay rule?
4. RULE OF LAW: Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence.
5. HOLDING AND DECISION: ( Mr. Justice Gray) Where the whereabouts of a declarant are at issue, are letters which contain statements tending to show the declarant's intent to travel admissible under the mental state exception to the hearsay rule? Yes. Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. If such statements are offered to corroborate other evidence, they are essential to the administration of justice, and are regarded as verbal acts. As such, they are competent evidence. The court compares the facts here to the situation in the case of a will. Although there are formal requirements which must be met for the instrument to be valid, if the testator's intent is not clear from the instrument, declarations regarding his intent are admissible. Since such declarations are the only way to ascertain the deceased's mental state or intentions, they are admissible as mental acts or conduct. Since the letters in this case are properly so characterized, the trial court's refusal to admit them was error. Judgment reversed.
6. LEGAL ANALYSIS: Note that the case here, as well as the court's example of the testator, involved a deceased declarant.

iv. **SHEPARD V. UNITED STATES** (pg. 224)

1. FACTS: Shepard (D) was charged with the murder by poison of his wife. Before his wife died, she asked her nurse to bring her a bottle of liquor. She claimed that she had drunk from this bottle before collapsing. She asked the nurse to test it for poison, stating "D has poisoned me." This conversation was admitted at trial, after testimony that the wife claimed she was about to die. However, at the time of the conversation, her chance of recovery was good.

A few weeks after the conversation, the wife indicated that she still hoped to recover. D was convicted, and the conviction was affirmed by the Court of Appeals. D then filed a writ of certiorari.

2. **ISSUE:** To consider a statement a dying declaration, must the declarant have spoken without hope of recovery, in the shadow of impending death?
3. **RULE OF LAW:** To consider a statement a dying declaration, the declarant must have spoken without hope of recovery, in the shadow of impending death.
4. **HOLDING AND DECISION:** (Cardozo, J.) To consider a statement a dying declaration, must the declarant have spoken without hope of recovery, in the shadow of impending death? Yes. To consider a statement a dying declaration, the declarant must have spoken without hope of recovery, in the shadow of impending death. The mere fear or belief that death will soon come is not enough. There must be support for this hopeless expectation of impending death. This impending death must be the impetus for the statement. In this case, the wife had hope for recovery, and death was not imminent when she made the statement. This is not a dying declaration because there was no showing of the declarant's consciousness of impending death, or of any abandonment of hope. Reversed and remanded.
5. **LEGAL ANALYSIS:** A very strict application of a rule indicates that such statements may not be completely trustworthy.
6. **NOTE:** **The statement was admitted in error – it is not a dying declaration, nor a state of mind.**

v. **UNITED STATES V. PHEASTER** (pg. 228)

1. **NATURE OF THE CASE:** This was a prosecution for kidnapping. Appealed.
2. **FACTS:** Larry Adell disappeared in the parking lot of a restaurant, and Inciso (D), after several failed attempts to get ransom from Larry's father, was arrested for his kidnapping. At trial, the United States attempted to offer testimony from Larry's date, who said that, shortly before he disappeared, Larry told the group of friends he was with that he was going to go out to the parking lot to meet D and get marijuana from him. The testimony tended to show that D was in the parking lot with Larry on the night of the kidnapping. D argued that this statement was inadmissible hearsay. The trial court admitted the statement, holding

that it fell under the mental state exception to the hearsay rule. D appealed.

3. ISSUE: May statements which otherwise fall under the mental state exception to the hearsay rule be admitted when they also tend to prove the whereabouts of someone other than the declarant?
4. RULE OF LAW: Statements that are admissible under the mental state exception to the hearsay rule may still be admitted even if the intention they represent also involves the actions of someone other than the declarant.
5. HOLDING AND DECISION: (Renfrew, District Judge) May statements which otherwise fall under the mental state exception to the hearsay rule be admitted when they also tend to prove the whereabouts of someone other than the declarant? Yes. Statements that are admissible under the mental state exception to the hearsay rule may still be admitted even if the intention they represent also involves the actions of someone other than the declarant. The Hillmon doctrine allows the admission of statements of a declarant's intention to do something as evidence of the fact that he actually did it. This rule, grounded in the common law, is codified in Rule 803(3) of the Federal Rules of Evidence. The court recognizes that the Notes of the House Committee on the Judiciary reflect that Committee's intent that such statements be admissible only to prove the conduct of the declarant, and not that of another person. Despite this, the court cannot find error in the District Court's decision to admit the testimony. Judgment affirmed.
6. LEGAL ANALYSIS: This case presents another example of a statement which is admissible for one purpose, i.e., proving the intent and whereabouts of the declarant, but not for another, i.e., proving the whereabouts of the defendant. Because the declarant's intent to go out to the parking lot was in issue, the statement was admissible to show that he did so.
7. Notes: **Cooke thinks this holding is wrong. He says you cannot use a statement to show the actions of anyone other than the declarant. Therefore, the statement would have to be redacted or given proper jury instructions that they not infer the third parties actions.**

**h. Medical Diagnosis or Treatment (pg. 240)**

- i. Rule 803(4): Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present**

**symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis.**

- ii. This rule has some overlap with present sense. Can also include cause of pain if that cause was important to the treatment – i.e. – a car ran over my foot, but not a red Chevrolet, driven by Mr. Donovan, ran over my foot.
- iii. A third person can speak to another person’s medical condition, but more likely to be allowed if that third person is a family member or relation.

**i. Prior Identification (This is an exemption not an exception) (pg. 243)**

- i. **Rule 801(d)(1)(c):** A statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is one of identification of a person made after perceiving the person.
- ii. Unlike prior inconsistent statement, and ID need not have been made under oath and need not have been made during a proceeding. A statement “that’s the man who robbed me” in a line up will be admissible as substantive evidence.
- iii. Rationale: ID of people made prior to trials are likely to be more accurate than ID’s made during testimony and for that reason should not be excluded from substantive use.

**iv. UNITED STATES V. OWENS (pg. 244)**

1. NATURE OF THE CASE: This was a criminal assault prosecution. Appealed.
2. FACTS: Foster, a correctional counselor at a federal prison, was attacked and beaten by one of the inmates, and received severe head injuries. When he was first interviewed by the FBI agent investigating the incident, Foster was unable to identify his attacker. At a later interview, Foster was able to describe the attack, name his attacker (D), and identify him in a photo array. At trial, Foster described the attack, testified that he remembered identifying D as his attacker during an interview with the FBI agent, and admitted that he could not remember seeing his attacker. He also admitted that the only hospital visitor he recalled having was the FBI agent, and he could not remember whether any of his other visitors might have suggested to him that D was the assailant. D's counsel unsuccessfully tried to refresh Foster's recollection with hospital records indicating that he had identified someone else as his attacker.

3. ISSUE: Does the admission of a prior, out-of-court identification of a criminal defendant violate the Confrontation Clause?
4. RULE OF LAW: A prior, out-of-court identification does not violate the Confrontation Clause.
5. HOLDING AND DECISION: (Justice Scalia) Does the admission of a prior, out-of-court identification of a criminal defendant violate the Confrontation Clause? No. A prior, out-of-court identification does not violate the Confrontation Clause. Rule 801(a)(1)(C) defines as not hearsay a prior statement of identification of a person made after perceiving the person, "if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement." The Court of Appeals found that Foster's statement did not fall within the exception because his memory loss prevented his being "subject to cross-examination concerning the statement." However, the Court of Appeals applied an incorrect standard in determining that the admission of this identification was harmless error. Rather than reverse, this court finds that Foster was in fact "available for cross-examination" as contemplated by Rule 801(a)(1)(C). Foster's memory loss does not preclude him from being deemed unavailable for purposes of this exception: the rule does not require it in express terms, and the court declines to read it into the rule. To this end, the court notes that, in at least one other rule regarding hearsay and the unavailability of witnesses, lack of memory of the subject matter of the statement is one of the circumstances under which a witness is deemed unavailable. D's argument that the creates an impermissible inconsistency between the two rules is rejected. The court also notes a general policy of preferring out-of-court identifications over in-court identifications, based on the assumption that the earlier identifications are more reliable.
6. LEGAL ANALYSIS: The identification of a criminal suspect is a form of prior out-of-court statement. Other prior statements in Rule 801 include: prior testimony which is inconsistent with present testimony and prior testimony which is consistent with present testimony, but used to rebut charges against the declarant of recent fabrication or improper influence or motive. Note first that, in these case, the declarant must be available for cross-examination. Also note that, by the terms of Rule 801, the above kinds of statements are not hearsay, rather than being exceptions to the hearsay rule.

j. **Present Recollection Refreshed:**

- i. **BAKER V. STATE (pg. 248)**
- ii. **NATURE OF THE CASE:** This is an appeal from a conviction for first-degree murder and robbery.
- iii. **FACTS:** When the police arrived at the scene of the alleged robbery at issue in this case, the victim was still alive. He describe the attack to Officer Bolton, who then took him to the hospital. While en route to the hospital, Bolton received a call from Officer Hucke, who informed him that a suspect had been picked up. Before going to the hospital, Bolton took the victim to the place where Hucke was holding the suspect. Hucke's report indicated that the victim confronted the suspect, Baker (D), and said that she was not one of his attackers. At trial, Bolton testified, and D attempted to elicit the victims reaction to her on cross-examination. To this end, D's counsel attempted to show Hucke's report to Bolton to refresh his memory. The trial court refused to allow the report, since it was not based on Bolton's personal knowledge. D appeals her conviction on the grounds that it was error for the court to refuse to allow the report.
- iv. **ISSUE:** In order to refresh the recollection of a witness, may a party introduce a document which was prepared from the personal knowledge of someone other than the witness?
- v. **RULE OF LAW:** In order to refresh the recollection of a witness, a party may introduce a document which was prepared from the personal knowledge of someone other than the witness.
- vi. **HOLDING AND DECISION:** (Moylan, J.) In order to refresh the recollection of a witness, may a party introduce a document which was prepared from the personal knowledge of someone other than the witness? Yes. In order to refresh the recollection of a witness, a party may introduce a document which was prepared from the personal knowledge of someone other than the witness. The court in this case erroneously applied the standards regarding the Past Recollection Recorded exception to the hearsay rule. It is appropriate to admit evidence under that exception when a witness does not recall a fact while he is on the stand, and the document being introduced was created or adopted by the witness at a time when he did recall the fact. By contrast, use of the Present Recollection Revived exception is appropriate when the document is being used to stimulate the memory of the witness while he is on the stand, so that he may testify to the facts contained in the document. The function of the document is different in each case, and the standards for allowing use of a document for the Present Recollection Revived exception are not as stringent as for Past

Recollection Recorded. For a document to be used to stimulate a witness' present recollection, the document may have been created by someone other than the witness. Further, it need not have been made immediately after the event, nor from the witness' firsthand knowledge. Finally, the witness need not be able to vouch for the fact that the document was accurate when it was made. The court also notes that the thing used to refresh the witness' recollection is not required to be a document. On the other hand, unlike a document used as Past Recollection Recorded, the item used to refresh the witness' present recollection is not itself evidence, although the opposing party may inspect it, and even show it to the jury. The lower court's refusal to allow use of the report to refresh Bolton's recollection was error, and the judgment is reversed.

- vii. LEGAL ANALYSIS: A document which falls under the Past Recollection Recorded exception to the hearsay rule may be admitted into evidence when the witness is unable to remember details of the event which are contained in the writing. The party seeking to introduce the writing must show 1) that the record was made or adopted by the witness at a time when the witness did have a recollection of the event, and 2) the witness can presently vouch for the fact that, when the records was made or adopted by him, he knew that it was accurate. The account of the event contained in the document is then admitted to evidence in place of the witness' testimony.
- viii. **Class Notes: Cooke says this is present recollection refreshed even though the book has it listed as past recollection recorded.**

k. **Past Recollection Recorded**

- i. **Rule 803(5):** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.
- ii. **Adams v. The New York Central Railroad Co.** (pg. 254)
  - 1. Cooke used this case to show the four requirements of the rule.

l. **Business and Public Records**

- i. **Rule 803(6):** A memorandum, report, record, or data compilation, in any form, of acts, events, condition, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of

that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

- ii. **Remember: You always need someone who is a "proper witness." I.e. – a records custodian or someone who is familiar with the records.**
- iii. **Cooke Says: Both parties, recorder and provider of information if different, must be under a business duty to provide accurate information.**
- iv. **JOHNSON V. LUTZ** (pg. 260)

1. **FACTS:** Plaintiff's (P) decedent was killed when his motorcycle collided with Defendant's (D) truck. There was conflict in the testimony regarding the circumstances of the accident, and D offered a police report which he had filed at the police station. The trial court refused to admit the report under the common law rule which excluded such reports as hearsay. However, the state legislature had recently amended the Civil Practice Act to except from the hearsay rule records prepared in the regular course of the author's business. The statute defined "business" to include business, profession, occupation or calling of any kind.
2. **ISSUE:** Is a police report based on statements of third persons who witnessed an accident admissible under the business records exception to the hearsay rule?
3. **RULE OF LAW:** Police reports based not on the knowledge of the officer, but on statements of third persons, are not admissible under the business records exception.
4. **HOLDING AND DECISION:** (Hubbs, J.) Is a police report based on statements of third persons who witnessed an accident admissible under the business records exception to the hearsay rule? No. Police reports based not on the knowledge of the officer, but on statements of third persons, are not admissible under the business records exception. As a general proposition, the court recognizes the need to allow business records in evidence to bring the hearsay rule into conformity with modern business practice. However, it finds that the report at issue here is outside the scope of the exception. The court finds that the report in this case was not made in the regular course of any

business, and that the officer who authored it was not present at the time of the accident. Rather, the report was based on the statements of persons who happened to be at the scene when the officer arrived, and does not indicate whether any of them had themselves seen the accident, or whether they were merely stating what they had heard from others who were eyewitnesses.

5. LEGAL ANALYSIS: The court observes in this case that a primary justification for excepting business records from the hearsay rule is that people regularly rely on the accuracy of such records in the course of their business, and it would be unfair to prevent them from using such records in litigation. It is unclear whether the police report in this case would have been admissible if it had been based on the officer's personal knowledge. Note the court's reference to the "hearsay within hearsay" problem as it addresses the fact that the witnesses interviewed by the officer may not have been eyewitnesses to the accident.

v. **UNITED STATES V. DUNCAN** (pg. 265)

1. NATURE OF THE CASE: This was an appeal from a conviction for mail fraud and conspiracy.
2. FACTS: The Duncans (D) and others purchased numerous hospitalization insurance policies, and on several occasions sought hospitalization for injuries which never occurred, or after staged accidents. D appeal their convictions, arguing that the trial court erroneously admitted the insurance companies' records because, among other things, they were improperly authenticated. Although the records were introduced through the testimony of the insurance companies' employees, D argues that the records contained unauthenticated medical records and hearsay statements by doctors.
3. ISSUE: Where a set of business records has been properly authenticated, must it nevertheless be excluded as hearsay because it contains other records which are not introduced into evidence through the testimony of their author?
4. RULE OF LAW: Where a set of business records has been properly authenticated, the entire set is admissible, even though it contains other records from a different source.
5. HOLDING AND DECISION: (Duhe, Circuit Judge)  
Where a set of business records has been properly authenticated, must it nevertheless be excluded as hearsay because it contains other records which are not introduced into evidence through the testimony of their author? No.  
Where a set of business records has been properly

authenticated, the entire set is admissible, even though it contains other records from a different source. There is no requirement that the witness himself be the author of the records, or that he be able to personally attest to their accuracy. The court notes that the medical records were themselves business records, and that Rule 803(6), which excepts business records from the hearsay rule, places primary emphasis on the trustworthiness of the records to be introduced, rather than on compliance with technical authentication rules. Because hospitals and insurance companies rely on medical records in conducting their business, the court finds that they are sufficiently trustworthy to be admissible under 803(6). Finally, the court notes that any medical information contained in the insurance companies' records would also be admissible under Rules 801(d)(2)(C)-(D) which also allows admission of any "statement by a person authorized by the party to make a statement concerning the subject" and any "statement by the party's agent...concerning a matter within the scope of agency." The court notes that a medical provider has implied authority from a patient to release information to the patient's insurance company to facilitate payment. All information in the insurance companies' records is therefore admissible.

6. LEGAL ANALYSIS: In order for business records to be introduced into evidence, they must be accompanied by the testimony of their author or custodian. The records having been properly authenticated, the statements contained in them are admissible even if the declarant is able to testify.

vi. **WILLIAMS V. ALEXANDER** (pg. 267)

1. FACTS: Williams (P) was hit by Alexander's (D) car as he was crossing the street with the traffic light in his favor. P claimed that D ran through the light without slowing down. D claimed that he was at a complete stop at the intersection, and had been propelled into P by another car. At trial, P introduced the portion of his hospital records which bore directly on his injuries and their treatment. D offered the remainder of the records, which was received in evidence over P's objection. At issue was an entry in the records to the effect that P had told a physician that "he was crossing the street and an automobile ran into another automobile that was at a standstill, causing this car to run into him." D argues that the records, and this statement, are admissible under the business records exception to the hearsay rule.

2. ISSUE: Are all statements contained in a hospital record admissible under the business records exception to the hearsay rule?
3. RULE OF LAW: The only items in a hospital records which fall under the business records exception to the hearsay rule are those reflecting acts, occurrences, or events that relate to diagnosis, prognosis or treatment or are otherwise helpful to an understanding of the medical or surgical aspects of the hospitalization.
4. HOLDING AND DECISION: (Fuld, Judge) Are all statements contained in a hospital record admissible under the business records exception to the hearsay rule? No. The only items in a hospital records which fall under the business records exception to the hearsay rule are those reflecting acts, occurrences, or events that relate to diagnosis, prognosis or treatment or are otherwise helpful to an understanding of the medical or surgical aspects of the hospitalization. Generally, hospital records qualify for admission as business records only to the extent that they are made in the regular course of the hospital's business. Since the business of a hospital is to diagnose and treat patients, its records regarding any acts or occurrences leading to a patient's hospitalization- including the patient's account of the accident causing the injury- are not admissible. The court recognizes that some details of the accident may be helpful to the doctor's understanding of the injury, and hence admissible. However, to the extent that such details do not serve any medical purpose, they are not admissible. In this case, the court finds that the substance of the statement serves no medical purpose, and is not admissible. The judgment is reversed.
5. DISSENT: (Desmond, Judge) The dissent would find the statement admissible as a declaration against interest. It also notes that because P introduced the bulk of the records without authenticating them through the testimony of the physician who wrote the notes, he had no grounds for objecting to the admission of the balance of the records. Further, the dissent believes that the entire records was made in the regular course of the hospital's business, and that there was no evidence indicating any motive on the part of the hospital or the physician to falsify the records.
6. LEGAL ANALYSIS: The business records exception is based both on an inference of reliability and from necessity. Reliance on the records as evidence relieves litigants from the need to identify and secure the appearance in court of all persons involved in creating the records.

vii. **Hahnemann University Hospital v. Dudnick** (pg. 276)

viii. **Palmer v. Hoffman** (pg. 273)

ix. **Lewis v. Baker** (pg. 278)

x. **Yates v. Bair** (pg. 281)

m. **Public Records Exception**

i. **Rule 803(8) – Does not require that a record keeper is called as a witness to get the document into evidence, only that the record is a certified copy.**

1. Three types of exceptions

a. 803(8)(a) – setting forth the activities of the office or agency

b. 803(8)(b) – matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or

c. 803(8)(c) – In civil actions and proceeding and against the government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

2. Have to look at the weight vs admissibility of the evidence.

3. Party adverse to the report can challenge its veracity.

4. Factual findings are not just limited to the facts but include opinions though not legal conclusions.

ii. **Beech Aircraft Corp v. Rainey** (284)

1. NATURE OF THE CASE: This was an appeal from the reversal of the denial of damages for wrongful death.

2. FACTS: Rainey's (P) decedent was killed when a Navy plane crashed. A report on the investigation concluded that the probable cause of the accident was pilot error. However, this conclusion was listed under "opinion" and not under "fact." P filed a wrongful death action against the aircraft's manufacturer, Beech Aircraft Corporation (D). At trial, the district court admitted the report under the public investigatory report hearsay exception of the Federal Rules of Evidence 803 (8)(c). The jury entered a verdict for D. The Eleventh Circuit reversed this decision, holding that only the factual findings contained in a report could be admitted under Rule 803 (8)(c), and that the admitted evidence was not a fact, but an opinion. The Supreme Court granted review.

3. ISSUE: Does the public investigatory report hearsay exception, Federal Rule 803 (8)(c), allow into evidence

conclusions and opinions contained in reports, as well as the facts?

4. **RULE OF LAW:** The public investigatory report hearsay exception, Federal Rule 803 (8)(c), allows conclusions and opinions, as well as facts, contained in reports to be entered into evidence.
5. **HOLDING AND DECISION:** (Brennan, J.) Does the public investigatory report hearsay exception, Federal Rule 803 (8)(c), allow into evidence conclusions and opinions contained in reports, as well as the facts? Yes. The public investigatory report hearsay exception, Federal Rule 803 (8)(c), allows conclusions and opinions, as well as facts, contained in reports to be entered into evidence. The Rule's language does not limit itself to mere facts; the drafters did not intend to distinguish between facts and opinions. The Rule states that reports setting forth factual findings are admissible. This seems to cover the whole report, not only parts of it. It is not easy to distinguish between facts and opinions in a report. Therefore, to draw a line between fact and opinion in Rule 803 (8)(c) would be impossible. It is easier to enforce the rule, and the policy behind the rule, by allowing the admission of the entire report into evidence. In this case, the report should have been allowed into evidence.
6. **LEGAL ANALYSIS:** This rule does not extend to allowing legal conclusions stated in reports into evidence.

iii. **United States v. Oates** (pg. 290)

1. **Rule 803(8)(b) & (c)**
2. **FACTS:** At issue in this appeal is the admission of two documents: the official report of the Customs Service chemist who analyzed the substance seized from Daniels' (D) person, and its accompanying worksheet. Weinberg, the chemist who prepared the reports, was ill and unable to testify at trial: the government had intended to call Weinberg to testify that the substance he had analyzed was heroin. Instead, the government called Harrington, another customs service chemist. Although Harrington did not know Weinberg personally, she was able to testify to the regular practices used by the customs Service chemists to identify unknown substances. When D objected to the introduction of the reports through Harrington, the government relied on the modified business records exception found in Rule 803(6).

3. ISSUE: Is a report generated by an executive agency admissible against a criminal defendant under the modified business records exception to the hearsay rule?
4. RULE OF LAW: A report which was generated by an executive agency and is not admissible against a criminal defendant under the public records exception to the hearsay rule is likewise inadmissible as a business record.
5. HOLDING AND DECISION: (Waterman, Circuit Judge)  
Is a report generated by an executive agency admissible against a criminal defendant under the modified business records exception to the hearsay rule? No. A report which was generated by an executive agency and is not admissible against a criminal defendant under the public records exception to the hearsay rule is likewise inadmissible as a business record. The reports at issue here are clearly not within the public records exception, which excludes "...in criminal cases matters observed by police officers and other law enforcement personnel." The court finds that employees of the Customs Service are law enforcement personnel for purposes of this rule, since the Customs Service has law enforcement authority in the field of narcotics trafficking. Additionally, the substance at issue in this case was in the custody of the Customs Service from the time it was seized from D until the report was prepared, and the tests were done for the specific purpose of convicting D. The government argues alternatively that the reports should be admissible under Rule 803(6), which excepts from the hearsay rule "records of regularly conducted activity." - the "modified business records exception." The court recognizes the possibility that the records here may fall within the literal terms of the 803(6) exception. It further recognizes that, ordinarily, the fact that a piece of evidence is not admissible under one exception to the hearsay rule does not preclude its admissibility under another exception. Here, however, Congress has clearly expressed its intent that reports generated by a law enforcement agency not be admissible in evidence against a criminal defendant. The court therefore finds that that only way to carry out congressional intent is to hold that such records are also inadmissible under the modified business records exception to the hearsay rule. Reversed and remanded.
6. LEGAL ANALYSIS: The court notes that, although records like the ones at issue here cannot be admitted against a criminal defendant, they may be introduced by the defendant against the government.

iv. **UNITED STATES V. GRADY** (pg 297)

1. **Rule 803(8)(b)**
2. NATURE OF THE CASE: This was an appeal from a conviction for conspiracy to violate the federal firearms law.
3. FACTS: Grady and Jankowski were convicted of conspiracy to export firearms to Northern Ireland. Jankowski, a licenses firearms dealer, made false entries in his records regarding ten rifles, which were then illegally exported by Grady. The records of an Irish police agency, which recorded the serial numbers of the rifles and accounted for their disposition, were admitted at trial for the purpose of showing that the rifles were found in Ireland on dates subsequent to their purchase. D appeal their convictions on the grounds that these reports were erroneously admitted.
4. ISSUE: Are routine records maintained by a law enforcement agency admissible against criminal defendants under the public records exception to the hearsay rule?
5. RULE OF LAW: Police records regarding routine matters are admissible against criminal defendants under the public records exception.
6. HOLDING AND DECISION: (Oakes, Circuit Judge) Are routine records maintained by a law enforcement agency admissible against criminal defendants under the public records exception to the hearsay rule? Yes. Police records regarding routine matters are admissible against criminal defendants under the public records exception. Rule 803(8)(B) excepts from the public records exception "matters observed by police officers and other law enforcement personnel." Although under this exception, the reports at issue here are technically inadmissible, the court finds that Congress' rationale behind including the exception in Rule 803(8) was to prevent prosecutors from basing their entire case on officers' reports regarding personal observations of crime. In this case, the reports did not reflect such observations, and were only a small part of the Government's entire case. The policy behind the exception does not apply and the reports are therefore admissible for the purpose for which they were introduced. Affirmed.
7. LEGAL ANALYSIS: This case carves a narrow exception to the rule that police reports are inadmissible hearsay as to criminal defendants. Where the report at issue is a routine administrative record, and is not the basis for the

government's case against the defendant, it may be admitted.

**n. MISCELANEOUS EXCEPTIONS**

- i. 803(22) – Judgment of previous conviction
  1. This exception is used when a prior conviction is an element to the crime and then only if that conviction is a felony. (does not apply to nolo contendere)
  2. The government may introduce convictions to prove an essential fact. Can only introduce a conviction of a party to the action. Civil cases can allow convictions of outside parties.
  3. Can introduce prior convictions against non-parties for the purpose of impeachment of a witness.
- ii. 803(12) – Marriage, baptismal, and similar certificates
  1. This exception includes public and non-public records (i.e. – church documents, etc.)
- iii. 803(13) – Family records
  1. This exception includes family bibles, tombstones, family tree, etc.
- iv. 803(18) – Learned Treatises.
  1. Used mainly for impeachment in cross-examination situations. I.e. – May be used to impeach a Dr.'s testimony regarding a procedure.

**G. CHARACTER, HABIT, AND CUSTOM**

- a. There are three types of character evidence:
  - i. Specific instances of Conduct
  - ii. Opinion Testimony
  - iii. Gossib (a.k.a. – Reputation)
  - iv. All three types are admissible when character is directly an issue.
- b. **Character in Issue**
  - i. Cleghorn v. New York Central & H. River Ry. Co.
  - ii. **FACTS:** Cleghorn (P) was injured in a train collision which occurred because of the negligence of the railroad's (D) switchman. At trial, P offered evidence of the switchman's intemperance. The court admitted it over D's objection. D appeals.
  - iii. **ISSUE:** Is evidence of a person's general character admissible to prove that a person acted in a manner consistent with that character at the time of a particular incident?

- iv. **RULE OF LAW:** Evidence of a person's general character is not admissible to prove that a person acted in a manner consistent with that character at the time of the incident.
- v. **HOLDING AND DECISION:** (Church, C.J.) Is evidence of a person's general character admissible to prove that a person acted in a manner consistent with that character at the time of a particular incident? No. Evidence of a person's general character is not admissible to prove that a person acted in a manner consistent with that character at the time of the incident. In this case, however, the evidence was introduced not only to prove that the switchman was drunk at the time of the accident, but also that his employer knew of his intemperate habits and should have fired him. For these purposes, the evidence was admissible. The judgment is reversed on other grounds.
- vi. **LEGAL ANALYSIS:** In this case, the plaintiff offered the evidence because it furthered his claim for punitive damages. As such, the court found that the switchman's character was in issue, and evidence regarding it could be introduced by the plaintiff.

c. **MICHELSON V. UNITED STATES** (pg. 378)

- i. Rule 404(b)
- ii. **NATURE OF THE CASE:** This was a prosecution for the bribery of a federal revenue agent.
- iii. **FACTS:** Michelson (D) claimed that he was entrapped by a federal officer. He called witnesses to testify about his good character and reputation in the community. The prosecution asked these witnesses if they were aware that D had been arrested 27 years ago. In response to direct questioning, D stated that he had been arrested 20 years ago. The judge met with the two parties before this line of questioning occurred to ensure that this was an actual event that would have resulted in some comment among acquaintances. He then instructed the jury that they should ignore the actual event and focus on the witness' opinion on D's reputation. D was convicted. He appealed, claiming that the judge should not have allowed this cross-examination.
- iv. **ISSUE:** Can the prosecution question character witnesses concerning past events or crimes which would tend to damage the defendant's reputation?
- v. **RULE OF LAW:** If a defendant raises the issue of his good character or reputation, then the prosecution can cross-examine the character witness about events and crimes from his past which could adversely affect the defendant's reputation.
- vi. **HOLDING AND DECISION:** (Jackson, J.) Can the prosecution question character witnesses concerning past events or crimes which would tend to damage the defendant's reputation? Yes. If a defendant raises the issue of his good character or reputation, then

the prosecution can cross-examine the character witness about events and crimes from his past which could adversely affect the defendant's reputation. Although this rule may be illogical and out of date, to improve it would cause a great amount of confusion and error, with no substantial gain. The prosecution cannot call these witnesses themselves, but can cross-examine any witness produced by the defendant. It is prejudicial if evidence is produced by the prosecution regarding the defendant's bad character. A witness produced by the defendant can attest to his good character if he has sufficient knowledge of it, and if he refers to his own judgment, not specific events from the past. Unrelated events are not allowed as evidence due to their lack of relevance. The issue here is of general character. Whether or not he was actually convicted of the past crimes is irrelevant, since they still serve to affect his reputation. This is illogical because it allows evidence that would not be allowed anyway, but to change this rule and disallow it would confuse the issue further.

- vii. LEGAL ANALYSIS: Rule 405 states that when character is an essential element of the offense, evidence of prior acts is allowed due to its probative value. The general rule that a witness may only testify about a defendant's reputation in the community had been changed.

d. **UNITED STATES V. CARILLO** (pg. 397)

- i. NATURE OF THE CASE: This is an appeal from a criminal conviction for distribution of heroin and cocaine.
- ii. FACTS: The evidence against Carillo (D) included the testimony of an undercover officer who claimed to have bought a narcotics-filled balloon from D. D claimed that the officer had misidentified him. To rebut, the government offered, and the trial court allowed, evidence of two other drug sales made by D. The other sales were offered as modus operandi to establish D's identity.
- iii. ISSUE: Is evidence of prior criminal conduct admissible against a criminal defendant?
- iv. RULE OF LAW: Evidence of prior criminal conduct is admissible to establish a defendant's modus operandi.
- v. HOLDING AND DECISION: (DeMoss, Circuit Judge) Is evidence of prior criminal conduct admissible against a criminal defendant? Yes. Evidence of prior criminal conduct is admissible to establish a defendant's modus operandi. **Rule 404(b)** provides that such evidence is not admissible to prove the defendant's bad character and that he acted in conformity therewith on the occasion at issue. However, it is admissible for other purposes, including the defendant's modus operandi. Admissibility of evidence under 404(b) is determined by use of a two-part test. **First**, it must be shown that the evidence is relevant to an issue other than

defendant's character. **Second**, the evidence's probative value must not be substantially outweighed by the danger of unfair prejudice. In this case, the government argues that the prior crimes were admissible to establish identity. Although modus operandi is not the only method of proving identity, it is clear that this was the method the government was using when it introduced D's prior crimes. To establish modus operandi, the other crimes must be so nearly identical in method as to earmark them as the handiwork of the accused. That standard was not met in this case. The government argues that the fact that the drugs were sold in a balloon is sufficient to establish modus operandi. However, the officer himself testified that it was very common for drugs to be sold in this manner, and he did not testify to any other distinctive features of the crimes. The court finds that the evidence did nothing more than to illustrate D's bad character, and is therefore inadmissible. Vacated and remanded.

vi. **LEGAL ANALYSIS: Under Rule 404(b), evidence of other crimes is admissible to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.**

e. **UNITED STATES V. BEASLEY** (1987)(pg. 401)

- i. **NATURE OF THE CASE:** This is an appeal from a conviction for possession of narcotics with intent to distribute.
- ii. **FACTS:** Beasley (D) was a research chemist who acquired prescriptions for narcotics from several doctors, purportedly for the purpose of conducting experiments on vegetables. The government claimed that D actually sold the drugs. D was charged with seven counts of obtaining Dilaudid with intent to distribute. The offenses for which he was charged occurred over a 10-month period in 1980 and 1981. However, the prosecution offered evidence of D's drug activity occurring between 1981 and 1984. It argued that, although some of the events occurred after the offenses charged, they were admissible under Rule 404(b) to show pattern. The court repeatedly told the jury that the purpose of the evidence was to show D's "intent". D appealed his conviction.
- iii. **ISSUE:** May evidence of a criminal defendant's bad acts be admitted under Rule 404(b) to show a pattern of conduct?
- iv. **RULE OF LAW:** Evidence of a criminal defendant's bad acts may not be admitted under Rule 404(b) to show a pattern of conduct.
- v. **HOLDING AND DECISION:** (Easterbrook, Circuit Judge) May evidence of a criminal defendant's bad acts be admitted under Rule 404(b) to show a pattern of conduct? No. Evidence of a criminal defendant's bad acts may not be admitted under Rule 404(b) to show a pattern of conduct. The court first notes that the fact that the events at issue occurred after the events leading to D's

indictment is irrelevant to the applicability of 404(b). It then notes that the term "pattern" is absent from Rule 404(b). "Pattern" refers to a series of acts that collectively identify the defendant, and is one of the ways to show identity. When such evidence is used, it must be sufficiently proximate in time to the crimes charged. The court recognizes the dispute in this case regarding introduction of evidence of events which occurred two or three years after the crimes charged in the indictment. However, it declines to rule on this, because the acts are too dissimilar for timing to become an issue. Rule 404(b) prohibits the use of prior acts to show the defendant's character, and to suggest that he acted in conformity therewith on the occasion in question. Therefore the inference to be drawn from mere "pattern" evidence is exactly that which is prohibited by the rule. Although patterns do tend to establish identity, something more is required, along the lines of the distinct similarity needed to show modus operandi. However, the record shows that the evidence was also introduced to show intent. In this case, some of the evidence at issue was relevant to show intent. This does not make it automatically admissible: the trial court had the discretion to weigh relevance against the danger of unfair prejudice, and misuse of the evidence to establish D's bad character. The court finds that the evidence regarding "shopping for doctors"; that regarding D acquiring prescriptions for drugs other than Dilaudid; and that regarding the addiction of certain persons to whom D sold the drugs was erroneously admitted. However, with respect to D's fraudulently obtaining Dilaudid, the error was harmless. The court finds that it was not harmless error with respect to the remaining counts. Reversed in part and remanded.

- vi. LEGAL ANALYSIS: As the court in this case defines it, "pattern" evidence is similar to modus operandi. However, modus operandi as evidence of identity requires that the other acts introduced (whether they occurred before or after the events giving rise to the trial) be so alike as to leave little doubt that they are the handiwork of the defendant. Without this high degree of similarity, pattern evidence calls for an impermissible inference that, because the defendant had engaged in such acts in the past, he must have done so on the occasion in question.
- vii. **TUCKER V. STATE** (pg. 412) (STATE RULE – NOT VALID UNDER FEDERAL RULE)
- viii. **HUDDLESTON V. UNITED STATES** (pg. 413) Federal Case
  - 1. NATURE OF THE CASE: This was an appeal from a conviction for the possession of stolen property.

2. **FACTS:** Huddleston (D) was charged with the possession of stolen property in interstate commerce. The allegation was that he possessed and sold Memorex videocassettes, knowing that they were stolen. The Government (P) entered evidence of "similar acts" under Rule 404 (b), which showed that D had sold a large amount of televisions recently at a very cheap price. It was assumed that this evidence was relevant as to his knowledge. D was convicted, and appealed.
3. **ISSUE:** Is "similar acts evidence" relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor?
4. **RULE OF LAW:** "Similar acts evidence" is only relevant if the jury can reasonably conclude that the act occurred and that the defendant was the actor.
5. **HOLDING AND DECISION:** (Rehnquist, C.J.) Is "similar acts evidence" relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor? Yes. "Similar acts evidence" is only relevant if the jury can reasonably conclude that the act occurred and that the defendant was the actor. Rule 404(b) protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character. An exception to this rule is if evidence is offered that affects a relevant issue. If its relevance depends upon the fulfillment of a condition of fact, then Rule 404(b) states that this condition be admitted upon introduction of evidence sufficient to support a finding of the fulfillment of the condition. The court must examine all evidence in a case to decide whether the jury could reasonably determine the conditional fact by a preponderance of the evidence. Under these facts the conditional fact to be determined was that the televisions were stolen. The jury could reasonably conclude by a preponderance of the evidence that this conditional fact was true.
6. **LEGAL ANALYSIS:** Rule 403 is a more liberal test than Rule 404.

ix. **PERRIN V. ANDERSON** (pg. 419)

1. **NATURE OF THE CASE:** This was an action for violation of civil rights. Appealed.
2. **FACTS:** Perrin's (P) decedent rear-ended another car on the highway. After determining that the occupants were unharmed, decedent left the scene and walked home. Two State Troopers, VonSchriltz and Anderson (D), went to the home. When decedent opened the door, he was behaving

erratically. VonSchriltz reached for his gun, and decedent slammed the door. The door bounced open, and decedent attacked D. VonSchriltz and D the unsuccessfully attempted to subdue decedent. Finally, D, who believed he was about to lose consciousness as a result of having been repeatedly kicked in the face and chest by decedent, drew his gun, and without warning, shot and killed decedent. At trial, the court permitted D to introduce the testimony of four State Troopers concerning previous violent encounters with decedent. The purpose of this evidence was to support D's self-defense claim by showing that decedent was the initial aggressor.

3. ISSUE: May a civil defendant introduce evidence regarding specific instances of conduct to further a claim of self-defense?
4. RULE OF LAW: A civil defendant may not introduce evidence of specific instances of conduct to further a claim of self-defense.
5. HOLDING AND DECISION: (Logan, Circuit Judge) May a civil defendant introduce evidence regarding specific instances of conduct to further a claim of self-defense? No. A civil defendant may not introduce evidence of specific instances of conduct to further a claim of self-defense. Rule 404(a), which outlines the circumstances under which character evidence is admissible to prove an individual's actions. By its terms, 404(a) applies only to criminal actions. Although this is technically a civil actions, the court finds that the self-defense claim raised here is not functionally different from a self-defense claim raised in a criminal case. Therefore, Rule 404(a) applies, and it was proper to allow D to introduce character evidence. However, use of specific instances of conduct was not permissible. Rule 405 establishes the permissible methods of introducing character evidence. Under Rule 405, specific instances are admissible only where a party's character is directly in issue. Because that was not the case here, the only proper method of introducing character evidence was by reputation or opinion testimony. In admitting this evidence, however, the court found alternatively that the evidence was admissible as evidence of habit under Rule 406. Habit evidence is not subject to the formal limitations of Rule 405, and may take the form of specific instances. The court finds that the testimony was admissible as habit, insofar that it showed that decedent consistently reacted to police officers with extreme violence. Affirmed.

6. LEGAL ANALYSIS: Although habit is similar to character, it relates to more specific tendencies of a person, and is considered more reliable for proving conduct than character. In order to establish habit, the conduct must be a specific practice which is repeated by the person over a sufficient period of time.
7. **Note: Cooke did not agree with this case.**
- x. **Rule 412: Sex offense Cases; Relevance of Alleged victim's Past Sexual Behavior or Alleged Sexual predisposition.**
  1. **Exceptions to rule 412:**
    - a. **Can introduce prior sexual relationship, if doing so to show the other person was the source of semen , hair, injuries, etc. (To show the evidence did not belong to the victim.)**
    - b. **Can introduce prior relationship b/w victim and defendant.**
    - c. **Defendant can introduce evidence of victim's relationship with others if it would violate defendant's right not to do so.**

**xi. STATE V. CASSIDY (pg. 428)**

1. NATURE OF THE CASE: This was an appeal from a rape conviction.
2. FACTS: Cassidy (D) was acquainted with the victim in this case, and the two had had sexual relations in the past. On the night of the incident, D and the victim ran into each other in a bar, and went to D's house. The victim got into bed with D, and at that point was willing to have sex with him. However, she testified that D became abusive, forced her to have sex with him, and afterwards told her that she had two seconds to get dressed and get out of the house or he would kill her. D then pushed her out of the house and threatened to kill her if she called the police. D claimed that the victim had consented to the encounter, but suddenly her whole attitude changed, and she started getting hysterical, screaming about her husband who was killed in Vietnam, and swinging at D. He then told her to put on her clothes and get out of the house. Prior to trial, D attempted to offer evidence of the victim's prior sexual conduct. The court admitted such evidence with respect to her prior conduct with D, but excluded evidence regarding an encounter with another man, during which the victim had engaged in similar conduct, i.e., "going crazy" and screaming about her husband who had been killed in

Vietnam. The evidence was handled in accordance with the state's rape shield statute. D argues that the evidence regarding the encounter with the other man was admissible to show a pattern of conduct, and that by excluding it the trial court violated his constitutional right of confrontation and to present witnesses in his own behalf.

3. ISSUE: May a rape shield statute be used to bar evidence of a rape victim's prior sexual conduct, even when such evidence is relevant?
4. RULE OF LAW: Rape shield statutes may be used to bar evidence of a victim's prior sexual conduct, even when such evidence is relevant.
5. HOLDING AND DECISION: (Borden, Judge) May a rape shield statute be used to bar evidence of a rape victim's prior sexual conduct, even when such evidence is relevant? Yes. Rape shield statutes may be used to bar evidence of a victim's prior sexual conduct, even when such evidence is relevant. Rape shield statutes were enacted to prohibit the introduction of relevant evidence against a rape victim which is also highly prejudicial. The statute reflects a policy decision that, even taking into account a defendant's constitutional rights, evidence of a victim's prior sexual conduct is to be excluded. Although the statute contains an exception for cases where the evidence is "so relevant and material to a critical issue that excluding it would violate the defendant's constitutional rights," in this case the trial court properly concluded that the exception would apply only if the victim had raised a false claim in the past. Otherwise, the incident had no bearing on the victim's encounter with D, and his constitutional rights were not violated by the exclusion. The court also observes that, even if the evidence of the prior encounter were not inadmissible because of the rape shield statute, it would be inadmissible because it is not relevant. Affirmed.
6. LEGAL ANALYSIS: Generally, rape shield statutes reflect a policy determination that, in most cases, the prejudicial effect of evidence regarding prior sexual conduct outweighs any relevance the evidence might have.

xii. **OLDEN V. KENTUCKY** (pg. 432)

1. NATURE OF THE CASE: This is an appeal from a conviction for kidnapping, rape and sodomy.
2. FACTS: Harris (D) was charged with raping Matthews. He allegedly met Matthews in a bar, induced her to go outside and get into his car, drove her to another location where he raped her, and then drove her to a dump, where he

raped her again. At Matthews' request, D then dropped her near Russell's home. Russell was D's half-brother, and Matthews had been on her way to see him when the incident occurred. At trial, D's defense was consent. Additionally, he attempted to impeach Matthews' testimony by offering evidence that, at the time of the incident, Matthews and Russell were involved in an extramarital relationship, although both were married to others. At the time of trial, each had separated from their respective spouses and were cohabiting. D argued that the evidence was necessary to establish Matthews' motive to lie to protect her relationship with Russell. The court refused to admit the testimony, finding that it could create extreme prejudice toward Matthews, since she was white and Russell was black. The court specifically found that the evidence was not barred by the state's rape shield law.

3. ISSUE: Does exclusion of evidence which does not fall under a rape shield statute on the grounds that it is highly prejudicial violate a defendant's rights under the Confrontation Clause?
4. RULE OF LAW: Exclusion of evidence which does not fall under a state's rape shield statute on the grounds that
5. it is highly prejudicial may violate a defendant's rights under the Confrontation Clause.
6. HOLDING AND DECISION: (Per Curiam) Does exclusion of evidence which does not fall under a rape shield statute on the grounds that it is highly prejudicial violate a defendant's rights under the Confrontation Clause? Yes. Exclusion of evidence which does not fall under a state's rape shield statute on the grounds that it is highly prejudicial may violate a defendant's rights under the Confrontation Clause. Where evidence meets one of three exceptions to the rape shield statute, it is not automatically admissible, but the court must weigh the value of the evidence to the defendant against the potential prejudice to the victim. In doing so, the court must give proper weight to the defendant's Sixth Amendment right to be confronted with the witnesses against him. In this case, D attempted to use the evidence at issue to impeach Matthews' testimony. The evidence was not barred by the rape shield statute, and it was relevant to Matthews' credibility. Although the court may bar such evidence on the grounds of unfair prejudice, or place limits on the defendant's attack on credibility, the reasons offered by the trial court were not sufficient to justify exclusion of the evidence. The court notes that the improper denial of a defendant's opportunity to impeach is

reviewed on a harmless-error standard, and is determined on the basis of a number of factors set out in *Delaware v. VanArsdall*. Applying these factors, the court concludes that D should have been allowed to present the evidence for the purpose of impeaching Matthews' testimony. Reversed and remanded.

7. **DISSENT:** (Justice Marshall) Justice Marshall dissents from the summary disposition of this case.
8. **LEGAL ANALYSIS:** Evidence of prior sexual conduct which does not fall under a rape shield statute is subject to the general analysis of probative value against prejudicial effect. Additionally, because this was a criminal case, the defendant's Sixth Amendment rights must be taken into account when determining admissibility.

f. **Similar Happenings**

i. **SIMON V. KENNEBUNKPORT** (pg. 441)

1. **NATURE OF THE CASE:** This was a personal injury action. Appealed.
2. **FACTS:** Simon (P) fell on a sidewalk in Kennebunkport and broke her hip. She filed a complaint against the Town of Kennebunkport (D), alleging that her injury was proximately caused by a defect in design or construction of the sidewalk. Two people who owned businesses near where P fell testified that the portion of the sidewalk was uneven, and that they had seen many people trip and fall in the same spot over the two years prior to the accident. The trial court sustained D's objection to the evidence. P appeals from a judgment in D's favor.
3. **ISSUE:** In a negligence action, is evidence regarding the occurrence of similar events to the one at issue admissible?
4. **RULE OF LAW:** In a negligence action, evidence regarding the occurrence of similar events to the one at issue is admissible.
5. **HOLDING AND DECISION:** (Glassman, Justice) In a negligence action, is evidence regarding the occurrence of similar events to the one at issue admissible? Yes. In a negligence action, evidence regarding the occurrence of similar events to the one at issue is admissible. Traditionally, such evidence was held inadmissible. Although it is relevant, it was believed to excite prejudice in the jury, and take their minds away from the point in issue. More recently, however, most courts have moved away from a rule of automatic exclusion, and allowed such evidence where the proponent can show that the other

accidents occurred under similar circumstances to those prevailing at the time of the accident in question. The new Rules of Evidence in Maine did not specifically bar the use of such evidence, so its admissibility is governed by the general provisions regarding relevant evidence. **Under these rules, all relevant evidence is admissible, unless the danger of unfair prejudice, confusion, or undue delay is disproportionate to the value of the evidence.**

To determine admissibility, the court is required to determine the relevancy of the evidence on the basis of whether there is a substantial similarity in the operative circumstances between the proffer and the case at bar, and whether the evidence is probative on a material issue in the case. He must then weigh the probative value of the evidence against the countervailing considerations discussed above. The court finds that the testimony offered by P clearly meets the standards for admissibility, and it was an abuse of discretion for the trial court to exclude it.

6. LEGAL ANALYSIS: Essentially, evidence regarding similar happenings is subject to the general rules regarding admissibility.

g. **Subsequent Happenings:**

- i. **Rule 407 – Subsequent Remedial Measures**

- ii. **4 exceptions to Rule 407**

1. **Ownership**
2. **Control**
3. **Feasibility**
4. **Impeachment**

- iii. **TUER V. MCDONALD** (pg. 448) (MD case)

1. CASE: This was a medical malpractice action.
2. FACTS: Mary Tuer (P) filed a medical malpractice action from the death of her husband Eugene at the hands of t. Joseph's Hospital. The Hospital and several doctors were joined as defendants. This action was concerned with the two cardiac surgeons, McDonald and Brawley and their professional association. The verdict went to the doctors and was affirmed by the special court of appeals. Certiorari was granted to determine if the trial court erred in excluding evidence that after Eugene's death, Ds changed the protocol regarding the administration of the drug Heparin to patients awaiting coronary bypass surgery. Prior to Eugene's surgery, he was given Atenolol, a beta blocker that reduced pressure on the heart, and Heparin, an anti-coagulant to help tabilize the angina. Eugene was taken off the Heparin three hours before surgery in order to

allow the drug to metabolize so that there would be no anticoagulant in the blood during the operation. An emergency occurred and the Drs had to deal with another patient and Eugene's operation was postponed by a few hours. Eugene's condition then deteriorated and he suffered a heart attack and despite resuscitation and seven hours in surgery, he died the next morning. After his death the Hospital changed the protocol with respect to discontinuing Heparin before an operation for patients with unstable angina. The trial court ruled under Maryland law that the evidence of subsequent remedial measures was inadmissible to prove negligence or culpable conduct.

3. ISSUE: Is evidence of subsequent remedial actions evidence that can be admitted for proof of feasibility and impeachment?
4. RULE OF LAW: Evidence of subsequent remedial actions is evidence that can be admitted for proof of feasibility and impeachment.
5. HOLDING AND DECISION: (Wilner, Justice) Is evidence of subsequent remedial actions evidence that can be admitted for proof of feasibility and impeachment? Yes. However, under these facts there was no issue of feasibility as the issue was one of professional judgment exercised by the Drs. They did not assert that the restarting of Heparin was not feasible, but that only in their view it was not advisable; therefore there was no issue of feasibility presented that would allow the evidence of subsequent remedial provisions to be admitted into evidence. As far as the use as evidence to impeach, that cannot be allowed either as at the time of the event, the measure taken was not believed to be as practical as the one employed. The Drs. made a judgment call based on knowledge and collective experience and the fact that the protocol was changed in no way suggests that they did not honestly believe that their judgment was inappropriate at the time it was taken. Affirmed.
6. LEGAL ANALYSIS: This evidence is admissible but not in a relaxed and broad interpretation of the events. Both the feasibility and impeachment issues of remedial measures is given a strict and narrow window of admissibility and certainly not in an area wherein professional judgment is honestly exercised such that there are no real obvious choices that make one determination clearly advantageous over another. On page 453 Evidence Waltz 9th Edition, there is a nice dissertation on the controversy surrounding the use of the word feasible and

how it has many definitions and different interpretations from different courts with respect to admissibility of subsequent precautions.

**h. Offers in Compromise**

**i. Rule 408 – Compromise and offers to compromise**

**ii. DAVIDSON V. PRINCE**

1. NATURE OF THE CASE: This was a personal injury action. Appealed.
2. FACTS: Prince (D) was driving a truck containing animals. He negligently overturned the truck, releasing the animals into the surrounding area. Davidson (P) was attacked and injured by a steer which had escaped from the truck. At trial, the testimony conflicted as to how close the steer was to P before it charged: D claimed it was ten feet, and offered in evidence a letter written to D wherein P estimated that the distance was ten feet. On the basis of this evidence, D argued, and the jury found that P had cornered the steer and was partly responsible for his own injuries. P moved for a new trial, claiming among other things that the trial court erred in admitting a settlement letter. The trial court concluded that, if there was error, it was harmless, and denied the motion. P appeals.
3. ISSUE: Is a statement made in a settlement letter admissible?
4. RULE OF LAW: Evidence of conduct or statements made in settlement negotiations is not admissible.
5. HOLDING AND DECISION: (Billings, Associate Presiding Judge) Is a statement made in a settlement letter inadmissible? Yes. Evidence of conduct or statements made in settlement negotiations is not admissible. Although evidence of conduct or statements made in settlement negotiations is not admissible, the rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of settlement negotiations. In this case, the letter was written by P himself, and was neither an offer to compromise, nor part of settlement negotiations. Rather, the letter was written to inform D of the facts of the case, and in fact evidences that P had no intention to compromise. It was therefore not error for the trial court to admit it.
6. LEGAL ANALYSIS: Rule 408 generally provides for the exclusion of statements made by the parties in the course of compromise negotiations. It does not exclude any fact which may be proven independently of statements made during negotiations, or statements offered to impeach a witness.

**i. Impeachment**

**i. Methods of Impeachment**

1. **Impeachment of capacity**
2. **by contradiction**
3. **by bias**
4. **by character evidence**
5. **by prior inconsistent statements**

**ii. UNITED STATES V. HOGAN (pg. 477)**

1. **NATURE OF THE CASE:** This is an appeal from a conviction for importing marijuana and conspiracy to import and possess with intent to distribute.
2. **FACTS:** The Hogan brothers (D) were indicted for importing marijuana after Carpenter, the pilot of an airplane owned by one of the brothers, was arrested in Mexico at a deserted airstrip. A pouch containing \$15,000 was found on the plane, and 6000 pounds of marijuana was found in a truck parked near the airstrip. After his arrest, Carpenter gave statements to Mexican and U.S. officials which implicated D in the conspiracy. When he returned to the U.S., Carpenter was called to give grand jury testimony in a related case pending before the same court in which D were to be tried, but before a different judge. After refusing to testify, Carpenter was given immunity, and denied that he or D were involved in a conspiracy. He also testified that the confessions he gave in Mexico were wholly fabricated and resulted from torture. He was indicted for perjury. At trial, the prosecutor announced during his opening arguments that he intended to call Carpenter, that he expected him to exculpate D, and that he intended to impeach such exculpatory testimony with the confession. D objected to Carpenter's testifying because the prosecution was calling him solely to impeach him. The testimony was admitted. D appeal their convictions.
3. **ISSUE:** May a court allow a party to call a witness for the sole purpose of impeaching that witness' testimony?
4. **RULE OF LAW:** A court may not allow a party to call a witness for the sole purpose of impeaching his testimony.
5. **HOLDING AND DECISION:** (Clark, Chief Judge) May a court allow a party to call a witness for the sole purpose of impeaching that witness' testimony? No. A court may not allow a party to call a witness for the sole purpose of impeaching his testimony. The prosecution maintains that, under Rule 607, it has a right to impeach its own witness, and that a prior inconsistent statement of the witness may be used to do so. Both contentions are correct. However, it

is well-settled that the prosecutor may not use a prior statement under the guise of impeachment where his primary purpose is to place the statement into substantive evidence. The court rejects the prosecution's argument that the evidence is independently admissible as substantive proof under the Rule 803(24) "catchall" exception to the hearsay rule, in that it has equivalent guarantees of trustworthiness. Finally, the court finds that the admission of this evidence did not constitute harmless error, and that D's convictions cannot stand without the evidence. D's convictions are reversed.

6. LEGAL ANALYSIS: In its opinion, the court recognizes the fact that evidence inadmissible for one purpose may still be admissible on other grounds. Here the evidence was inadmissible regardless of any alternative grounds offered by the prosecution, because they had already expressed their intent to use it to impeach Carpenter's testimony.

iii. **Impeachment by Contradiction:**

iv. **STATE V. OSWALT** (pg. 482)

1. NATURE OF THE CASE: This was an appeal from a robbery conviction.
2. FACTS: Oswald (D) was charged with robbery as a result of an incident which occurred on July 14 in Washington. D's defense was alibi. He presented Ardiss as a witness. Ardiss testified that D was a regular patron of his restaurant in Oregon, and that D was in the restaurant on July 14, rendering it impossible for D to have been in Washington at the time of the robbery. On cross-examination, Ardiss testified that D had been in the restaurant every day during the months surrounding the incident. To rebut this testimony, the state was allowed to present a police officer who testified that he had seen D in Washington on June 12. D objected to this testimony, arguing that his presence in Washington on June 12 was not in issue. The state argued that it was admissible to challenge the witness' credibility, and to establish D's presence in Washington preparatory to the offense.
3. ISSUE: May a witness be impeached with regard to an issue which is not being tried?
4. RULE OF LAW: A witness cannot be impeached on matters collateral to the principal issues being tried.
5. HOLDING AND DECISION: (Hamilton, Judge) May a witness be impeached with regard to an issue which is not being tried? No. A witness cannot be impeached on

matters collateral to the principal issues being tried. The purpose of this rule is to prevent confusion of issues and to prevent unfair advantage over a witness unprepared to answer concerning matters unrelated or remote to the issues at hand. The test of whether an issue is collateral is whether the fact used to impeach could have been shown in evidence for any purpose other than contradicting the witness. Here the issue was whether D was present in Washington on July 14. Therefore, his whereabouts on June 12 is irrelevant and collateral. The court rejects that state's argument that D's presence in Washington on June 12 was relevant to show his preparation for the offense, noting that no evidence of the mechanics of such preparation is on the record. Therefore, it was error to allow testimony regarding D's whereabouts on June 12. The court further finds that the error was not harmless, since it was prejudicial to the substantive rights of D. Reversed and remanded.

6. LEGAL ANALYSIS: Although a party is permitted to impeach the credibility of a witness generally, where the party rebuts specific facts asserted by the witness, those facts must be material to the issues in the case.
7. **Note: You cannot impeach on a collateral (insignificant) matter. Also, cannot introduce intrinsic evidence to impeach.**

v. **UNITED STATES V. COPELIN** (pg. 484)

1. NATURE OF THE CASE: This was a conviction for unlawful distribution of cocaine. Appealed.
2. FACTS: Copelin (D) allegedly sold two rocks of crack cocaine to an undercover police officer. At trial, he claimed that the officer had confused him with Bailey, with whom he was playing dice at the time of the sale. During D's cross-examination, he claimed that he did not see any drugs at the time of the sale, and had in fact never seen cocaine, except on television. Over D's objection, the prosecution was permitted to question D regarding three drug tests he had failed while on release awaiting trial. No limiting instruction regarding the proper use of the evidence was requested or given. D claims that the questioning should not have been permitted, although he admits that evidence of prior bad acts is admissible under certain circumstances.
3. ISSUE: Where prejudicial evidence is admitted for impeachment purposes, must the court give a limiting instruction to the jury regarding proper use of the evidence?

4. RULE OF LAW: Where prejudicial evidence is admitted for impeachment purposes, the court must give a limiting instruction to the jury.
5. HOLDING AND DECISION: (Mikva, Chief Judge)  
Where prejudicial evidence is admitted for impeachment purposes, must the court give a limiting instruction to the jury regarding proper use of the evidence? Yes. Where prejudicial evidence is admitted for impeachment purposes, the court must give a limiting instruction to the jury. The court rejects all of D's arguments that the evidence was not admissible. Although the evidence is highly prejudicial to D, it was introduced for a proper purpose, and there was no indication that the prosecution "trapped" D into testifying that he had never seen drugs before. Further, the evidence the prosecution used to impeach went to a matter directly in issue, and was not collateral. Finally, no extrinsic evidence was used to attempt to prove that D had failed drug tests. However, the court notes that the trial court failed to give a limiting instruction regarding the proper use of the evidence. Evidence of D's drug use was "bad acts" evidence of the most prejudicial sort, and there is a presumption of plain error where the trial court omits a limiting instruction for impeachment evidence to which a jury could give a substantial effect against a defendant. This necessity does not change where the impeachment evidence is admissible for an additional substantive purpose, as the government argues is the case here. The court finds that a limiting instruction was imperative in this case. Reversed and remanded.
6. LEGAL ANALYSIS: "Prior bad acts" of a defendant, although generally inadmissible under Rule 404(b) may be admitted to impeach a witness. However, such evidence is subject to the general analysis concerning unfair prejudice and confusion of issues. Particularly where the witness is a criminal defendant, a limiting instruction may be necessary to lessen the prejudicial effect of the evidence.

j. **Prior Bad Acts**

- i. **Rule 609(a)(2) – For the purpose of attacking the credibility of a witness, evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.**
- ii. **3 Forms of character impeachment:**
  1. **Defendant puts on witness and the government puts on a witness to rebut**
  2. **Impeachment by prior conviction**

3. **Impeachment by prior bad act:**
  - a. **Only trying to impeach a witnesses credibility**
  - b. **Have to use conduct which is probative of their truthfulness.**
- iii. **Rule 609(b) – There is a “10 year rule” on convictions, unless the court determines, in the interest of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect..**
- iv. **UNITED STATES V. OWENS** (pg. 490)
  1. **FACTS:** Owens (D) was on trial for the unpremeditated murder of his wife. At trial, the prosecutor questioned D about three criminal convictions which he failed to mention on his application for appointment as a Warrant Officer: one of these was for marijuana possession; one was for assault and battery on his second wife; and the third for carrying a firearm without a permit. D denied that he had been convicted of any of these offenses. On examination by defense counsel, D admitted to the marijuana and firearms offenses, claiming that he had told the personnel specialists who had processed his application about these offenses, and relied on them to properly handle them. He made no admission about the assault and battery offense. Prior to deliberation, the judge gave an instruction that the evidence had been admitted for the purpose of assessing the credibility of D, insofar as he had failed to put them on his Warrant Officer application.
  2. **ISSUE:** In attempting to impeach a witness on the basis of his failure to completely disclose his criminal record on an application, may a party introduce evidence of the substance of the offenses which were omitted?
  3. **RULE OF LAW:** In attempting to impeach a witness on the basis of his failure to completely disclose his criminal record on an application, a party may introduce evidence of the substance of the offenses which were omitted.
  4. **HOLDING AND DECISION:** (Cox, Judge) In attempting to impeach a witness on the basis of his failure to completely disclose his criminal record on an application, may a party introduce evidence of the substance of the offenses which were omitted? Yes. In attempting to impeach a witness on the basis of his failure to completely disclose his criminal record on an application, a party may introduce evidence of the substance of the offenses which were omitted. Here, it was proper for the prosecution to attempt to impeach D by eliciting an admission of a prior

act of intentional falsehood. In doing so, however, the prosecution was prohibited from suggesting or introducing inadmissible evidence. The substance of D's prior convictions was not admissible to show criminal disposition or untruthful character. The fact that he had sworn falsely under oath, however, was admissible for impeachment purposes. Further, since the prior convictions were the subject of the alleged false swearing, they were necessary and inseparable parts of this act of deceit. As such, they were clearly relevant. Additionally, they had substantial probative value, and, except for the assault and battery charge, were not unduly prejudicial. However, the court finds that, to the extent that there was error in admitting evidence of the assault and battery charge, the court finds that there was no actual prejudice to D, and affirms the conviction.

5. LEGAL ANALYSIS: The court in this case justified the admission of the substance of the convictions because they were necessary to show that the facts omitted from the application were material to the success of the application.
- 6.

v. **UNITED STATES V. SANDERS** (pg. 504)

1. NATURE OF THE CASE: This is an appeal from a conviction for assault with a dangerous weapon with intent to do bodily harm, and for possession of contraband.
2. FACTS: Sanders (D) and Alston were indicted for assault with intent to commit murder and possession of a knife or shank. Both were in prison at the time the assault occurred. D had previously been convicted on similar charges, and filed a motion in limine to exclude evidence of these convictions. The court granted the motion with respect to an armed robbery where the conviction was reversed, and with respect to a stabbing, where D was acquitted. However, the court allowed evidence regarding prior assault and contraband convictions. At trial, D was convicted for possession of a shank, but the jury was unable to reach a verdict on the assault charge. Before the second trial, D renewed his motion in limine to exclude his previous assault and possession of contraband convictions. The court denied the motions. D was convicted of assault, and appeals both the contraband and assault convictions.
3. ISSUE: Where the accused in a criminal case takes the stand, may the court allow the prosecution to attack his credibility with evidence of prior convictions for similar offenses to the ones for which he is being tried?

4. **RULE OF LAW:** Where the accused in a criminal case takes the stand, the court may not allow the prosecution to attack his credibility with evidence of prior convictions for similar offenses to the ones for which he is being tried.
5. **HOLDING AND DECISION:** (Phillips, Circuit Judge)  
Where the accused in a criminal case takes the stand, may the court allow the prosecution to attack his credibility with evidence of prior convictions for similar offenses to the ones for which he is being tried? No. Where the accused in a criminal case takes the stand, the court may not allow the prosecution to attack his credibility with evidence of prior convictions for similar offenses to the ones for which he is being tried. Although Rule 609(a) allows a party to impeach a witness with evidence of prior convictions where those convictions were either for a felony or for crimes involving dishonesty or false statements, such evidence is not automatically admissible. The court is still required to weigh the probative value of the evidence against its potential for unfair prejudice. Here, although the evidence may be generally probative of D's lack of credibility, it is extremely prejudicial because the convictions were for the same offenses for which D now stands trial. Generally, Rule 609 should be used sparingly, if at all, to allow evidence of an accused's prior convictions for similar offenses. Even assuming a limiting instruction was given, it would be difficult for the jury not to infer guilt from the evidence of the prior convictions. Additionally, the court should have recognized that the offenses introduced had little bearing on D's propensity to tell the truth. The court also rejects the contention that evidence of D's prior conviction was relevant to show intent, noting that such evidence is a "prime example" of evidence which only proves criminal disposition. Finally, the court finds that admission of the evidence was not harmless error with respect to the assault conviction, but was harmless with respect to the possession of contraband conviction.  
Affirmed in part, reversed in part.
6. **DISSENT:** (Niemeyer, Circuit Judge) The dissent argues that D placed his intent in issue by raising self-defense. Evidence of a prior assault conviction is probative of intent, and therefore admissible under Rule 404(b).
7. **LEGAL ANALYSIS:** Factors commonly included in the determination of whether to admit evidence of a prior conviction to impeach the accused are: the impeachment value of the prior crime; the remoteness of the prior crime; the similarity between the prior crime and the crime at issue

in the trial; the importance of the defendant's testimony; and the importance of the credibility issue.

vi. **UNITED STATES V. WONG** (pg. 510)

1. NATURE OF THE CASE: This was a prosecution for violation of the mail fraud and RICO statutes. Appealed.
2. FACTS: Wong (D) had two prior convictions for mail fraud at the time of trial on the charges at issue. Before putting D on the stand,, his counsel moved to preclude use of these convictions to impeach him. The trial court ruled that the probative value of the prior convictions did not outweigh the potential for prejudice. However, because the convictions were for crimes involving dishonesty, the court found that a balancing process was not appropriate, and allowed the prosecution to introduce the convictions. D appeals his conviction, arguing that it was error for the court to admit the prior convictions without balancing their probative value against their potential for prejudice.
3. ISSUE: Does a district court have discretion to exclude, as unduly prejudicial, evidence that a witness had previously been convicted for a crime involving dishonesty or false statement?
4. RULE OF LAW: A district court does not have discretion to exclude evidence that a witness had previously been convicted for a crime involving dishonesty or false statement.
5. HOLDING AND DECISION: (Per Curiam) Does a district court have discretion to exclude, as unduly prejudicial, evidence that a witness had previously been convicted for a crime involving dishonesty or false statement? No. A district court does not have discretion to exclude evidence that a witness had previously been convicted for a crime involving dishonesty or false statement. Rule 609(a) distinguishes between crimes punishable by imprisonment for more than one year, stating that these may be used to impeach a witness only if their probative value outweighs their prejudicial effect, and crimes involving dishonesty or false statement, which are admissible regardless of their prejudicial effect. D argues that, although Rule 609(a) appears to make admission of crimes involving dishonesty mandatory, admissibility is actually subject to the balancing process laid out in Rule 403. However, Rule 403 was not designed to override more specific rules such as 609(a). With respect to Rule 609(a), the court finds that Congress clearly intended that evidence of prior crimes involving dishonesty to be admissible to impeach regardless of any

potential prejudice, and without any balancing. Therefore, the court finds that Rule 403 is not applicable to impeachment evidence of crimes involving dishonesty, and the trial court was correct in concluding that it had no discretion to exclude the evidence. Affirmed.

6. LEGAL ANALYSIS: Although the balancing of probative value against the other factors contained in Rule 403 applies to admissibility determinations generally, it will not apply to certain kinds of evidence, where Congress has clearly expressed its intent that no balancing is required.

vii. **LUCE V. UNITED STATES** (pg. 517)

1. NATURE OF THE CASE: This is an appeal from a conviction for conspiracy and possession of cocaine with intent to distribute.
2. FACTS: During his trial, Luce (D) moved for a ruling to preclude the government from introducing evidence of a prior state conviction for possession of a controlled substance. D did not commit to testify if the motion was granted, nor did he make a proffer as to the substance of his testimony. The court ruled that the conviction fell within the scope of Rule 609(a), but that a specific ruling regarding admissibility would depend on the nature and scope of D's testimony. The court therefore denied D's motion. D did not testify, and was convicted. D appealed, claiming that the trial court abused its discretion in failing to make an explicit finding that the prejudicial effect of the evidence outweighed its probative value. The Sixth Circuit affirmed the conviction, holding that, where a defendant does not testify, the court would not review the lower court's in limine ruling. Certiorari was granted to resolve a conflict among circuits on this issue.
3. ISSUE: Where a defendant does not testify at trial, must the trial court's denial of a motion in limine regarding use of a prior conviction for impeachment purposes be reviewed on appeal.
4. RULE OF LAW: Where a defendant does not testify at trial, the trial court's denial of a motion in limine regarding use of a prior conviction for impeachment purposes need not be reviewed on appeal.
5. HOLDING AND DECISION: (Chief Justice Burger) Where a defendant does not testify at trial, must the trial court's denial of a motion in limine regarding use of a prior conviction for impeachment purposes be reviewed on appeal. No. Where a defendant does not testify at trial, the trial court's denial of a motion in limine regarding use of a

prior conviction for impeachment purposes need not be reviewed on appeal. Had D testified, the court's denial of the motion in limine would clearly have been reviewable. In such a case, the Court of Appeals would then have a complete record of the nature of D's testimony, the scope of the cross-examination, and the possible impact of the evidence on the jury's decision. However, without knowing these things, a reviewing court would be handicapped in making an evidentiary ruling since, particularly under Rule 609(a)(1), the required balancing process is heavily dependent on the nature and scope of the testimony. Further, because an accused's decision not to testify seldom turns on any one factor, a reviewing court cannot assume that the adverse ruling on a motion in limine motivated the defendant's decision. Finally, the court notes that, if in limine rulings under 609(a)(1) were reviewable on appeal, almost any error would result in reversal, since a reviewing court could not logically term "harmless" an error which presumptively kept the defendant from testifying. Therefore, the court holds that, in order to raise and preserve for review the claim of improper impeachment with a prior conviction, the defendant must testify. Affirmed.

6. **CONCURRENCE:** (Justice Brennan) Justice Brennan concurs with the decision insofar as it applies to in limine rulings respecting admission of prior convictions for impeachment purposes under 609(a). To the extent that the holding applies to broader questions of appealability of rulings not involving Rule 609(a), Justice Brennan does not concur.
  7. **LEGAL ANALYSIS:** The court notes that the result here would be no different if the defendant had made a proffer of testimony, and then refused to take the stand, since a person's trial testimony may differ from his proffer.
- viii. **Prior Statements to Impeach or Rehabilitate: Rule 613 – Prior statement of a Witness**
- ix. **Note: Under Rule 613, when introducing evidence to impeach the credibility of the witness, prior inconsistent statements will be admitted but not for the truth of the matter asserted, unless those statements were made under oath. 613 is a more limited version of 801**
- x. **TOME V. UNITED STATES** (pg 534)
1. 513 U.S. 150 (1995)
  2. **CASE:** This was a case about child sexual abuse.

3. **FACTS:** Tome (D) was charged with child sexual abuse of his four year old daughter. D and the child's mother had been divorced and a tribal court awarded joint custody of the child to both parents but D had primary physical custody. The mother petitioned the tribe for primary custody but was awarded primary custody for the summer months. The mother then contacted the authorities and reported child sexual abuse. The child took the stand and gave yes and no answers to a series of leading questions and when questioned about the abuse she was reluctant to answer and as the trial judge commented on the record there were delays in answering by as much as 40-50 seconds and the child was losing concentration on the second day. Six additional witnesses were called to the stand to testify about statements made by the child to them regarding the alleged abuse. These statements were offered and accepted under Rule 801(d)(1)(B) and D objected. The statements rebutted the implicit charge that the testimony was motivated by a desire to live with the mother. D was convicted and sentenced to 12 years. D Appealed.
4. **ISSUE:** Does a prior consistent statement have no relevancy to refute a charge unless the consistent statement was made before the source of the bias, interest, or incapacity originated?
5. **RULE OF LAW:** A prior consistent statement has no relevancy to refute a charge unless the consistent statement was made before the source of the bias, interest, or incapacity originated.
6. **HOLDING AND DECISION:** (Kennedy, Justice) Does a prior consistent statement have no relevancy to refute a charge unless the consistent statement was made before the source of the bias, interest, or incapacity originated? Yes. In the present context under Rule 801, the question is whether the child's out of court statements rebutted the alleged link between her desire to be with her mother and her testimony and not whether they suggested that the child's in court testimony was true. The Rule addressed the rebutting of an alleged motive and not in bolstering the veracity of the story told. The statements made by these witnesses shed but minimal light on whether the child had the motive to fabricate and during closing argument no mention was made of their use to rebut the impact of the alleged motive but use was made for substantive purposes of bolstering the veracity of the story. Reversed and remanded. Concurring: (Scalia, Justice) The rule says what is says regardless of the intent of the drafters. The notes on

this issue are important but they cannot be the sole procedure by which we endorse what the law itself states. Notes cannot change the meaning of what a Rule of Law itself states.

7. Dissent: (Breyer, Justice) This is issue is of relevance and not hearsay. If a trial court properly admits a statement that is consistent with the declarant's testimony for the purpose of rebutting an express or implied charge of recent fabrication or improper influence or motive, then that statement is not hearsay and the jury may also consider it for the truth of what it says. As for the issue of the time when the statements were made; that is a question of relevance and not hearsay because the statements are clearly not hearsay. Post motive statements can in appropriate circumstances directly refute the charge of recent fabrication based on improper motive when the circumstances indicate that the statements were not causally connected to the alleged motive to lie.
8. LEGAL ANALYSIS: Page 538 Waltz 9th part B gives the key analysis in this decision as the cardinal rule of interpretation regarding the common law requirements and the FREED acceptance of those requirements. The only real evidence against D was the Dr. evidence of vaginal penetration. You can get any young child to say anything you want after a short period of brain washing; the mother had strong motives to do so and it is really suspicious that the child made the charges after being in the mother's care for the summer. There is a large abstract difference in the Court over these matters.

k. **Bias -**

i. **UNITED STATES V. ABEL** (pg. 545)

1. NATURE OF THE CASE: This was an appeal for a conviction for robbery.
2. FACTS: Abel (D) was on trial for robbery. The court ruled that it would allow admit testimony into evidence that would impeach one of D's witnesses. This testimony was regarding a secret prison organization that required its members to deny the organization's existence and to protect each other. The court of appeals reversed on this issue, despite the potential bias issue as to the witness. The Government (P) appealed.
3. ISSUE: Can one impeach a witness under the Federal Rules of Evidence by showing his bias?
4. RULE OF LAW: It is permissible under the Federal Rules of Evidence to impeach a witness by showing his bias.

5. HOLDING AND DECISION: (Rehnquist, J.) Can one impeach a witness under the Federal Rules of Evidence by showing his bias? Yes. It is permissible under the Federal Rules of Evidence to impeach a witness by showing his bias. **The principle defined bias as the relationship between a party and a witness that may lead the witness to slant his testimony to favor that party, whether consciously or unconsciously.** Proof of bias is almost always admissible, because the jury is the final judge on the truth and accuracy of the testimony, and is allowed to assess all testimony. A court can admit bias evidence if it deems it relevant. The appellate court should have allowed the testimony relating to D's gang membership. This testimony was admissible to show bias. Reversed.
6. LEGAL ANALYSIS: The Court did not allow P to mention "Aryan" at all, even though the case involved the Aryan Brotherhood. It used the term "secret organization" instead.

**l. Attorney Client Privilege**

- i. Allows a client to refuse to disclose and to prevent others from disclosing confidential communications made between an attorney and client or representative for the purpose of facilitating the rendition of legal services.
- ii. There is a crime/fraud exception to the privilege.
- iii. **Upjohn Co. v. U.S.** (pg. 559)(1981)
  1. Case involved the scope of attorney client privilege in the corporate context. The IRS was after Upjohn because they had foreign subsidiaries accused of making bribes to foreign officials in order to gain business. The IRS refuted the tax deduction claim of the bribes. Uphohn's corporate attorney's had sent questionnaires to employees in order to understand the extent of bribes made to foreign governments. The Prosecution wanted copies of the surveys and responses, but the court said they fell within the attorney client privilege and work product.

**m. Physician Patient Relationship (Rule 501)**

- i. **This privilege applies when a patient is seeking treatment, not for litigation purposes or non-treatment situations.**
- ii. **Has to be made with the intention that it is kept confidential**
- iii. **Prink v. Rockefeller**
  1. P is an administratrix of her husband's estate. Her husband had fallen from a high window at rockefeller center. Decedent's mental state was at issue as the defendant's claimed he committed suicide.

2. If the decedant's mental state is a material issue the Dr. patient privilege can be waived.
- iv. **Jaffe v. Redmond** (pg. 585)(S.C case)
  1. Court held that there a psychotherapist/patient privilege exists.
- n. **Authentication** (pg. 663)
  - i. **Rule 901**
  - ii. **Whenever evidence is introduced, physical evidence needs to be authenticated. I.e. – chain of custody needs to not every person involved in its handling – Unless it is so unique it can be identified purely by its sensory examination.**
  - iii. **Photographs:** Show it to a witness who can testify that it is what it is being introduced to be. I.e. – Does it fairly and accurately depict what it is supposed to depict.
  - iv. **Documents:** Handwritten document can be authenticated through:
    1. admission
    2. someone familiar with the person's handwriting
    3. Handwriting Analyst
    4. Jury can compare the document with writing known to be that of the defendant's
    5. Someone who saw the defendant write the document.
  - v. **Voice: 901(b)(6):** Voice can be authenticated through:
    1. Admission
    2. Another person familiar with the voice on a tape
    3. Over the phone: if the number is assigned to the declarant and the declarant identifies himself.
  - vi. **First State Bank of Denton v. Maryland Casualty Co.**
    1. 901(b)(6)
    2. When a person places a telephone call to a listed number, and the answering party identifies himself as the expected party, that is enough to authenticate the voice.
  - vii. **U.S., v. Dockins** (pg. 674)
    1. As a condition precedent to admissibility, documents that are not self-authenticating require authentication or identification by evidence sufficient to show they are what their proponent claims.
- o. **Best Evidence Rule**
  - i. **Rule 1001 – 1004**
  - ii. **In proving the terms of a writing, where such terms are material, the original writing must be produced, unless it is shown to be unavailable for some reason other than the serious fault of the proponent.**
  - iii. **Sirico v. Cotto** (pg. 665)
    1. Under the best evidence rule, a party who seeks to prove the content of a document must offer in evidence the original copy, but if secondary evidence is offered, the

proponent must explain his failure to offer the original in order to proceed.

- iv. **Herzig v. Swift & Co.**
- v. **Meyers v. U.S.**