

PROF. CARLTON BAILEY

FALL 2008

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BASIC EVIDENCE
SYLLABUS*
(Course No. 6093)

INDEX

("cb": Casebook Reference)

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Problems & Jury Instructions (See on the web at:

<http://law.uark.edu/new/reserve/bailey/>) **on the web**

Admissibility of Victim's Prior Sexual Conduct (**Appendix A**) 27

Rule 502 - Lawyer-Client Privilege - (**Appendix B**) 29

Rule 504 - Husband-Wife Privilege - (**Appendix C**) 31

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First Three Case Assignments: *United States v. Foster*; *Douglass v. Eaton Corp.*; *United States v. Hall*. Cases begin at page 34.

BASIC EVIDENCE

I. REQUIRED MATERIALS:

- a. **Weinstein, Mansfield, Abrams and Berger**, Cases and Materials on Evidence (9th Edition, Foundation Press). (At the bookstore)
- b. **Weinstein, Mansfield, Abrams and Berger**, 2008 Rules, Statute and Case Supplement. (At the bookstore)
- c. This **Syllabus!!** Cases at pp. 34-65 **and on the web**.

In preparing for class, be sure to read the notes as well as the cases.

Because of the large number of pages we have to cover, if the entire assignment is not covered in **one** class, we will complete that assignment on the next class day. You will still be responsible, however, for final examination purposes, for the **material assigned but not covered** in class.

II. A GUIDE TO RULE ANALYSIS:

The Arkansas Rules of Evidence are essentially the same as the Federal Rules of Evidence (**with a few differences which will be discussed in class**); thus, when an assignment states a rule number, you should look at both the federal and Arkansas rule (which may be numbered the same, but, in some cases, may be worded differently: **For example, compare Fed. R. Evid. 410 with Ark. R. Evid. 410**). For class preparation, **please read the Advisory Committee Notes, House and Senate Judiciary Committee reports, and Conference Committee reports** which are in the Supplement right after the cited federal rule (there is, of course, no legislative history for the Arkansas Rules).

III. OUTSIDE MATERIALS:

Useful outside materials abound in the field of evidence. The three I would recommend to solve almost all of your problems are (1) the hornbook, McCormick on Evidence, 3d Ed. (which has West references); (2) the treatise, Weinstein's Federal Evidence is a worthwhile source, and (3) the example and explanation book by Professor Arthur Best. (Little, Brown and Company Publisher) (there is also available a student edition, 1 vol. of Weinstein). I also recommend the CALI exercises in the library. Of course, I **encourage** you to **call on me** to answer questions as well. [office #315]

IV. COVERAGE:

Each student is expected to read, study and be prepared to discuss the assigned materials prior to class. Moreover, each student should read and study the pertinent Federal Rules of Evidence and the accompanying **Advisory Notes** in preparation for class. Each student should try to answer **all** assigned problems and hypotheticals. We will consider the hypotheticals and your answers during class discussions. You need not write your answers. The hypotheticals and your preparations are intended to facilitate your understanding of the various rules.

V. GRADE:

A. Components for **final grade:**

1.	<i>Classroom Participation</i> (Film clips, etc.)	=	100 points
2.	Argument Supporting an Answer to True or False Query (See page 4 infra for instructions) (DUE before Thanksgiving break!)	=	100 points
3.	<i>Final Examination</i>		
	a. Multiple choice	=	200 points
	b. Long Fact Pattern	=	200 points
		TOTAL	600 points
4.	Attendance/Absences See page ____ of Syllabus		?
5.	Unprepared for class See Part V (B) below		?

FINAL GRADE

B. The **classroom participation** component affords a student the opportunity to earn the following array of points:

"Kudos"	=	10 points or more
"Excellent"	=	6 points
"Good"	=	4 points
"OK"	=	3 points
"You don't mean that?" "What?"	=	0 points
"Unprepared or failing to answer"	=	minus points or grade reduction

[Questions to the professor about Basic Evidence Rules.]

C. Argument Supporting an Answer to a **True** or **False** Query

In order to **earn 100 points** toward your final point total for grade in this course (see page 3 of the Syllabus), please answer a query about two (2) United States Supreme Court opinions. Your argument should be no longer than **250 words** or two (2) typed pages. **All arguments must be typed – double spaced! No handwritten arguments will be considered!**

All arguments are due by (no later than!) **noon, Friday, November 21, 2008**. Please see Professor Bailey about any questions regarding the successful completion of this argument.

D. Final Examination – See p. 5-6 of the Syllabus.

F. **Prepared for class:**

Students are expected to be **fully prepared** for each class. Please read the assignments and problems before class! **A student who is *unprepared* faces the possibility of a grade reduction** (e.g., *failing to respond* when called on constitutes unpreparedness). A student may be excused from classroom participation by signing a sheet before class begins. **[The sheet will read: “I am unprepared today.” Enter name of student.]**

E. **ATTENDANCE POLICY STUDENTS ARE EXPECTED TO ATTEND CLASSES REGULARLY. EXCESSIVE ABSENTEEISM WILL RESULT IN GRADE REDUCTION. AFTER THE FIFTH (5TH) ABSENCE IN A SEMESTER, THE PROFESSOR MAY SUBJECT THE STUDENT TO A SINGLE GRADE REDUCTION. SEVEN (7) OR MORE ABSENCES MAY RESULT IN A FULL LETTER REDUCTION. STUDENTS WHO ARE ABSENT EIGHT (8) OR MORE TIMES WILL RECEIVE A FAILING GRADE. EXCUSES ARE ACCEPTED ONLY AFTER THE FIFTH (5TH) ABSENCE AND THEN ONLY IN THE PROFESSOR'S DISCRETION. ALL EXCUSES MUST BE PRESENTED TO PROFESSOR BAILEY'S SECRETARY NO LATER THAN 48 HOURS AFTER THE MISSED CLASS.**

BASIC EVIDENCE

FINAL EXAMINATION

Sample instructions for a final examination, an exemplary multiple choice query and an exemplary short answer query may be found below. The examination will be closed-book **except for an 8x11 "cheat sheet"** described below, no other outside materials. The examination is 3-1/2 hours long. Although this course is a combination of case law and rules, examination questions will not require that the student have memorized the rules.

FINAL (ONE LONG FACT PATTERN)

(Coverage: Relevance, Character, Subsequent Remedial Measures, Habit, Guilty Pleas, Settlement Negotiations, Cross Examination, Impeachment, Direct Examination, Competency, Refreshing Recollection, Opinions - Lay and Expert, Authentication, "Best Evidence", Hearsay, Privileges, Judicial Notice)

TEST NO. _____

STUDENT EXAM NO. _____

Professor Bailey
Spring Semester 2008

FINAL EXAMINATION
(date)

BASIC EVIDENCE

OVERALL INSTRUCTIONS

1. This is a closed book examination. You are not permitted to consult any books, notes or other materials during this examination. **Except you may prepare a one page 8 ½ x 11 (both sides) "cheat sheet" of information that you deem helpful.**
2. You have **three (3) hours and thirty (30) Minutes** to complete the examination on Monday, December 15, 2008. One half (½) hour (8:30-9:00 A.M.) has been set aside to allow you to read the exam in its entirety before writing. The time allocated for writing is 3 hours (9:00-12:00 Noon).
3. There is one (1) part to the **FINAL** examination:

PART I	Multiple Choice	300 points
PART II	One Long Fact Pattern Query	100 points*

*(Examples of multiple choice questions on Professor Bailey's web page.)

4. Please write answers to the essay question in your blue books and write only on one side of the paper. Make every attempt to write legibly.
5. Write your Test Number on every blue book and on this examination.
6. PLEASE NUMBER CONSECUTIVELY ON THE COVER OF EACH BLUE BOOK THAT YOU USE.
7. Do not write your name anywhere on the test or your blue book.
8. To be **eligible** to pass this examination, please turn in all examinations with your blue books. You may not copy the entire examination or any part of it.

EXAMINATION BLUE BOOK

NAME Exam #1123
SUBJECT _____
INSTRUCTOR Bailey
EXAM SEAT NO. _____ SECTION _____
DATE _____ GRADE _____

BB-2
11 X 8.5
8 SHEETS/16 PAGES



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Book 1 of 2 on exam #1123

BASIC EVIDENCE

ARKANSAS BAR EXAMINATION
JULY 1995

[1 question - 30 minutes]

EVIDENCE

You represent John Doe in a civil action against Bill Smith. Doe alleges that Smith, without provocation, struck Doe repeatedly as a result of an argument that started at a social gathering. Doe suffered permanent brain damage and is unable to testify on his own behalf. You learn that Rick Jones was present at the incident. In a recorded interview with Jones you learn that Jones saw the fight. Jones tells you that Smith became angry at Doe when Doe danced with Smith's girlfriend. Jones also tells you that Smith came up behind Doe and hit him on the head with a beer bottle rendering him unconscious. Jones also tells you that Smith gave no warning to Doe that he was angry. Doe did nothing to provoke Smith except ask the girl to dance. Smith also repeatedly struck the unconscious Doe in the head until he was pulled away by Jones. Jones tells you that he is concerned about testifying because of his friendship with Smith. He is also concerned that evidence will surface that he has been convicted of driving while intoxicated twice in the last five years which might prove embarrassing to him.

Since Doe cannot testify on his own behalf, you call Jones as your first witness. Jones admits that Smith hit Doe with a beer bottle and with his fist. To your surprise and dismay, Jones also testifies that Doe attacked Smith first and that Smith struck Doe with the beer bottle in self defense. This information comes out during your direct examination of Jones.

Can you use the recorded statement of Jones to impeach his testimony?
Explain why or why not.

Can you use the two DWI convictions in your examination of Jones? Explain why or why not.

BASIC EVIDENCE

TWO TEENS CHARGED IN MULTIPLE SLAYINGS

Police: Case Involves Sex, Drugs,
Money, Decapitation, Dog Bite

by Cassandra Smalls - Reporter at Large
Arkansas Democrat-Gazette
Wednesday, December 13, 2007

FAYETTEVILLE: Authorities on Tuesday charged a man and a woman, both 19, in a multiple slaying that involved money, gambling, sex and gang activity in late November of 2007 in Fayetteville, officials said.

Prosecutors likely will seek the death penalty for Carla W. Webb and James A. Brock, who lived in Fayetteville at the time of the November 25 slayings, Deputy Prosecuting Attorney Jim Strickman of Fayetteville said.

Deputies arrested Brock and Webb nearly two weeks after lawmen found the bodies of Lola Brown, 63, and her son, Charles Brown, 46, both of Fayetteville, and his girlfriend, Susan Green, 42, of Tulsa, Oklahoma, and three unidentified white males.

Authorities have said that they believe Brock was angry after finding out about a sexual relationship between Webb and Charles Brown and that that played a role in the deaths.

Police also reportedly believe that Webb and Brock are members of a Northwest Arkansas gang.

Police say they believe Charles Brown was killed at a house he rented and used for gambling and possible drug sales at 1644 Maple Street. It was common knowledge that Charles Brown often carried large amounts of cash, authorities reported. Also found dead at that location were three unidentified white males.

Webb and Brock were charged with six counts each of being accomplices to capital murder. They are being held in the Washington County Jail without bond, Strickman said. They are scheduled to be arraigned December 15 in Washington County Circuit Court.

Strickman said the investigation, which included officers of the Washington County Sheriff's Office and the Arkansas State Police, may result in more arrests.

Investigators found Lola Brown and Charles Brown's girlfriend, Susan Green, dead in Ms. Brown's back yard. Both had been shot twice in the head and burned beyond recognition, authorities said.

On the morning of November 22, 2007, an anonymous person called the Fayetteville Police Department at approximately 8:30 a.m. and told Sergeant Harold

Turner that a man was knocking at the front door of the home of Lola Brown at 1244 Maple Street and he had a gun and a knife. The caller hung up when the police asked the person for a name and an address.

Based on the information from the anonymous caller two squad cars went to 1244 Maple. Officer Tim Hoover was the first to arrive at the scene where he found the front door of the house standing open. After searching the rooms, he went to the back door and saw the bodies of Lola Brown and Susan Green lying side by side in the back yard. He further observed severe cut wounds on the victim's heads and bodies. The family dog, Scooter, was found between the bodies, whimpering. Scooter had parts of a light green short sleeve in his mouth.

A neighbor, Brad Bruns, smelled what seemed to him to be burning flesh. He had smelled this odor before when he served in Desert Storm. He directed the second squad car of police to 1250 Maple where he was certain he smelled burning flesh. Sheriff Kearns, from the "second" squad car, went to the house next door, 1250 Maple, pursuant to the information from neighbor Bruns. Officer Kearns pushed open this door and found the two occupants smoking marijuana. Both were arrested. Kearns was suspended with three days' pay after the arrest at 1250 Maple.

Charles Brown's burned Chevrolet Blazer was found near Springdale and within three miles of where some of Brock's relatives live, Strickman said. "The vehicle was burned to keep law enforcement officers from getting additional evidence in relation to this murder," he said.

Hours later, investigators found Charles' decapitated body at a house, 1644 Maple, a few blocks from where he lived with his aunt, Lola Brown at 1244 Maple, authorities said. Someone had shot and stabbed him numerous times then cut off his head. The head could not be found. The police also found the dead bodies of three unidentified white males. Each had been shot and stabbed several times.

Authorities believe that Charles Brown was killed at the house he rented at 1644 Maple Street, down the street from where he lived with his aunt (Lola). Brock and Webb lived at the Maple Street house that was used for gambling and possibly drug sales, authorities said.

Brock and Webb had a long and colorful juvenile history. Brock had been charged and convicted of burglary, rape, indecent exposure, assault and disorderly conduct. Webb has been convicted of theft of property, prostitution, disorderly conduct, and receipt of stolen property. Both are on probation for a recent October 2007 violation of the Arkansas Hot Check Law (\$3,000 each), authorities said.

In the bedroom of the house shared by Brock and Webb, 1644 Maple, investigators found "one pair of blue-and-white tennis shoes, which appeared to have blood spatters on them" and in a trash can "one pair of white leather gloves with blood stains, a light green long sleeved shirt with blood stains and a ripped hole in the left sleeve," according to a police affidavit. Brock claimed to own the shoes and the gloves but not the shirt. He could not explain how blood got on them, the affidavit stated.

The affidavit by Washington County investigator Ray Coffman states that he found "a towel that also appeared to have blood stains on it."

Investigators learned about the relationship between Webb and Charles Brown after interviewing two witnesses in the case, the affidavit stated. One witness told officers that "Brock knew Charles Brown was having a sexual relationship with Carla Webb," according to the affidavit.

Another witness told authorities that she "had seen James Brock two days prior to Charles Brown's death in Fayetteville near the U. of A. Administration Building and that he (Brock) was carrying a pistol at that time," the affidavit stated, "She also heard him say that he was going to kill someone."

Another woman told investigators that about three weeks before Charles Brown's death, Brock told her he was going to get even with Charles Brown. At the time he was wearing a light green long sleeved shirt with no blood stains. "She stated that she thought James Brock had found out about Charles Brown having sex with Carla Webb," the affidavit stated, "She also advised that her daughter told her that Brock was mad at Charles Brown for telling him to keep the grass cut and clean things up" around the house.

A witness told authorities that Brown always kept \$7,000 to \$13,000 in a zippered bag "either on his person or at his house at all times," the affidavit stated.

One witness, Buster "Little Pookey" Jimerson - a known gangster who frequented Charles Brown's gambling house for over two years, told investigators that he usually sees Webb "counting Charles Brown's money at the gambling house. Each time she finished counting the money she and Charles Brown always went to a back bedroom to play "tie me," "whip me," "do me!" "till I holler!" for a few hours. Webb and Brown repeated this routine at least three times a week for over a year. Pookey went on to say that Brown would always send Webb's stupid boyfriend, Brock, off on some kind of errand during that time.

Brock and Webb have juvenile records and are believed to be members of the Folks Disciples, a gang that operates out of West Fork and Fayetteville, Coffman said.

Investigators arrested Brock at a house in Elkins. He had several cuts and deep scratches on both arms. He wore a white "tee" shirt and a cashmere V neck. Webb was arrested at a residence in Madison County, Chief Deputy Mark Flowers said. Webb had \$10.00 in her pocket.

After he was arrested, the police searched Brock and found \$3,000 in cash in a money belt he was wearing. The \$3,000 was later transferred to a large plastic bag in Officer Duncan's locker. Brock did not speak to the police during the ride from Elkins to the Washington County Jail. However, the two arresting officers, Duncan and Pierce, talked about how the Brown family could not have an open casket for Charles because it would be too gruesome. They both wondered aloud how a person could decapitate someone and hide the head. Pierce said, "If Jeffrey Dahmer can eat people, I guess this could happen! Brock told the police that he had heard gangsters from Tulsa used

to hide dead bodies in Tyson's chicken refuse area in Springdale. Two hours later the State Police found Charles Brown's decomposed head at that site.

Brock and Webb said they left Fayetteville about 11 p.m. November 25, went to Eureka Springs and didn't return to Fayetteville until after 3 a.m. November 26, the affidavit stated.

"The statements were contradicted by phone records, which were obtained from the 1644 Maple Street residence, which showed collect phone calls being made from Ohio to that residence at a time after 11 p.m. This is also contradicted by the fact that Brock's vehicle was seen in the Fayetteville area between 1:30 a.m. and 2 a.m. in the early morning hours of November 26, 2007."

Authorities allege that Brock and Webb killed Charles Brown and the three unidentified white males at the Maple Street residence and then went to his house four blocks away to find more money. While ransacking the residence, they killed Lola Brown and Susan Green (Charles Brown's girlfriend), the affidavit stated.

"Honey Drop" (born Sarah Mullins), a prostitute who worked off and on for Charles Brown at his gambling house, will testify that Carla Webb told Charles Brown two weeks before her death that they had to stop doing it so much at the house because Big "B" will find out. Honey quoted Carla to say, "If he does, he'll cancel both our tickets." Honey Drop will admit that she had a two year sexual relationship with Carla.

Two members of "The Heavy Hitters" (Snake Eye and "Little Puke" or "Pukey") are prepared to testify that they overheard Brock telling Charles Brown that he would "cancel his ticket" if he found out that Brown was messing with Carla.

Bruce Strong, a salesman at Wal-Mart's Super Center on Highway 62, is prepared to testify that Brock and Webb stole a machete and a large kitchen knife from that store on November 20, 2007.

Carla Webb attended John Brown University for a year. Her reputation at John Brown was that of hard worker, dependable, smart student. No one there knew of her criminal record.

Brock lived in the Willow Heights Federal Housing Project for two years prior to living at 1644 Maple. His neighbors say that he was quiet, non-violent, soft-spoken and honest. No one there knew of his criminal record.

Upon arriving at the Washington County Jail, both Brock and Webb were placed in a line-up in Sheriff McKee's office. They were placed in a line-up with one other couple of similar height, etc. The clerk from the Wal-Mart store and Scooter were allowed to identify them. After Scooter began barking loudly and attacked Brock, the store clerk said yes that's them - pointing to Brock and Webb. At this point Brock was asked if he had anything to say. He said "Yeah, Carla Webb gave me that \$3,000!"

Trial is set for **WEDNESDAY, SEPTEMBER 3, 2008 at 10:00 a.m.**

ASSIGNMENTS

FIRST ASSIGNMENT:

- (1) GIVE YOUR EMAIL ADDRESS TO _____ IN ROOM 183.
- (2) THE CLASS HAS BEEN DIVIDED INTO PLAINTIFF TEAMS VERSUS DEFENSE TEAMS FOR THE DURATION OF THIS SEMESTER. YOU MAY DETERMINE YOUR TEAM BY EXAMINING APPENDIX D (page 32) OF THE SYLLABUS. BE PREPARED TO DISCUSS 2(a) AND (b) AND (3) BELOW:
 - (a) Federal Rules of Evidence 401, 402, 403 AND 104(a) [particularly RULE 401];
 - (b) (a.1)
UNITED STATES v. FOSTER; DOUGLASS v. EATON CORP.; UNITED STATES v. HALL; pp. 34-41 of the Syllabus.
- (3) PLEASE READ THE GRADE AND ATTENDANCE POLICIES FOR THE COURSE (at pp. 3-4 of the Syllabus).

BASIC EVIDENCE

SEQUENCE OF RULES AND CASES

- I. **WHAT IS EVIDENCE?**
- II. **DEFINITION AND ADMISSIBILITY**
 - (a) RULE 401 - Relevance (Is it?)
 - (b) RULE 402 - Admissible (If it is relevant it is admissible, except as otherwise?)
- III. **BASIC RULE OF EXCLUSION**
 - (a) RULES 403 - General Balancing Test
 - (b) RULE 403 - Factors to be considered
- IV. **CHARACTER AND CREDIBILITY**
 - (a) RULE 404(a)(1) & (2)/405 - **All Other Victims** - Criminal Case
 - (b) RULE 412 - **Rape** Victim - **Only** - Criminal Case
 - (c) RULE 404(a)/405 - Civil Cases
 - (d) RULE 404(b) - "Other Act" Evidence
 - (e) RULE 406 - Habit
- V. **BASIC EXCLUSIONS**
 - (a) RULE 407 Subsequent Remedial Measures
 - (b) RULE 408 Settlement Offers
 - (c) RULE 409 Payment of Medical Expenses
 - (d) RULE 410 Inadmissibility of Pleas
 - (e) RULE 411 Insurance
- VI. **EXAMINATION OF WITNESSES**
 - (a) RULE 601 Competency
 - (b) RULE 602 Personal Knowledge
 - (c) RULE 603 Oath
 - (d) RULE 611(a)(b)(c) Direct/Cross Examination
 - (e) RULE 612 Refreshing Recollection
 - (6) RULE 803(5) Recorded Recollection
- VII. **OPINION TESTIMONY.**
 - (a) RULE 701 Lay Opinion
 - (b) RULE 702 Expert Opinion
 - (c) RULE 703 Bases of Expert's Opinion
 - (d) RULE 704 Ultimate Issue and Expert
 - (e) RULE 705 Disclosure of Facts Supporting Expert's Opinion

VIII. **IMPEACHMENT**

- (a) RULE 607 Impeaching Own Witness
- (b) RULE 609 Prior Convictions
- (c) RULE 608 Prior Bad Acts
- (d) RULE 613 Prior Inconsistent Statements

IX. **AUTHENTICATION**

- (a) RULE 901(a) & (b) General Provisions
- (b) RULE 902 Self-Authentication
- (c) RULE 903 Subscribing Witness' Testimony Unnecessary

X. **BEST EVIDENCE (ORIGINAL WRITING)**

- (a) RULE 1001 Definitions
- (b) RULE 1002 Requirement of Original
- (c) RULE 1003 Admissibility of Duplicates
- (d) RULE 1004 Admissibility of Other Evidence of Contents
- (e) RULE 1005 Public Records
- (f) RULE 1006 Summaries
- (g) RULE 1007 Admission of Party
- (h) RULE 1008 Function of Court and Jury

XI. **HEARSAY**

- (a) RULES 801 & 802 Basic Definitions
- (b) RULES 801(d)(1) Statement **Not** Hearsay
- (c) RULE 801(d)(2) Admissions
- (d) RULE 804(b)(3) Statement Against Interest Versus "Admission"
- (e) RULE 803(1) & (2) Present Sense Impression and Excited Utterance
- (f) RULE 803(3) Then Existing Mental Condition
- (g) RULE 803(4) Statement for Purposes of Medical Diagnosis or Treatment
- (b) RULE 803(6) Business Records
- (c) RULE 803(8) Public Records
- (d) RULE 804(b)(1) Former Testimony
- (e) RULE 804(b)(2) Dying Declarations
- (f) RULE 807 Residual Exception

XII. **PRIVILEGES**

- (a) RULE 502 Attorney-Client
- (b) RULE 504 Husband-Wife
- (c) Trammel Adverse Spousal Testimony

XIII. **JUDICIAL NOTICE**

- (a) RULE 201 Legislative Facts
- (b) RULE 201 Adjudicative Facts

BASIC EVIDENCE

READING LIST

I. “RELEVANCY” VERSUS “ADMISSIBILITY” (DIFFERENT CONCEPTS!):
RULES 401, 402, 403 104(a), 104(b) and 103(a)(2)

- (a) RULE 401 Read pp. 25-26 of the Supplement (2008)
- (b) RULE 402 Read pp. 27-28 of the Supplement (2008)
- (c) RULE 403 Read pp. 28-29 of the Supplement (2008)
- (d) RULE 104(a) Read pp. 11-14 of the Supplement (2008)
- (e) RULE 104(b) Read pp. 12-15 of the Supplement (2008)
- (f) RULE 103(a)(2) Read pp. 7-11 of the Supplement (2008)

RULES, CASES AND PROBLEMS

A. FIRST ASSIGNMENT – READ: [Cases (1 - 5) below]

- (1) Supplement pages identified above in I(a) - (f)
- (2) United States v. Foster, pp. 34-35 of Syllabus
- (3) Douglass v. Eaton Corp, pp. 36-39 of Syllabus
- (4) United States v. Hall, pp. 40-41 of the Syllabus
- (5) United States v. Lowery, pp. 42-44 of Syllabus
- (6) Hackenson v. City of Waterbury, pp. 45-46 of Syllabus
- (7) EEN v. Consolidated Freightways, pp. 47-49 of Syllabus
- (8) Owen v. Patton, pp. 50-51 of Syllabus
- (9) McQueeney v. Wilmington Trust Co., pp. 52-59 of Syllabus
- (10) People of The Territory of Guam v. Shymanovitz, pp. 56-59 of Syllabus
- (11) Ballon v. Henri Studios, pp. 60-61 of Syllabus
- (12) United States v. Hankins, pp. 62-63 of Syllabus
- (13) Hall v. Montgomery Ward & Co., pp. 64-65 of Syllabus
- (14) Nachtsheim v. Beech Aircraft Corp.
- (15) Terry v. State, **on the web**
- (16) United States v. McVeigh, **on the web**
- (17) United States v. Green, **on the web (#35)**
- (18) United States v. Bedonie, **on the web**

Be prepared to discuss **A. (1 - 4)** above! on **MONDAY, AUGUST 25, 2008**
Consider the following issues when studying **RULE 401** and the case assignments listed above (Is it relevant?):

- B. (1) Basic definition
- (2) “Probative value” and a “*fact in consequence*”
- (3) “*Any tendency*” (how “probative”?)
- (4) “Background” information
- (5) Similar act evidence

C. **Contemporaneous Objection Rule**

- (1) Hackenson v. City of Waterbury, pp. 45 of Syllabus
- (2) EEN v. Consolidated Freightways, pp. 47 of Syllabus
- (3) Owen v. Patton, pp. 50 of Syllabus

D. **RULE 403 – (THE “GENERAL” BALANCING TEST)**

- (1) (a) McQueeney v. Wilmington Trust Co., pp. 52 of Syllabus
- (1) (b) People of The Territory of Guam v. Shymanovitz, pp. 56 of Syllabus
- (1) (c) Ballon v. Henri Studios, pp. 60 of Syllabus
- (2) State v. Poe – p. 20 cb
- (3) Note #3 – p. 24 cb
- (4) Note #10, p. 26 cb
- (5) **Old Chief v. United States (HUGE!)** - p. 27 cb
- (6) United States v. Hankins, pp. 62 of Syllabus
- (7) Hall v. Montgomery Ward & Co., pp. 64 of Syllabus
- (8) Nachtsheim v. Beech Aircraft Corp.
- (9) Terry v. State, **on the web**
- (10) United States v. McVeigh, **on the web**
- (11) United States v. Green, **on the web**

II. **CHARACTER EVIDENCE**

- (a) Rule 404(a) – Read pp. 30-35 of Supplement (2008)
- (b) Rule 404(a)(2) and (3) – Read pp. 30-35 of Supplement (2008)
- (c) Rule 405(a) & (b) – Read pp. 36-37 of the Supplement (2008)

A. **CRIMINAL CASES – RULE 404(A)**

1. United States v. Williams – on the web
2. **Michelson v. United States** – (HUGE!!) p. 875 cb
3. United States v. Wooden – on the web
4. United States v. Keiser – on the web
5. Burgeon v. State – p. 891 cb
6. Notes – pp. 893-95 cb
7. State v. Hicks – on the web

Rape Victim

[Read Fed. R. Evidence 412, pp. 50-60 of Supplement (2008) and compare to Arkansas’ Rape Shield Statute in Appendix A, pp. 27 of the Syllabus.]

8. White v. State – p. 895 cb
9. Notes (1) - (7) – pp. 901-06 cb

B. **CIVIL CASES – RULE 404(A)**

1. Ginter v. Northwestern Mutual Life Insurance Co. – on the web
2. **Crumpton v. Confederation Life Insurance Co. (HUGE!)** – p. 907 cb
3. Notes (1) - (7) – pp. 912-14 cb
4. Moorhead v. Mitsubishi Aircraft International, Inc. – on the web

C. UNCHARGED OR OTHER ACT EVIDENCE OFFERED FOR A PURPOSE OTHER THAN TO SHOW "CHARACTER"
RULE 404(B) - HUGE!! – pp. 30-36 of the Supplement (2008)

1. United States v. Beechum (HUGE!) – on the web
2. Huddleston v. United States (HUGE!) – p. 861 cb
3. Dowling v. United States – p. 867 cb
4. People v. Castillo – p. 868 cb
5. United States v. Jones – on the web
6. Notes (1)-(3) - pp. 866-868 cb

D. **SIMILAR CRIMES IN SEXUAL ASSAULT CASES – RULE 413, 414, 415, pp. 60-63 of the Supplement (2008)**

1. United States v. Mound – p. 585 Supplement
2. Garceau v. Woodford – p. 588 Supplement
3. Johnson v. Elk Lake School District – p. 589 Supplement

III. HABIT - EVIDENCE OFFERED TO SHOW CONDUCT CONFORMED TO SAME
RULE 406 – Read pp. 37-39 of the Supplement (2008)

Cases

1. Halloran v. Virginia Chemicals, Inc. (HUGE!) – p. 921 cb
2. Notes (1) - (7) – pp. 924-29 cb

IV. SUBSEQUENT REMEDIAL MEASURES – RULE 407 – Read pp. 39-41 of the Supplement (2008)

Cases

1. Phar-Mor, Inc. v. Goff – p. 929 cb
2. Notes (1) - (9) – pp. 934-38 cb

V. OFFERS TO COMPROMISE – RULE 408 – Read pp. 41-45 of the Supplement (2008)

Cases

1. Hiram Ricker & Sons v. Students Intern'l Mediation Soc'y – p. 938 cb
2. Notes (1) - (6) – pp. 940-41 cb
3. John McShain, Inc. v. Cessna Aircraft Co. – p. 941 cb
4. Notes (1) - (5) – pp. 943-47 cb

VI. OFFERS TO PAY MEDICAL EXPENSES – RULE 409 – Read pp. 45-46 of Supplement (2008)

Cases/Problems

1. Note 6 – p. 941 cb
2. Be prepared to discuss problems found on the web

VII. PLEAS OF GUILTY AND NOLO CONTENDERE – RULE 410 – Read pp. 46-50 of the Supplement

Cases/Problems

1. Note 5 – pp. 944-47 cb
2. Be prepared to discuss problems – on the web

VIII. **LIABILITY INSURANCE – RULE 411** – Read pp. 50 of the Supplement (2008)

IX. **EXAMINATION OF WITNESSES**

A. **COMPETENCY – RULE 601** – Read p. 65-66 of the Supplement (2008)

Cases

1. **Rock v. Arkansas (HUGE!)** - p. 257 cb
2. **United States v. Scheffer** - p. 531 of the Supplement (2008)
3. **Holmes v. South Carolina** - p. 543 of the Supplement (2008)
4. **State v. Reiner** - p. 549 of the Supplement (2008)
5. **Ohler v. United States** - p. 549 of the Supplement (2008)
6. **Hammon v. State (WOW!)** - 338 Ark. 733 (1999)
7. **United States v. Bedonie**

B. **PERSONAL KNOWLEDGE – RULE 602** – Read p. 66 of the Supplement (2008)

Cases

1. **Gladden v. State** – p. 291 cb
2. **Notes (1) - (4)** – pp. 292-93 cb
3. **State v. Ranier** – p. 293 cb
4. **Notes (1) - (5)** – pp. 296-97 cb
5. **State v. Singh** – p. 297 cb
6. **Notes (1) - (3)** – pp. 304-05 cb
7. **Schneiderman v. Interstate Transit Lines** – p. 305 cb
8. **People v. White** – p. 304 cb
9. **Cramer v. Tyars** – p. 311 cb

C. **OATH – RULE 603** – Read p. 67 of the Supplement (2008)

D. **DIRECT EXAMINATION AND FORM OF THE QUESTIONS**
RULES 611(A), (B) AND (C) – Read pp. 87-91 of Supplement (2008)

E. **REFRESHING RECOLLECTION, RULE 612** - Read pp. 91-94 of the Supplement (2008) (CONTRAST WITH IMPEACHMENT BY PRIOR INCONSISTENT STATEMENT – RULE ____ pp. 94-96 of the Supplement) (2008).

Cases

1. **United States v. Riccardi** – p. 340 cb
2. **Notes (1) - (8)** – pp. 345-52 cb

X. **OPINION TESTIMONY**

A. **LAY OPINION – RULE 701** – Read pp. 98-100 of the Supplement (2008).

Cases

1. **State v. Garver** – p. 352 cb
2. **Notes (1) - (7)** – pp. 354-59 cb

B. **EXPERT OPINION – RULE 702 – Read pp. 100-107 of the Supplement (2008).**

Cases

1. United States v. Robinson – p. 955 cb
2. Notes (1) - (2) – pp. 957-58 cb
3. Een v. Consolidated Freightways – 958 cb and pp. 47 of Syllabus.
4. New Prospect Drilling Co. v. First Commercial Trust – on the web.
5. Notes (1) - (2) – pp. 960-62 cb
6. **Daubert v. Merrell Dow Pharmaceuticals (HUGE!)** – p. 962 cb
7. **Kumho Tire Co., LTD v. Carmichael (HUGE!)** – p. 606 of the Supplement (2008).
8. General Electric v. Joiner – p. 596 of Supplement (2008).
9. United States v. Llera Plaza – p. 697 of Supplement (2008).
10. Meier v. Ross General Hospital – p. 993 cb
11. Notes (1) - (4) – pp. 998-1004 cb
12. Specht v. Jensen – p. 1021 cb
13. Note #2 – pp. 1020-21 cb
14. United States v. West – p. 1028 cb

C. **BASES OF THE EXPERT’S OPINION AND DISCLOSURE OF FACTS RULE 703 – Read pp. 107-09 of the Supplement (2008).**

Cases

1. Rabata v. Dohner – p. 1036 cb
2. Notes (1) - (4) – pp. 1041-42 cb
3. United States v. Scop – p. 1043 cb
4. Pelster v. Ray – p. 1045 cb
5. Christopher v. Allied-Signal Corp. – p. 1048 cb

D. **ULTIMATE ISSUE – RULE 704 – Read pp. 109-11 of the Supplement (2008)**

Cases

1. Washington v. United States – p. 1005 cb
2. United States v. Scop – p. 1015 cb

E. **DISCLOSURE OF FACTS UNDERLYING AN EXPERT’S OPINION RULE 705 – Read pp. 112-13 of the Supplement (2008)**

Cases

1. People v. Anderson – p. 1053 cb
2. Note #7 – pp. 1063-64 cb

XI. **IMPEACHMENT (COLLATERAL VS. NON-COLLATERAL MATTERS)**

A. **IMPEACHING OWN WITNESS – RULE 607 – pp. 72-73 of the Supplement (2008)**

Cases

1. United States v. Cosentino – p. 385 cb
2. Notes (1) & (2) – pp. 387-90 cb
3. United States v. Ince – p. 390 cb
4. Notes (1) - (10) – pp. 394-400 cb
5. Note 2 -- Opponent's Witness – pp. 401-405 cb
6. **United States v. Abel (bias!) (HUGE!)** – p. 406 cb
7. Notes (1) - (6) – pp. 411-13 cb

B. **PRIOR CONVICTIONS – RULES 609(A), (B), (C), (D) AND (E) - (HUGE!) - Read pp. 77-87 of the Supplement (2008)**

Cases

1. United States v. Valencia – p. 416 cb
2. Notes (1) - (9) – pp. 418-23 cb
3. Cree v. Hatcher – p. 424 cb
4. Notes (1) - (8) – pp. 426-29 cb

C. **PRIOR “BAD” ACTS – RULE 608**
Read pp. 73-77 of the Supplement (2008)

Cases

1. People v. Sorge – p. 429 cb
2. Notes (1) - (9) – pp. 431-38 cb
3. State v. Ternan – p. 438 cb
4. United States v. Dotson – p. 439 cb
5. Notes (1) - (10) – pp. 444-51 cb

D. **PRIOR INCONSISTENT STATEMENTS (CONTRAST WITH REFRESHING RECOLLECTION, RULE 612) RULE 613 – Read pp. 94-95 of the Supplement (2008)**

Cases

1. Denver City Tramway Co. v. Lomovt – p. 453 cb
2. Notes (1) - (9) -- pp. 456-64 cb
3. Rodriguez v. State – p. 464 cb
4. Note at – pp. 465-67 cb

XII. **AUTHENTICATION – RULES 901-903**
Read pp. 166-75 of the Supplement (2008)

Cases

1. Keegan v. Green Giant & Co. – p. 181 cb
2. Notes (2) - (5) – pp. 185-86 cb
3. United States v. Branch – p. 186 cb
4. Zenith Radio Corporation v. Matsushita Electric – p. 195 cb
5. Notes (1) - (3) – pp. 200-01 cb
6. Notes (1) - (4) – pp. 203-04 cb
7. University of Illinois v. Spalding – p. 206 cb
8. Notes (1) - (3) – pp. 207-08 cb

XIII. **BEST EVIDENCE (ORIGINAL WRITING) RULE – RULES 1001-1008**
Read pp. 176-83 of the Supplement (2008)

Cases

1. **Seiler v. Lucasfilms, Ltd.** (IMPORTANT!) – p. 212 cb
2. Notes (1) - (3) – p. 217 cb
3. Meyer v. United States – p. 217 cb
4. Notes (1) - (6) – pp. 219-20 cb
5. Federal Union Surety Co. v. Indiana Lumber – p. 221 cb
6. Notes (1) - (5) – pp. 222-25 cb
7. Davenport v. Ourisman-Mendell Chevrolet, Inc. – p. 225 cb

XIV. **HEARSAY**

- A. **BASIC DEFINITIONS – RULES 801 & 802**
Read pp. 119-29 of the Supplement (2008) and “classic” hearsay on the web.

Cases

1. Leake v. Hagert – p. 475 cb
2. Notes (1) - (6) – pp. 476-78 cb
3. Central of Georgia Railway Co. v. Reeves – p. 480 cb
4. Hickey v. Settlemier – p. 484 cb
5. Notes (1) - (3) – pp. 486-87 cb
6. Banks v. State – p. 489 cb
7. Notes (1) & (2) – p. 492-94 cb
8. United States v. Reyes – p. 494 cb
9. **Wright v. Doe D. Tatham** (HUGE!) – p. 500 cb
10. Headley v. Tilghman – p. 505 cb

- B. **STATEMENTS NOT HEARSAY – RULE 801(D)(1) (HUGE!)**
Read pp. 119-26 of the Supplement (2008).

Cases

1. Rowe v. Farmers Insurance Company, Inc. – p. 522 cb
2. Notes (1) - (3) – pp. 529-30 cb
3. **California v. Green** (HUGE!) – p. 530 cb
4. Notes (1) - (3) – pp. 538-40 cb
5. Tome v. United States – p. 540 cb
6. Notes (1) - (4) – pp. 549-54 cb
7. **United States v. Owens** (HUGE!) – p. 554 cb
8. Notes (1) - (4) – pp. 561-63 cb

C. **ADMISSIONS (MISNOMER) - RULE 801(D)(2) (HUGE!) – pp. 120-128 of the Supplement (2008).**

Cases

1. Bill v. Farm Bureau Life Insurance Co. – p. 563 cb
2. Notes (1) - (6) – pp. 566-69 cb
3. Notes on Adoptive Admissions – pp. 569-72 cb
4. United States v. McKeon – p. 572 cb
5. Notes (1) - (4) – pp. 578-82 cb
6. **Mahlandt v. Wild Canid Survival & Research (HUGE!)** – p. 582 cb
7. Notes (1) - (6) – pp. 586-89 cb
8. **Bourjaily v. United States (HUGE!)** – p. 590 cb
9. Notes (1) - (5) – pp. 600-05 cb

D. **HEARSAY EXCEPTION - (UNAVAILABLE WITNESS) (DECLARATION AGAINST INTEREST CONTRASTED WITH ADMISSION OF A PARTY RULE 804(a) – Read pp. 153-62 of the Supplement (2008). RULE 804(b)(3) – Read pp. 154-61 of the Supplement (2008).**

Cases

1. Cole v. Cole – p. 605 cb
2. Notes (1) - (5) – pp. 606-08 cb
3. Carpenter v. Davis – p. 608 cb
4. Notes (1) - (5) – pp. 614-16 cb
5. People v. Brown – p. 616 cb
6. Notes (1) - (4) – pp. 619-22 cb
7. **Williamson v. United States (HUGE!)** – p. 622 cb
8. Notes (1) - (3) – pp. 631-34 cb

E. **HEARSAY EXCEPTIONS (AVAILABILITY OF DECLARANT IRRELEVANT RULE 803(1) (PRESENT SENSE IMPRESSION) RULE 803(2) (EXCITED UTTERANCE) Read pp. 129 & 134-35 of the Supplement (2008).**

Cases

1. Commonwealth v. Coleman – p. 634 cb
2. Notes (1) - (13) – pp. 638-44 cb

F. **HEARSAY EXCEPTION (THEN EXISTING MENTAL CONDITION) RULE 803(3) – Read pp. 130 & 136 of the Supplement (2008). Rule 803 (4) statement for purpose of medical diagnosis or treatment - Read pp. 130 & 136-37 of the Supplement (2008).**

Cases

1. Fidelity Service Insurance Co. v. Jones – p. 645 cb
2. United States v. Tome – p. 647 cb
3. Notes (1) - (4) – pp. 651-54 cb
4. White v. Illinois – p. 796 cb
5. Notes (1) - (3) – pp. 805-06 cb
6. **Mutual Life Insurance Co. v. Hillmon (HUGE!)** - p. 659 cb

- G. **HEARSAY EXCEPTION**
RULE 803(6) (BUSINESS RECORDS) – Read pp. 130 & 139-43 of the Supplement (2008). RULE 803(8) (PUBLIC RECORDS) – Read pp. 130-31 & 143-45 of the Supplement (2008).

Cases

1. United States v. Jacoby – p. 680 cb
2. Notes (1) - (4) – pp. 685-89 cb
3. **Palmer v. Hoffman (HUGE!)** – p 692 cb
4. Notes (1) & (2) – pp. 695-97 cb
5. **Johnson v. Lutz (HUGE!)** – p. 697 cb
6. Notes (1) & (2) – pp. 699-701 cb
7. **Beech Aircraft v. Rainey (HUGE!)** – p. 701 cb
8. Notes (1) - (5) – pp. 708-14 cb
9. Commonwealth v. DiGiacomo – p. 714 cb
10. Notes (1) - (4) – pp. 717-18 cb

- H. **FORMER TESTIMONY – (DECLARANT MUST BE UNAVAILABLE)**
RULE 804(b) – Read pp. 154-56 & 157-62 of the Supplement (2008).
RULE 804(b)(1) – Read pp. 154 & 157-58 of the Supplement (2008).

Cases

1. **Gaines v. Thomas (HUGE!)** – p. 723 cb
2. Lloyd v. American Export Lines, Inc. – p. 725 cb
3. Notes (1) - (6) – pp. 731-37 cb
4. **Ohio v. Roberts** – p. 737 cb (**Remember White v. Illinois!**, p. 796 cb)
5. **Crawford v. Washington – Huge 2 times !!** – p. 551 of the Supplement (2008)
6. Davis v. Washington - p. 572 of the Supplement (2008)
7. United States v. DiNapoli – p. 747 cb
8. Notes (1) & (2) – p. 752 cb

- I. **DYING DECLARATIONS – (THE ULTIMATE UNAVAILABLE WITNESS!)**
RULE 804(b)(2) – Read p. 154 and p. 159 of the Supplement (2008)

Cases

1. Wilson v. State – p. 753 cb
2. Notes (1) - (7) – pp. 757-60 cb

- J. **THE RESIDUAL EXCEPTION**
RULE 807 – Read p. 165 of the Supplement (2008)

Cases

1. United States v. Carlson – on the web
2. United States v. Wilkus – on the web
3. **Idaho v. Wright (HUGE!)** – p. 778 cb
4. Notes (1) - (6) – pp. 789-96 cb

XV. **PRIVILEGES**

RULE 501 – Read pp. 63-65 of the Supplement (2008)

A. Arkansas:

Lawyer-Client Privilege – Rule 502 (Appendix “B” (pp. 33) of this Syllabus) & On the web!;
Husband-Wife Privilege - Rule 504 (Appendix “C” (p. 35) of this Syllabus) & On the web!; AND

B. **THE ATTORNEY-CLIENT PRIVILEGE**

1. In re: Sealed Case – p. 1398 cb
2. Notes (1)- (6) – p. 1402-04 cb
3. Ralls v. United States – p. 1411 cb
4. Notes (1) - (3) – pp. 1414-16 cb
5. **People v. Meredith (HUGE!)** – p. 1430 cb
6. Notes (1) - (6) – pp. 1435-37 cb
7. **United States v. Zolin (HUGE!)** – p. 1465 cb
8. Swidler v. Berlin and Hamilton v. United States - p. 672 of the Supplement (2008)

C. **HUSBAND-WIFE PRIVILEGE**

1. **Trammel v. United States (HUGE!)** – p. 1494 cb
2. Notes (1) - (10) – pp. 1500-02 cb
3. In the Matter of Grand Jury Subpoena of Ford v. United States - p. 1504 cb
4. Notes (1) - (4) – p. 1507 cb
5. United States v. Marashi – p. 1508 cb
6. Notes (1) - (5) – pp. 1511-13 cb

D. **THE PRIVILEGE AGAINST SELF-INCRIMINATION**

1. **UNITED STATES v. BALSYS** - p. 652 of the Supplement (2008)
2. Mitchell v. United States, p. 663 of the Supplement (2008)
3. Chavez v. Martinez, p. 638 of the Supplement (2008)

XVI. **JUDICIAL NOTICE**

RULE 201 – Read pp. 17-23 of the Supplement (2008)

Cases

1. In re Marriage of Tresnak – p. 1243 cb
2. United States v. Gould – p. 1265 cb

**ADMISSIBILITY OF EVIDENCE OF
VICTIM'S PRIOR SEXUAL CONDUCT**

16-42-101. Admissibility of evidence of victim's prior sexual conduct.

- (a) As used in this section, unless the context otherwise requires, "sexual conduct" means deviate sexual activity, sexual contact, or sexual intercourse, as those terms are defined by § 5-14-101.
 - (b) In any criminal prosecution under §§ 5-14-103—5-14-110, or for criminal attempt to commit, criminal solicitation to commit, or criminal conspiracy to commit an offense defined in any of those sections, opinion evidence, reputation evidence, or evidence of specific instances of the victim's prior sexual conduct with the defendant or any other person is not admissible by the defendant, either through direct examination of any defense witness or through cross-examination of the victim or other prosecution witness, to attack the credibility of the victim, to prove consent or any other defense, or for any other purpose.
 - (c) Notwithstanding the prohibition contained in subsection (b) of this section, evidence directly pertaining to the act upon which the prosecution is based or evidence of the victim's prior sexual conduct with the defendant or any other person may be admitted at the trial if the relevancy of the evidence is determined in the following manner:
 - (1) A written motion shall be filed by the defendant with the court at any time prior to the time the defense rests stating that the defendant has an offer of relevant evidence of the victim's prior sexual conduct and the purpose for which the evidence is believed relevant.
- 2.
- (A) A hearing on the motion shall be held in camera no later than three (3) days before the trial is scheduled to begin, or at such later time as the court may for good cause permit.
 - (B) A written record shall be made of the in camera hearing and shall be furnished to the Arkansas Supreme Court on appeal.
 - (C) If, following the hearing, the court determines that the offered proof is relevant to a fact in issue, and that its probative value outweighs its inflammatory or prejudicial nature, the court shall make a written order stating what evidence, if any, may be introduced by the defendant and the nature of the questions to be permitted in accordance with the applicable rules of evidence.

APPENDIX A (CONT.)

3.
 - (A) If the court determines that some or all of the offered proof is relevant to a fact in issue, the victim shall be told of the court's order and given the opportunity to consult in private with the prosecuting attorney.
 - (B) If the prosecuting attorney is satisfied that the order substantially prejudices the prosecution of the case, an interlocutory appeal on behalf of the state may be taken in accordance with Rule 36.10(a) and (c), Arkansas Rules of Criminal Procedure.
 - (C) Further proceedings in the trial court shall be stayed pending determination of the appeal. However, a decision by the Arkansas Supreme Court sustaining in its entirety the order appealed shall not bar further proceedings against the defendant on the charge.
 - (D) In the event the defendant has not filed a written motion or a written motion has been filed and the court has determined that the offered proof is not relevant to a fact in issue, any willful attempt by counsel or a defendant to make any reference to the victim's prior sexual conduct in the presence of the jury may subject counsel or a defendant to appropriate sanctions by the court.

History. Acts 1977, No. 197, §§ 1-4; 1983, No. 889, § 1; A.S.A. 1947, §§ 41-1810.1 — 41-1810.4.

RULE 502: LAWYER-CLIENT PRIVILEGE

RULE 502. Lawyer-client privilege.— (a) Definitions. As used in this rule:

1. A “client” is a person, public officer, or corporation, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him.
2. A [“] representative of the client [“] is one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.
3. A “lawyer” is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.
4. A “representative of the lawyer” is one employed by the lawyer to assist the lawyer in the rendition of professional legal services.
5. A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.
6. General Rule of Privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications [communications] made for the purpose of facilitating the rendition of professional legal services to the client (1) between himself or his representative and his lawyer or his lawyer’s representative, (2) between his lawyer and the lawyer’s representative, (3) by him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein, (4) between representatives of the client or between the client and a representative of the client, or (5) among lawyers and their representatives representing the same client.

APPENDIX B (CONT.)

7. Who May Claim the Privilege. The privilege may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.
8. Exceptions. There is no privilege under this rule:
 - (a) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;
 - (b) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transaction;
 - (c) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by the lawyer to his client or by the client to his lawyer.
 - (d) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;
 - (e) Joint clients. As to a communication relevant to a matter of common interest between or among two [2] or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients; or
9. Public officer or agency. As to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to process the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

Publisher's Notes. The bracketed quotes in subdivision (a)(2) and the bracketed word "communications" in subsection (b) were inserted by the publisher.

RULE 504: HUSBAND-WIFE PRIVILEGE**RULE 504. Husband-wife privilege.—**

1. Definition. A communication is confidential if it is made privately by any person to his or her spouse and is not intended for disclosure to any other person.
2. General Rule of Privilege. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse.
3. Who May Claim the Privilege. The privilege may be claimed by the accused or by the spouse on behalf of the accused. The authority of the spouse to do so is presumed.
4. Exceptions. There is no privilege under this rule in a proceeding in which one [1] spouse is charged with a crime against the person or property of (1) the other, (2) a child of either, (3) a person residing in the household of either, or (4) a third person committed in the course of committing a crime against any of them.

Prosecution

vs.

Defense

**If your last name ends in
“A” through “H”**

**If your last name ends in
“I” through “Z”**

First Five (5) Case Assignments:

1. UNITED STATES v. FOSTER pp. 34-35
2. DOUGLASS v. EATON CORP pp. 36-39
3. UNITED STATES v. HALL pp. 40-41
4. UNITED STATES v. LOWERY pp. 42-44
5. HACKENSON v. CITY OF WATERBURY pp. 45-46
6. EEN v. CONSOLIDATED FREIGHTWAYS pp. 47-49

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.

A. “Any” Tendency

A (1). **UNITED STATES v. FOSTER**
986 F2d 541 (D.C.Cir. 1993)

RANDOLPH, Circuit Judge:

After a jury trial, James A. Foster was convicted of unlawfully possessing more than 5 grams of crack cocaine with intent to distribute and of committing the offense within 1000 feet of a school. Sergeant Thomas Clark of the U.S. Park Police was the critical witness for the prosecution. His identification of Foster supplied the only evidence directly linking Foster with the cocaine.

The facts, as Sergeant Clark related them, are these. On a clear, sunny August afternoon, Clark settled into his observation post in a District of Columbia neighborhood known for its illicit drug activity. Thirty to forty feet below him and 150 yards away, near an apartment complex, were a parking lot, a basketball court and a playground. Clark was watching this area with 10 X 50 binoculars when he spotted an individual, whom he later identified as Foster, sitting in the front seat of a car in the parking lot.

Events typical of drug dealing then unfolded. Sergeant Clark saw Foster give something to someone in the back seat, leave the car, walk to the basketball court, receive money from another individual, count the bills, hand over a small white object, walk away, take two clear plastic bags from his pocket, put them into a brown paper bag, drop the bag over a chain link fence, pick up the bag again, walk over to the apartment building and drop the paper bag near another fence. Clark radioed a description of Foster. Other officers arrived at the scene. One arrested Foster and found \$ 311 on him. Another officer retrieved the brown bag. It held 51 packets of crack cocaine.

Sergeant Clark testified on direct that he saw Foster pass something to a person seated in the back seat of a car. The first objection came when defense counsel asked Clark if he had been able to observe the features of the other person. The second objection, actually a series of objections, came in response to defense questions posed to Clark and Officer Egan, who had been called to the scene, asking whether Clark had broadcast the description not only of Foster but also of another individual Clark suspected of drug dealing in the same area at the same time.

We think both lines of inquiry sought to elicit relevant evidence and that the district court erred in sustaining the government's objections. The general rule is that relevant evidence is admissible. Rule 402, Fed. R. Evid. Relevant evidence, Rule 401 tells us, is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the

evidence." Under this test, there is no such thing as "highly relevant" evidence or, as the government puts it in its brief, "marginally relevant" evidence. Evidence is either relevant or it is not. "Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Advisory Committee's Note to Rule 401, Fed. R. Evid. The initial step in determining relevancy is therefore to identify the "matter properly provable." As Professor James explained in a highly-regarded article, "to discover the relevancy of an offered item of evidence one must first discover to what proposition it is supposed to be relevant." James, Relevancy, Probability and the Law, 29 Cal. L. Rev. 689, 696 n.15 (1941).

Whether Clark could see inside the car on the parking lot well enough to identify its occupants was a matter of consequence at trial. If he could not perceive the features of the person in the back seat this would tend to make it less likely that he was able to recognize the person in the front seat as Foster, and vice versa. Defense counsel's question to Clark about this subject therefore sought relevant evidence and the district court should have allowed it. It is of no moment that a negative answer by Clark would not have conclusively proven that he had misidentified Foster as the person possessing the bag of cocaine. Evaluating all the evidence on a particular issue is for the jury. Each piece of evidence need not be conclusive: "A brick is not a wall." 1 McCormick on Evidence § 185, at 776 (J. Strong ed., 4th ed. 1992); see Advisory Committee's Note to Rule 401, Fed. R. Evid.

The questions whether Clark had broadcast the description of another individual suspected of drug dealing also sought relevant evidence. Depending on Clark's response, his answer would have had a tendency to make it more or less probable that he had confused Foster with the other person. In its case-in-chief the government put on evidence that Clark had radioed a description tallying with Foster's--a black male, about 25 years old, 6 feet tall, 150-160 pounds, with a goatee. The relevancy of Clark's and Egan's answers to the questions propounded by defense counsel illustrates Wigmore's principle of "explanation." Wigmore demonstrated that "every evidentiary fact or class of facts may call for two processes and raise two sets of questions: (1) the admissibility of the original fact from the proponent, and (2) the admissibility of explanatory facts from the opponent." 1A J. Wigmore, Evidence § 36, at 1004 (Tillers rev. 1983). It is always open in a criminal case for the defendant to explain away the force of specific items of the government's proof by showing the existence of other hypotheses. "[F]or this purpose other facts affording such explanations are receivable from the [defendant]." *Id.* The district court therefore should have allowed these questions.

For the reasons given, Foster's conviction is reversed and the case is remanded for a retrial in accordance with this opinion.

A (2).

DOUGLAS v. EATON CORP.
956 F.2d 1339 (6th Cir. 1992)

KEITH, CIRCUIT JUDGE

Plaintiff-appellant Pearl H. Douglass, a Michigan citizen, ("Douglass") appeals the judgment of the district court overturning the jury verdict in her favor and rejecting her claim of discriminatory discharge against the defendant-appellee Eaton Corporation ("Eaton"), an Ohio corporation, under the Michigan Elliott-Larsen Civil Rights Act,

Douglass, a black woman, was an hourly employee at Eaton's Saginaw, Michigan manufacturing plant. Prior to her discharge, Douglass had approximately 12 years seniority. Until the incident giving rise to the present action, Douglass received no reprimands or any form of discipline. As a production worker at the plant, Douglass was represented by Local No. 433 of the Allied Industrial Workers Union (the "Union"). The collective bargaining agreement between Eaton and the Union included "Shop Rules and Regulations" that prohibited, upon penalty of discharge, "assaulting another, brawling, or fighting on the premises."

On November 21, 1985, Douglass was involved in a fight with two white co-workers, Robert and Jan McCrossen. As a result of the altercation, Douglass was fired. Neither of the McCrossens were discharged. The Union sought to have Douglass reinstated by meeting with Eaton management on several occasions, but Eaton upheld its original decision to discharge. Having exhausted her administrative remedies, Douglass brought the present action in the district court on the basis of diversity, alleging that her discharge was discriminatory.

...As to the events on November 21, 1985, the facts are in dispute.

Douglass claimed that at the start of work on that afternoon, Jan McCrossen turned on mist collectors on Douglass' machine, an action which could have caused Douglass' machine to malfunction. Douglass complained to her supervisor to no avail. During their lunch break later in the day, Douglass claimed that the McCrossens attempted to hit her with a swinging cafeteria door.

At the end of the day while exiting the plant, Douglass alleged that Jan McCrossen shoved her, and Douglass retaliated by grabbing Jan McCrossen around her neck. Robert McCrossen intervened and hit Douglass two or three times on the back of her head/neck. Douglass' son and nephew, who had come to pick her up from work, then jumped on Robert McCrossen. There is dispute as to whether a third person joined Douglass' son and nephew in the altercation with Robert McCrossen. When other employees attempted to pull the young men off of Robert McCrossen, Douglass threatened to kill anyone who bothered her son.

Eaton's Human Resources Manager, Rick Blauwiel, was informed the next day, November 22, 1985, that there had been a physical altercation outside the plant the previous night. Blauwiel reviewed signed statements from five employees who witnessed the incident, as well as a report by the security guard who was on duty when the incident occurred. These documents contained testimony that as employees left the plant,

Douglass "grabbed" or "jumped on" Jan McCrossen and "tossed her to the ground." Robert McCrossen went to his wife's defense by hitting Douglass. Robert McCrossen was then attacked by young men who had come from a car parked in front of the plant. When other employees attempted to halt the attack, Douglass threatened to "kill" these employees if they touched her son. Douglass and at least one of the men who had fought with Robert McCrossen then drove away.

On the basis of this information, Blauwikel determined that Douglass had attacked Jan McCrossen without apparent provocation, thereby violating Eaton's shop rule against fighting. He suspended her pending further investigation. Later, Blauwikel interviewed Douglass. Douglass told Blauwikel that Jan McCrossen had switched on a machine near Douglass' work station that cleared oil mist out of the air on the day of the fight, that the McCrossens had swung a door toward her, and that Jan McCrossen had bumped Douglass with her purse or elbow as they left the plant on the day of the altercation. She said that two other employees could confirm this information, but those employees were not able to confirm these allegations. After the interviews, Blauwikel concluded that Douglass had, without provocation, violently attacked a fellow employee. He then terminated Douglass.

Douglass also presented evidence at trial regarding disciplinary treatment against blacks and whites who had previously engaged in fights at Eaton. She alleged that the evidence demonstrated a pattern of disparate treatment against racial minorities by Eaton. The district court admitted this evidence at trial after denying a motion in limine submitted by Eaton to exclude the evidence. The evidence included the following:

- 1) T. J. Robinson, who is black, was involved in a fight with Richard Tolles, who is white, in June 1974. There was conflicting evidence as to who provoked the incident. Eaton's record showed that after the two men exchanged heated words, Robinson struck Tolles, and Tolles swung a wild blow at Robinson, but missed hitting him. Eaton then discharged both Robinson and Tolles, but later reinstated Tolles, reducing his penalty to a 30 day suspension.
- 2) Kenneth Carlton, a white employee of Eaton, was the only white employee who was discharged by Eaton for engaging in a physical altercation at the workplace. There was evidence that Carlton had gone home early on the date of the altercation in September 1975. He returned to the plant intoxicated and incoherent, and then attacked a plant foreman, repeatedly striking and kicking the supervisor, who did not hit Carlton in return.
- 3) Two white employees, William Short and Felix Matuzewski, were involved in a fight at Eaton's plant in March 1976. Matuzewski was hospitalized as a result of injuries sustained during this altercation. He was subsequently suspended for three weeks. Short was given six weeks of disciplinary layoff.
- 4) In May 1977, Charles Jarlock, a white employee of Eaton, struck co-worker Mike Horzelski, who is also white, "after provocation," according to Eaton's records. Jarlock was given one week disciplinary layoff.
- 5) In September 1978, Florencio Quiroga, a Mexican-American, hit D. Pinnell, a white employee, in the face. Although both employees told management at Eaton that they were merely goofing around, Eaton discharged Quiroga.

6) Charles Culberson and Helen Browning, two black employees, were engaged in an altercation in 1984 when Culberson pushed Browning. Culberson was given a four day disciplinary layoff and warned that he would be discharged for any further incidents.

7) Donald Kasper, who is white, was engaged in a physical altercation with a plant supervisor in July 1987 and was subsequently given a one day disciplinary layoff.

Following trial, Eaton moved for a directed verdict and argued that the above evidence did not show a pattern of discrimination at Eaton. The district court denied the motion for a directed verdict. The case was then submitted to the jury. On July 25, 1990, the jury returned its verdict, concluding that Eaton discriminated against Douglass on the basis of her race and granted her damages in the amount of \$ 143,154.97. In accordance with the jury verdict, the district court entered judgment in Douglass' favor on October 2, 1990.

Subsequently, Eaton submitted a motion for judgment notwithstanding the verdict, or, alternatively, for a new trial. On February 22, 1991, the district court granted the motion. The court ruled that the above evidence of alleged past, comparable conduct regarding fights at Eaton was not relevant as a matter of law and was erroneously admitted into evidence. The district court ruled that these incidents were incomparable to the present case. According to the district court, in each case where Eaton discharged an employee, it was shown that the discharged employee was the "aggressor." Where the employee was not discharged, the employee was a "victim" or it was unclear who the aggressor was. The district court further ruled that Douglass was not similarly situated to "victims" or employees who were not clearly shown to be the "aggressor" during a physical altercation. Therefore, the district court held that the above evidence should have been excluded.

II. The standard for determining whether evidence is relevant is extremely liberal. Federal Rule of Evidence 401 defines relevant evidence as "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." The district court has broad discretion in determining whether evidence is relevant, and we may only reverse the ruling if the district court has abused its discretion.

We note that in determining whether evidence is relevant, the district court must not consider the weight or sufficiency of the evidence. Even if a district court believes the evidence is insufficient to prove the ultimate point for which it is offered, it may not exclude the evidence if it has even the slightest probative worth.

With these standards in mind, we conclude that the district court's decision to exclude the evidence in this case was an abuse of discretion. In making its determination that the evidence of past incidents was irrelevant, the district court examined the sufficiency of the comparable evidence, and not merely whether this evidence had "any tendency" to support a consequential fact.

As we have noted, the test of relevance is very liberal and does not entail a determination of the sufficiency of the evidence. In this case, however, the comparable evidence clearly met the threshold test of relevance. Each of the prior incidents involved a

physical altercation between employees at the Eaton plant. In each case, Eaton took disciplinary action pursuant to its shop rule against fighting based on Eaton's assessment of the situation. The district court looked beyond this threshold relevance, however, and ruled that the situations were different based on its interpretation of Eaton's differential treatment of the employees involved. The district court concluded that the evidence was irrelevant because it "failed in adducing anything upon which a factfinder could properly ground a decision based either in direct facts or inferences drawn from the circumstances." This conclusion about the value of plaintiff's evidence was based on the district court's determination of the *sufficiency* of the evidence, not the *relevance*. The evidence in this case clearly met the threshold test of relevance, and we conclude that the district court abused its discretion in ruling that the evidence was not relevant. We, therefore, reverse the district court's grant of a new trial. For the reasons set forth above, we REVERSE the district court grant of judgment notwithstanding the verdict or a new trial; REINSTATE the jury verdict in favor of Douglass, including damages less \$ 9,980.77; and REMAND to the district court for further proceedings consistent with this opinion.

[Concurring opinion omitted.]

B. Fact of Consequence

B (1).

UNITED STATES v. HALL 653 F2d 1002 (5th Cir. 1981)

Christopher Hall was tried to a jury on charges of conspiring to distribute and to possess with intent to distribute cocaine (Count I), possessing with intent to distribute cocaine (Count II), and distributing cocaine (Counts III and IV), in violation of 21 U.S.C. §§ 841 (a)(1), 846 and 18 U.S.C. § 2. He was convicted of conspiracy and distribution (Counts I, III, and IV) and sentenced to ten years' imprisonment with nine years and nine months suspended and a five year term of probation.

Because we agree that the court below erred in admitting irrelevant and highly prejudicial opinion testimony by an agent of the federal Drug Enforcement Administration (DEA), we reverse the convictions and remand the case to the district court for a new trial.

I.

The government's case at trial rested primarily upon the testimony of Hall's alleged coconspirators, James Worthy, Jack Beck, and Debbie Ryan, all of whom testified under the auspices of plea bargaining agreements with the government. This testimony was uncorroborated by physical evidence the government had made no "controlled buy" or seizure of cocaine in connection with any of the transactions covered in the indictment.

Hall stood silent at his trial. The theory of his defense was that the three key government witnesses, in an effort to reap the benefits of cooperation with the government and at the same time to protect their true source of supply, offered him up to federal prosecution as a convenient scapegoat. In support of this theory, Hall sought to impeach the credibility of the witnesses against him by bringing out the details of their plea agreements with the government, their relationships to one another, and their other potential motivations for lying, and by stressing the total absence of any corroborating physical evidence to support their version of the facts.

To bolster its case, the government called its final witness, DEA agent John Donald. Donald did not participate in the investigation leading to Hall's arrest and prosecution, and was in no way connected with the development of the case against Hall. The sole purpose of his testimony was to respond to defense counsel's suggestion that the government had been unable to obtain corroborating physical evidence against Hall because Hall was innocent of the offenses charged. Donald testified in general terms about the various procedures used by the DEA in its narcotics investigations. In sum, Donald described the various investigative techniques and testified that it is not always possible to conduct a "controlled buy" and seizure of narcotics during the course of an investigation, particularly where the conspiracy under investigation has already terminated by the time the investigation is commenced or the subject of the investigation is insulated in the higher echelons of the narcotics conspiracy.

Hall's strenuous objections to this line of testimony were overruled by the district

court. On appeal, Hall renews those objections, contending that the testimony of agent Donald should have been excluded as irrelevant or, if relevant, as unfairly prejudicial.

We must agree.

The essential prerequisite of admissibility is relevance. Fed.R.Ev. 402. To be relevant, evidence must have some "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." Id. 401. Implicit in that definition are two distinct requirements: (1) The evidence must be probative of the proposition it is offered to prove, and (2) the proposition to be proved must be one that is of consequence to the determination of the action. McCormick on Evidence § 185, at 435 (2d ed. 1972); 1 Weinstein's Evidence P 401(03), at 401-13 (1980); 22 Wright & Graham, Federal Practice and Procedure: Evidence § 5162, at 18 (1978). Whether a proposition is of consequence to the determination of the action is a question that is governed by the substantive law.

The governing hypothesis of any criminal prosecution consists of the elements of the offenses charged and the relevant defenses (if any) raised to defeat criminal liability. Cf. 1 Weinstein's Evidence, supra, P 401(03) at 401-11. n1 As characterized by the government, Donald's testimony was offered to show that the DEA routinely utilized procedures other than the controlled buy and seizure method in order to develop criminal narcotics cases. In essence, Donald testified as a kind of quasi-expert on DEA investigative procedures, and his testimony was limited to the general and quite hypothetical descriptions of accepted practice that are typical of the expert witness. He testified to no facts bearing on any manner on the prosecution of Christopher Hall or on the investigation leading to that prosecution. His testimony had no tendency whatsoever to make the existence of any fact of consequence to the government's case in chief either more or less probable than it would have been without his testimony. See Fed.R.Ev. 401. Clearly, then, in the context of the government's case in chief, agent Donald's opinion testimony lacked substantial relevance to any matter in issue, and was therefore not admissible.

We conclude, therefore, that the testimony of the DEA agent John Donald lacked substantial relevance to any matters in issue in this case and was improperly admitted. That error was not harmless. The agent's "expert" generalities about the difficulty of making controlled buys and seizures of narcotics from individuals insulated in the higher echelons of drug conspiracies clearly and improperly suggested to the trial jury in the absence of any substantial evidence to that effect that Christopher Hall was just such a high-ranking conspirator. The risk of unfair prejudice inherent in such damning generalities alone enough to warrant reversal, see Fed.R.Ev. 403 is exacerbated by the nature of the testimony itself. Reduced to its essentials, Donald's testimony constituted little more than a (quasi-) expert commentary on the strength of the government's proof. Its sole purpose was to inform the jury that it need not view the absence of corroborating physical evidence as a weakness in the government's case. Such "evidence" has no place in a criminal trial.

Reversed and remanded.

C. Source of Authority for Excluding Relevant Evidence

C (1). **UNITED STATES v. LOWERY**
166 F.3D 1119 (11th Cir. 1999)

Carnes, Circuit Judge:

These defendants, in separate criminal cases, prevailed upon the district court to grant their pretrial motions to suppress the testimony of their alleged co-conspirators. That expected testimony had been obtained through plea agreements in which the government promised to consider recommending a lighter sentence in exchange for the alleged co-conspirators' substantial assistance in the prosecution of the remaining defendants, i.e., these appellees.

The district court (the same judge in each case) held that such agreements, although commonplace in the criminal justice system, are prohibited by 18 U.S.C. § 201(c)(2), which makes it a crime to give or promise anything of value for testimony. The court also held that the agreements violated Rule 4-3.4(b) of the Florida Bar Rules of Professional Conduct. It suppressed the testimony obtained through the agreements on both grounds. We reverse.

I. BACKGROUND

We first discuss the procedural facts of each of the three cases.

[In each of these consolidated cases, the defendants moved to exclude the testimony of cooperating witnesses. The testimony was undeniably relevant, but the defendants argued that the testimony had to be excluded because it was in violation of a federal statute prohibiting bribery of witnesses, as well as a state standard of professional responsibility that prohibits a lawyer from giving anything of value to a witness. The defendants argued, and the trial court agreed, that the witnesses received something of value for testifying specifically a guarantee of a lesser sentence. As to the federal bribery question, the defendants relied on an interpretation of 18 U.S.C. § 201(c)(2) (the federal bribery statute) offered by a panel of the Tenth Circuit in *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *rev'd en banc*, 165 F.3d 1297 (10th Cir. 1999).]

II. DISCUSSION

As we have said, this appeal involves what has come to be known as "the *Singleton* issue." The issue is whether plea agreements of the kind found in this case violate the federal prohibition against bribing witnesses contained in 18 U.S.C. § 201(c)(2).

Since the Tenth Circuit panel issued its opinion in *Singleton*, three circuits have rejected its holding that government plea agreements violate § 201(c)(2). The Tenth Circuit itself, sitting en banc, has since reversed the panel decision. See *United States v. Singleton*, 165 F.3d 1297, 1999 U.S. App. LEXIS 222 (10th Cir. 1999). It is not the law of any circuit.

An overwhelming number of the district courts that have considered the issue have also rejected the holding of the panel decision in *Singleton*.

In joining the cavalcade--or perhaps we should say stampede--of courts that have

considered and rejected the *Singleton* panel's holding, we see no point in going over ground that has been thoroughly tilled by the other courts whose decisions we have already cited. But we do wish to discuss the following point, which is not given much attention in those decisions.

The best argument that the defendants can muster in their efforts to bring government plea agreements containing cooperation clauses within the terms of 18 U.S.C. § 201(c)(2) is that the plain meaning of that statutory language requires such a reading. The statute says "Whoever ..." and that word obviously includes everyone, even the government. Or so the argument goes. The reason this "best" argument is not good enough to carry the day should itself be plain.

The statutory language in question has been on the books since 1962. During the three and a half decades of its existence, what the defendants now claim is the plain meaning of that language has not been plain to the thousands of prosecutors, judges, and defense lawyers who have been involved with testimony for consideration agreements over the decades.

These type of agreements have been used extensively in federal prosecutions, both long before and continually since the statutory prohibition in question was enacted. Testimony derived through them is a commonplace feature of trials. In drug cases, at least, it seems more usual than not for the testimony critical to a conviction, or the expected testimony that precipitates a guilty plea, to have stemmed directly from such an agreement. It happens every work day in federal trial courts all around this country, and it has been happening since the first day this language was put on the books thirty-six years ago. If it were plain from the statutory language that entering this type of agreement was a crime, the legions of attorneys who have represented defendants convicted over the years because of testimony dependent upon such illegal agreements would have raised the issue day in and day out in every district court in every circuit in the country. They did not. The sound of their silence is deafening.

Joining all those other courts that have rejected the reasoning and holding of the now-vacated panel decision in *Singleton*, we hold that agreements in which the government trades sentencing recommendations or other official action or consideration for cooperation, including testimony, do not violate 18 U.S.C. § 210(c)(2)

B. FLORIDA BAR RULE OF PROFESSIONAL CONDUCT 4-3.4(B)

The district court also held that the plea agreements with the cooperating co-defendants in these cases violated Rule 4-3.4(b) of the Florida Bar Rules of Professional Conduct, and the resulting testimony was due to be suppressed for that reason. The relevant portion of the Florida rule forbids lawyers from "offer[ing] an inducement to a witness...."

As an initial matter, it is not clear that at the time the plea agreements in this case were negotiated, the Florida Bar Rules of Professional Conduct applied to the conduct of the United States attorneys in this case, though the local rules of the Southern District of Florida do incorporate them. See Local Rules of the United States District Court for the

Southern District of Florida, Rules Governing Attorney Discipline, Rule I.A (West 1998). Congress has since indicated that state rules of professional conduct should apply to the conduct of federal government attorneys. See 28 U.S.C. § 530(b)) ("An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."). Assuming for present purposes that the rule is violated when a prosecutor promises a witness some consideration regarding charges or sentencing in return for testimony, a state rule of professional conduct cannot provide an adequate basis for a federal court to suppress evidence that is otherwise admissible. Federal law, not state law, determines the admissibility of evidence in federal court.

* * * * Federal Rule of Evidence 402 provides

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority.

That is an exclusive list of the sources of authority for exclusion of evidence in federal court. State rules of professional conduct are not included in the list.

Local rules of federal courts are not listed in Rule 402, either. As a result, otherwise admissible evidence cannot be excluded based upon local rules. For that reason, the Southern District of Florida's adoption of the State of Florida's professional conduct rules does not affect our analysis or the result. Acts of Congress are included in the Rule 402 list, of course, because Congress has the authority to exclude from evidence in federal courts anything it pleases, subject only to the limits placed upon it by the Constitution. The question is whether Congress' recent statutory directive that state laws and rules governing attorney conduct shall apply to federal government attorneys "to the same extent and in the same manner as other attorneys in that State," P.L. No. 105-277, § 801(a), *supra*, is aimed at admission of evidence in federal court. In other words, did Congress intend by that enactment to turn over to state supreme courts in every state--and state legislatures, too, assuming they can also enact codes of professional conduct for attorneys--the authority to decide that otherwise admissible evidence cannot be used in federal court? We think not.

There is nothing in the language or legislative history of the Act that would support such a radical notion. Making state prescribed professional conduct rules applicable to federal attorneys is one thing. Letting those rules govern the admission of evidence in federal court is another. If Congress wants to give state courts and legislatures veto power over the admission of evidence in federal court, it will have to tell us that in plain language using clear terms.

III. CONCLUSION

We REVERSE the district court's orders granting the motions to suppress, and REMAND for proceedings consistent with this opinion.

D. Contemporaneous Objection Rule

HACKENSON V. CITY OF WATERBURY 2 A.2d 215 (Conn. 1938)

_____BROWN, JUDGE.

It is undisputed that upon the evidence the jury could properly have found that the plaintiff, while walking southerly across North Main Street in Waterbury from the northwesterly corner of its intersection with Bishop Street to the southerly side of North Main Street, in the exercise of due care, stepped into a hole or depression in the pavement located somewhere between the double trolley tracks near the center of the street, which caused her to fall, resulting in the injuries complained of. The question determinative of this appeal is whether the evidence warranted the finding of the further fact, essential to a verdict against the defendant, that this hole or depression was not located within eight inches of a trolley rail, the defendant not being liable for a defect within this area by virtue of §§ 3752 and 3755 of the General Statutes.

By her amended complaint the plaintiff alleged that there "existed . . . at said place a defective and dangerous condition, in that said crosswalk bulged and a deep depression exists just north of the trolley tracks on the north rail of the northbound traffic." This rail is the third one from the north side of the street and we refer to it herein as the third rail. The plaintiff further alleged that as she walked southerly she "put her left toe and the sole of her foot into said depression and was thrown." In support of these allegations, the plaintiff on direct examination stated that she fell between the second and third rails, and testified: "I struck a bulge in the pavement, and I went up and then to the right -- yes -- struck the hole, and put my foot in the hole and it threw me to the pavement. . . . Well, the hole I stepped into was about two and a half . . . inches deep -- quite round -- that is, in circumference -- and right near it is the rail that was raised up a little bit" (referring to the third rail). Her further testimony on cross-examination was:

"Q. You say you fell on a raised part of the pavement; is that it? A. No, I stepped into a hole.

"Q. In a hole? A. I certainly did.

"Q. And is that near the track? A. It certainly was.

"Q. Was it right on the track? A. No.

"Q. How close to the track was it? . . . A. Well, I should say two and one-half inches.

"Q. From the rail? A. Yes.

"Q. . . . Your foot went into that hole, two and one-half inches from the rail, and you fell? A. Yes."

This testimony, aside from that offered through the plaintiff after the defendant had rested its case, which is hereinafter referred to, was the only direct evidence as to where the hole in question was located.

The plaintiff's . . . contention is predicated upon what she claims to be evidence in the record disclosed by the transcript of what occurred when she was recalled to the stand after the defendant had rested its case. In the absence of a finding, the plaintiff's claim can only be tested by what is revealed by this transcript, made a part of the record by order of this court in response to the plaintiff's motion. This shows that the plaintiff's counsel, after the defendant had closed its case, recalled the plaintiff and the following transpired:

"Q. And where your foot went into the hole, measuring from the toe of your foot to the center of the north rail of the north bound traffic [the third rail], can you tell how far that was? A. Twenty-eight inches.

"Mr. Sullivan: I object to that if Your Honor pleases."

The court sustained the objection to the question, ruling that it was not proper rebuttal, and denying the plaintiff's request to reopen the plaintiff's case to permit the inquiry. An exception to this ruling was duly granted to the plaintiff. Her claim now is that in the absence of a motion to strike it out, her answer having been given before the defendant's objection was made to the question, it remains in the record and constitutes evidence that the hole was more than eight inches from the rail, which is sufficient to warrant the verdict.

The generally accepted rule as to when objection to a question must be interposed has been stated to be: "For evidence contained in a specific question, the objection must ordinarily be made as soon as the question is stated, and before the answer is given; unless the inadmissibility was due, not to the subject of the question, but to some feature of the answer." 1 Wigmore, Evidence (2d Ed.) 175, § 18, a, (1). This rule, however, is to be reasonably applied. Thus in an opinion quoted by Wigmore in this connection, the court, in referring to a rule of court of similar import, said: "It must have a reasonable interpretation. The object is to prevent a party from knowingly withholding his objection, until he discovers the effect of the testimony, and then if it turns out to be unfavorable to interpose his objection."

There is authority that where the court in sustaining an objection to the question has not directed the jury not to consider the reply given, a motion to strike it out is essential to its proper elimination. We adopt, however, a rule upon the situation before us which is less technical, yet sufficient for the ample protection of the parties' rights. "If the question is put and the answer given in such rapid succession that the party objecting has not fair opportunity to state his objection, it is the duty of the court to entertain the objection when thereafter promptly made." This the court did here, and so far as appears it was within its discretion to sustain the objection to the question as not proper rebuttal. We are not here concerned with a situation presenting the question whether the jury might have failed to understand the effect of the ruling and so something more than the mere sustaining of the objection would be necessary in order to protect the rights of the parties. The only basis upon which the plaintiff can claim error in the ruling of the trial court in setting aside the verdict is that the jury could, in the absence of a motion to strike out, properly consider the testimony. That is not the law in this jurisdiction. The plaintiff has failed to protect any rights she had by an appeal from the ruling made. Under these circumstances, even in the absence of a motion to strike out the answer, no testimony indicating the hole was not within eight inches from the rail is available in support of the jury's verdict.

There is no error.

SPECIFIC OBJECTION

EEN v. CONSOLIDATED FREIGHTWAYS 220 F.2d 82 (8th Cir. 1955)

GARDNER, CHIEF JUDGE.

This was an action by Clarence O. Een brought by his guardian ad litem and by his wife, Shirley A. Een, individually, to recover damages on account of personal injuries suffered by said Clarence O. Een as the result of a collision between an automobile driven by him and a tractor-trailer owned by Consolidated Freightways and driven by Walter Dulski. The collision was alleged to have occurred on U.S. Highway No. 10 at a point on said highway three-quarters of a mile south of the town of Buffalo, North Dakota, on the 11th day of March, 1953, at the hour of 7:00 o'clock P.M. It was alleged that the driver of the tractor-trailer was negligent in that he drove said vehicle onto and upon the northbound lane upon which said Een was driving his automobile and that he failed to keep a proper lookout and that he drove at an excessive rate of speed and that as a result of such negligent conduct the tractor-trailer collided with the automobile then being driven by said Een in the northbound lane of said highway inflicting serious personal injuries and causing him great pecuniary damage set out and described in the complaint. The defendants answered denying all acts of negligence, admitting the ownership of the tractor-trailer, admitting that the defendant Dulski was at the time of the accident in the employ of Consolidated Freightways and affirmatively pleaded that the accident was caused or contributed to by the negligence of the plaintiff Een.

At and prior to the time of receiving his injuries here complained of Clarence O. Een was in the employ of the Northwestern Bell Telephone Company in the capacity of an engineer. In the course of his employment he was driving a Chevrolet automobile belonging to his employer in a northerly direction on a jog in U.S. Highway No. 10 which is a hard surfaced highway extending generally east and west through the State of North Dakota. The defendant Dulski in the course of his employment was driving a tractor-trailer belonging to Consolidated Freightways south on the southbound lane of said highway. It was foggy and misting and raining slightly and about 7:00 o'clock P.M. the two vehicles collided as hereinbefore recited. It was the claim of the plaintiffs that the collision occurred in the northbound lane of the highway and it was the claim of the defendants that it occurred in the southbound lane and evidence was introduced by the respective parties tending to support these conflicting contentions. At the close of all the testimony the defendants interposed a motion for a directed verdict. The court reserved ruling on the motion and the case was submitted to the jury on instructions to which no exceptions were saved by either of the parties. The jury returned a verdict in favor of defendants and against the plaintiffs on all the issues and on this verdict the court entered judgment dismissing the action on its merits. From the judgment so entered plaintiffs have appealed and seek reversal on the following grounds:

1. The trial court committed reversible and prejudicial error in admitting in evidence the testimony of the defendants' witness, John Holcomb, to the effect that, in his opinion and judgment, the collision or impact occurred in the west lane of traffic.

In support of their defense defendants called one John Holcomb who was a deputy sheriff and former city policeman with more than seventeen years' experience investigating accidents as a law enforcement officer. He had appeared at the scene of the accident about an hour and twenty minutes following its occurrence and before any of the vehicles involved had been moved. He observed the location of the vehicles, their physical condition and their relative positions with relation to the highway and with relation to each other. He also observed the condition of the traveled portion of the highway at the point of the accident. Each of the parties was apparently contending that the physical facts determined to a large extent whether the collision between the vehicles occurred on the west side of the center line of the highway or on the east side of that line. After he had testified to his acts in investigating the scene of the accident and his observations as to the conditions which he had observed the following occurred:

"Q. I am going to ask you -- give me a 'yes' or 'no' answer on this -- from your observation of what you saw out there that night, did you form any opinion as to where the point of the impact occurred?

"Mr. Oehlert: Just answer it 'yes' or 'no', please.

"A. Yes, sir.

"Q. Can you please give us that

"Mr. Oehlert: Just a moment, we object to that as incompetent, irrelevant, immaterial, calling for speculation, guess and conjecture, obviously invading the province of the jury, calling for a conclusion.

"The Court: Overruled, and you may answer, Mr. Holcomb.

"A. My observation would have been that it happened in the left lane of traffic.

"Q. (By Mr. Conmy) In the left lane? A. I mean the west lane.'

This ruling of the court is urged as reversible error.

It will be noted that the witness was not asked a hypothetical question but was asked to express his opinion based upon his personal observations and upon facts and conditions to which he testified. The general objection that the question was "incompetent, irrelevant, immaterial, calling for speculation, guess and conjecture" was too general to call anything sharply to the attention of the court and no error could be predicated on the ruling on such an objection. The objection that the question called for an answer invading the province of the jury was also without merit. *Mutual Benefit Health & Accident Ass'n v. Francis*, 8 Cir., 148 F.2d 590. In *Mutual Benefit Health & Accident Ass'n v. Francis, supra* (148 F.2d 594), we held that:

". . . an expert witness may properly be asked his opinion as to an ultimate fact."

No question is raised as to the qualification of the witness. Neither is any question raised by the objection that the question propounded was not a proper subject for expert testimony.

It is essential to a review of a ruling on the admissibility of evidence that a specific objection be made in the trial court sharply calling the ground relied upon to the attention of the court and on appeal the objection interposed must be relied upon. The applicable rule is stated in Simkins Federal Practice, Third Edition, Section 581, as follows:

“Objections to evidence must be specific, and no reversal can be had except upon the ground specifically stated.”

This rule has uniformly been followed by this court. Thus in *United States v. Nickle*, supra (70 F.2d 875), we said:

“Where complaint is made that the court erred in overruling an objection to the admissibility of evidence, it is generally essential that the objection definitely and specifically state the grounds on which it is based so that the court may intelligently rule upon it. In other words, the appellate court will not reverse on a ruling which overrules an objection to testimony, unless a good objection has been made, even though the testimony might have been objectionable on grounds not specifically and sharply called to the court's attention.”

What is said in *Metropolitan Ins. Co. v. Armstrong*, supra (85 F.2d 190), is here apposite. We there said:

“Defendant urges that there was no evidence that the insured kept his diabetes under control. This ground of objection, however, was not embodied in the objection as made, nor called to the attention of the lower court or opposing counsel. It cannot, therefore, be considered on appeal.” We are convinced that the Court committed no prejudicial error in the trial of this action and the judgment appealed from is therefore affirmed.

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CONSEQUENCES OF FAILING TO OBJECT

OWEN V. PATTON
925 F.2d 1111 (8th Cir. 1991)

BRIGHT, SENIOR CIRCUIT JUDGE

Matthew P. Owen brought this personal injury action based on diversity of citizenship against Donald Patton, the owner of Papa Don's tavern, a young adults' hangout on a highway near Farmington, Missouri. Owen claimed that an employee of the tavern, one Brian McGee, inflicted severe blows to Owen's head at approximately midnight on January 2, 1987. In his complaint, Owen alleged that the battery occurred in the scope of McGee's employment as a bouncer at Papa Don's. Patton's answer denied that McGee worked for Papa Don's or assaulted Owen.

After a three-day trial before Magistrate Judge William S. Bahn, the jury returned a verdict for Patton. The magistrate judge entered judgment and denied Owen's post-trial motion for a new trial.

[We] turn to Owen's claim that undue prejudice resulted when defendant's counsel elicited testimony that certain of Owen's companions on the evening in question, Ronnie Mullineaux and Roger Hahn, now reside in prison. We agree that this testimony of "guilt by association" did not belong in the lawsuit and could have evoked some improper prejudice against Owen. Even so, the magistrate judge committed no error.

In cross-examining Owen, defendant's counsel asked:

Q. Where is Ronnie Mullineaux at this time?

A. I think he is in jail, sir.

Q. In the penitentiary?

A. Yes.

Q. He's doing time for what?

A. I'm not really sure, sir.

Q. Well, do you know that he's doing time for burglary, ten years?

A. No. I wasn't —

At this point, Owen's counsel asked to approach the bench, but registered no formal objection. The magistrate judge nevertheless instructed defendant's counsel to end this line of inquiry. At that time, counsel for defendant agreed to do so. Yet, only two witnesses later, defendant's counsel again engaged in a similar colloquy on cross-examination:

Q. Do you know where [Roger] Hahn is right now?

A. Prison, I think.

Q. Prison?

A. I think so.

Q. Do you know where [Ronnie] Mullineaux is?

Although Owen's counsel failed to object, the magistrate judge interrupted: "We've been through that. That's enough of that. Come on." *Id.* This admonishment notwithstanding, defendant's counsel continued the same line of questioning, asking whether the witness had talked to the two incarcerated men. However, Owen's counsel still did not object.

Yes, we agree that the inquiry amounted to improper cross-examination upon an irrelevant matter. See Fed. R. Evid. 402. Even if relevant, the probative worth of the plaintiff's association with persons who subsequently ended up in prison did not justify its inclusion in the trial. See Fed. R. Evid. 403. However, without an objection, a motion to strike, a request for special instructions or a motion for mistrial, the court was not called upon to make a ruling that could result in error for failure to accommodate [**10] the plaintiff's request. Thus, we are not justified in granting a new trial even though we believe that defense counsel's tactics here bordered on misconduct.

Trial counsel must recognize that objections must be made to improper questions or any improper evidence put before the jury. Without an objection and a proper request for relief, the matter is waived and will receive no consideration on appeal absent plain error. Judge Arnold's comments in *United States v. Thornberg*, 844 F.2d 573, 575 (8th Cir.), *cert. denied*, 487 U.S. 1240, 108 S. Ct. 2913, 101 L. Ed. 2d 944 (1988), are apropos:

In general, preserving an issue is a matter of making a timely objection to the trial court and clearly stating the grounds for the objection, so that the trial court has an opportunity to prevent or correct the error in the first instance. Unless the issue was brought to the attention of the trial court in this manner, we are loath to reverse, even if there is error, for at least two reasons. First, as a practical matter, without a timely objection a reviewing court cannot know whether the appellant knew of the error at the time it was made, but decided nevertheless to accept the ruling in the hope that it would not harm his case. Thus the reviewing court cannot be sure that the appellant did not consent to the error. Second, in most cases it is simply unfair to reverse a trial court on the basis of an issue that it has not had an opportunity to consider. In our adversarial system, so long as the proceeding is conducted within the bounds of fundamental fairness, it is not the duty of the trial court to anticipate and evaluate every possible error that might be alleged. Rather, it is the role of counsel to bring such matters to the court's attention.

Further, we cannot say that the admission of this evidence constituted plain error. Having reviewed the record, we fail to perceive any resultant injustice of sufficient magnitude to require reversal.

In conclusion, as the magistrate judge committed no reversible error, we affirm. In view of the questionable conduct on the part of the appellee's witness and attorney, however, the appellee shall pay his own costs for this appeal.

RULE 403's GENERAL BALANCING TEST

McQueeney v. Wilmington Trust Co.
779 F.2d 916 (3d Cir. 1985)

BECKER, CIRCUIT JUDGE.

This appeal by the owner and operator of a supertanker from a verdict in favor of plaintiff Francis McQueeney, a seaman aboard the vessel, presents a question * * * arising under Fed. R. Evid. 401 and 403, is whether evidence from which it might be inferred that McQueeney has suborned perjury of a proffered witness is admissible as substantive evidence that his claim is unfounded even though the witness never testified * * * The district court excluded the evidence of subornation of perjury* * * but we conclude that it erred.

I. BACKGROUND

A. *Plaintiff's Accident, His Lawsuit, and the Deposition of Mauro De la Cerda*

Appellee McQueeney was a second officer on the T T WILLIAMSBURG, a supertanker owned by appellant Wilmington Trust Company and operated by Anndep Steamship Corporation. McQueeney claims that on March 20, 1981, while the WILLIAMSBURG was docked at Hounds Point Scotland, he was knocked to the deck while manning a water hose. McQueeney asserts that his fall was caused by both overpressure of the hose and by oil that had been spilled on the deck, making firm footing impossible, and that as a result of his accident, he suffered a herniated cervical disc.* * * The district court conducted a jury trial at the end of which the jury awarded plaintiff a verdict of \$305,788.00 against the two defendants. Judgment was entered in the same amount, and the defendants' motions for a new trial and for relief from the judgment were denied. The present appeal followed.

At trial, McQueeney was his only witness on the issue of liability. On the day the trial was scheduled to begin, however, McQueeney's counsel informed the court that he had just located an eyewitness to the accident, a fellow seaman of McQueeney's named Mauro De la Cerda, who was on board a ship in Freeport, Texas, and was therefore not able to appear as a witness. Counsel requested permission to depose De la Cerda.

The district court granted plaintiff's counsel permission to depose De la Cerda on the conditions that (1) defense counsel be given an opportunity to speak with De la Cerda before deciding whether to travel to Texas, and (2) plaintiff pay costs of defense counsel's trip to Texas if defense counsel chose to make the trip. Defense counsel spoke with De la Cerda by telephone that afternoon and chose to go to Houston. The appropriate arrangements were made, trial was recessed, and the next day De la Cerda was deposed in Houston. His testimony corroborated McQueeney's in all significant respects. Defense counsel, claiming to have been surprised by the deposition testimony because De la Cerda had allegedly told him a different version with respect to several significant facts in their telephone conversation, cross-examined De la Cerda about his statements. However, on both direct and then redirect examination at the deposition, De la Cerda either denied making any statements that contradicted his deposition testimony or testified that his

statements of the night before were incorrect and that his current statements were accurate.

When the parties returned to trial, defense counsel moved for leave to withdraw his appearance so that he could testify and impeach De la Cerda's deposition testimony, which he presumed plaintiff would offer at trial. Defense counsel also listed plaintiff's counsel and his associate as witnesses. After a colloquy in the chambers of the district court, plaintiff's counsel and his associate signed affidavits stating that they had not discussed De la Cerda's testimony with him prior to his deposition. The court thereupon denied the counsel's motion for leave to withdraw.

B. Evidence of the Falsity of De la Cerda's Deposition, Plaintiff's Decision Not to Offer it, and the District Court's Ruling.

The trial resumed, and McQueeney took the stand. His testimony lasted several [*919] days. During cross-examination, and after court [**6] had adjourned for the day, defense counsel received crew lists from his client. The lists reflected that De la Cerda had not joined the crew of the WILLIAMSBURG until three months after the alleged accident. The lists proved, therefore, that De la Cerda's "eyewitness" testimony that he had given at his deposition had been fabricated. The next morning, defense counsel brought this information to the attention of the court in a discussion in chambers. After reviewing the crew lists, plaintiff's counsel immediately stated his intention not to use the deposition. n2 Defense counsel rejoined that he intended to use the deposition to show fraud on the court. Plaintiff's counsel responded that, so long as he was not using the deposition himself, and so long as there was no evidence that McQueeney had perjured himself on the stand, there had been no fraud and the deposition was irrelevant. The district court agreed with plaintiff's counsel and stated that it would not receive the deposition and the crew lists into evidence.

The district court did not articulate the basis for its ruling at trial. However, as appears from the colloquy at the time, the district court felt that so long as the deposition was not introduced by plaintiff, any perjury associated with the deposition was irrelevant to the suit at bar. That this was the court's thinking is evident from its opinion denying defendants' post-trial motion for relief from the judgment or, in the alternative, a new trial. In support of the motion, defendants argued that it was reversible error to bar the deposition and crew lists, but the court ruled that the deposition and crew lists were either irrelevant or only minimally relevant:

It is questionable if Mr. De la Cerda's testimony is even relevant, since defendant seeks admission for the mere purpose to impeach and not for the substance of the testimony. Certainly, the confusion of a person's recollection brings little to show whether or not a set of facts occurred in a specific manner. Such testimony would confuse and mislead the jury, because what is at issue here is whether or not Mr. De la Cerda can remember or has such knowledge. To admit such testimony would not be for any probative value but merely to prejudice the jury against the plaintiff. Surely the probative value of such testimony would be minimal at best and is outweighed by the severe prejudice it would cause at the time of trial.

Thus the court may fairly be said to have excluded the evidence as either irrelevant under Fed. R. Evid. 401, or as relevant but misleading or unfairly prejudicial, in accordance with Fed. R. Evid. 403.

II. DEFENDANTS' PROFFER THAT MCQUEENEY HAD SUBORNED PERJURY

A. *The Rule 401 Ruling*

We believe that the district court abused its discretion in excluding the proffered evidence. We base our conclusion on common sense, eminent commentators, case law, and the explicit language of Rule 401.

The intuitive appeal of defendants' proffer is immediate. One who believes his own case to be weak is more likely to suborn perjury than one who thinks he has a strong case, and a party knows better than anyone else the truth about his own case. Thus, subornation [**14] of perjury by a party is strong evidence that the party's case is weak. Admittedly the conclusion is not inescapable: parties may be mistaken about the merits or force of their own cases. But evidence need not lead inescapably towards a single conclusion to be relevant, it need only make certain facts more probable than not. The evidence of subornation here does cast into doubt the merits of McQueeney's claim, even if it does not extinguish them.

Finally, the explicit language of Fed. R. Evid. 401, which defines as relevant evidence that has "any tendency" to make a difference in the case, provides added reason to permit the materials into evidence. The plain meaning of the Rule demonstrates that the scope of relevant evidence is intended to be broad, and the authorities support such a broad reading. See *Carter v. Hewitt*, 617 F.2d 961, 966 (3d Cir. 1980) ("the standard of relevance established by the Federal Rules of Evidence is not high"). Thus, logic, authority, and the clear language of Rule 401 lead us to the conclusion that the deposition and related testimony were relevant and that the district court abused its discretion in excluding it on relevancy grounds.

B. *The Rule 403 Balance*

That the evidence was relevant does not necessarily mean that it should have been admitted. As noted above, the district court, after voicing its doubts that the evidence had any relevance, ruled that even assuming it was relevant, the evidence should not have been admitted because its prejudicial impact would likely outweigh its probative value. This is a standard Fed. R. Evid. 403 balance which we review with substantial deference. Despite this deferential standard, we find that the district court erred, for it underestimated the probative value of the evidence, and miscalculated its prejudicial impact.

The district court assigned virtually no probative value to the evidence of subornation. See *supra* pp. 7-8. It should be clear from what we said above, see *supra* (Slip Op.) pp. 11-14, however, that evidence of subornation of perjury may be quite valuable to the defendant in this case. Intuition and the unanimity of the commentators and numerous courts that have considered it suggest not only that subornation of perjury is relevant but that it is powerful evidence indeed. Evidence that McQueeney suborned

perjury might well have made the jurors re-evaluate McQueeney's case. Of course, it is not certain that McQueeney did suborn perjury; De la Cerda may have had other reasons for making up his story. But the circumstances of the case and the correlation between McQueeney's story and De la Cerda's deposition suggest that subornation of perjury by McQueeney is a possibility that the jury should have been allowed to consider.

By contrast, although the district court referred to potential confusion and "severe prejudice," *supra* at p. 8, and although there was danger of prejudice -- the mere suggestion that McQueeney suborned perjury might have led the jury to reflect on his character in an improper manner— it is unlikely that the evidence would result in the "unfair prejudice" proscribed by Rule 403. *Cf. Dollar v. Long Mfg., N.C. Inc.*, 561 F.2d 613, 618 (5th Cir. 1977) ("'unfair prejudice' as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair.'"). Moreover, it appears to us that the danger of improper influence was not sufficient to "substantially outweigh" the probative value of the evidence, as required by Fed. R. Evid. 403. The court did not articulate any reasons for its finding of prejudice, and this does not appear to us to be the kind of evidence with obvious or overwhelming potential for unfair prejudice. In the absence of a showing of particularized danger of unfair prejudice, the evidence must be admitted. Were we to rule otherwise, evidence could be excluded on an unfounded fear of prejudice and we would effectively preclude all evidence of subornation of perjury.

In sum, the district court misconstrued both elements of the Rule 403 balance hence its balancing exercise was skewed. The court's Rule 403 ruling was thus an abuse of discretion.

RULE 403

People of the Territory of Guam v. Shymanovitz 157 F.3d 1154 (9th Cir. 1998)

REINHARDT, CIRCUIT JUDGE:

In this case we consider whether the prosecution may present testimony regarding the contents of sexually explicit gay adult magazines that are found in the residence of a defendant who is being tried on charges of unlawful sexual activity with minors. John Benjamin Shymanovitz appeals his conviction of multiple counts of criminal sexual conduct involving children, assault, and child abuse, on the ground that his trial was tainted by the admission of such testimony, as well as by the admission of the actual texts of two of the articles. Because we agree that the admission of this evidence constituted prejudicial error, we reverse the convictions.

BACKGROUND

Shymanovitz was a middle-school guidance counselor. He began taking a group of boys who attended the school on outings, such as hiking and camping trips, and sometimes had them sleep over at his home. Shymanovitz was charged with sexually and physically abusing seven of the boys while they were under his supervision. Several months later, he was charged with similar offenses relating to four more boys. The two indictments were then joined.

Prior to trial, the government filed a motion in limine requesting permission to introduce into evidence two articles from sexually explicit magazines found in Shymanovitz's residence, on the ground that they were relevant to establishing Shymanovitz's intent to commit the offenses. The court deferred ruling on the motion but at trial permitted a police officer, Winnie Blas, to testify that at Shymanovitz's house she seized, among other things, the following: condoms, a box of surgical gloves, a tube of K-Y Jelly, some children's underwear, a calendar, and six sexually-explicit magazines. Of the six magazines, four were entitled "Stroke"; one was entitled "After Midnight"; and one was entitled "Playboy." Officer Blas testified in great detail, over defense counsel's objections, as to the contents of the four issues of "Stroke"; she told the jury that they contained photos of men masturbating; performing auto-fellatio; ejaculating; using sex toys; wearing "leather equipment"; paddling one another; and having oral and anal sex. She also described two articles from the "Stroke" magazines, which had been the subject of the motion in limine. The articles consisted of presumably fictional tales and described two couples engaging in sexual conduct: the first, a father and son; the second, a priest and a young boy. The two articles, the K-Y Jelly, and a page from the calendar were entered directly into evidence.

During her initial closing argument, the prosecutor vigorously argued to the jury that the articles demonstrated that Shymanovitz intentionally engaged in the conduct of which he was accused:

And the acts that are portrayed in that article are acts that, if you look at what the Defendant himself has done, or what he is charged with, that it goes to his

knowledge that he's aware of these kinds of facts, that it goes to his intent to engage in these kinds of acts, that it goes to his motivation to get involved in these types of acts. . . .

. . . . How does it all go fit in? Again, members of the Jury, it goes to the same thing, that this Defendant knows about these types of facts, *that this Defendant was motivated to perform these types of acts.*

She recounted the testimony about the content of the "Stroke" magazines in great detail:

[Officer Blas] talked to you about these magazines. She was asked to describe the contents of these magazines. She told you there were a total of six magazines, four of which were entitled "Stroke," S-T-R-O-K-E, is how she spelled it. She told you about those magazines. She said there was also one "Playboy" and one "After Midnight" magazine. Now in the "Stroke" magazine, she testified that those magazines contained photographs of men ejaculating. When we asked her, "Well, 'ejaculating,' what do you mean?" "Semen coming out of their penis." She talked to you about there are men masturbating, men with men, having oral sex, and anal sex, men's penis being inserted into the anus of another male individual, or an object being inserted into the male anus. She said that it also had photographs of - that depicted the use of mechanisms, and when she was asked, "What do you mean by 'mechanisms,'" she said, "Well, other objects besides a penis and a finger, such as dildos."

"Well, what are dildos?"

"They're shaped like a penis, rubber-like instrument, dome-like top."

She talked about balls on a string; that they're inserted into the anal cavity, and they're pulled out one by one. She also talked about paddles being used on the butt, and so she testified to that. She talked about leather clothing, people wearing jackets and pants with openings on the penis and the anus, or anal area.

Near the end of her initial closing, the prosecutor emphasized that Shymanovitz and his female roommate were merely friends but not engaged.

Finally, in her rebuttal argument, the prosecutor returned to her theme:

Don't let the fact that these magazines were found in his possession fool you as not being important because I told you what the importance was of those magazines. It's the acts that are depicted in the magazines that Officer [Blas] testified to. The acts - the fellatio, the anal intercourse, the touching - the acts that she described to you are important. That's why it's relevant, because it does go to the Defendant's intent, his motivation; his claim that he doesn't do anything or that he doesn't have any knowledge that certain things might be illegal. The articles are important because they were found in those magazines that were in his possession. Those magazine articles said on the very top how it's illegal to have sex with children So, it is important and it goes to his intent and motivation.

Aside from the evidence at issue here, the government's case consisted principally of the alleged victims' testimony. Shymanovitz, however, denied any sexual contact with the minors. His counsel argued that the boys and some of the parents had concocted the allegations against him for a number of reasons. He pointed to the testimony of two of the boys who had testified before the grand jury that Shymanovitz abused them but then testified at trial that they had made up the allegations.

The trial lasted three weeks. On the fourth day of deliberations, after the jury indicated it could not reach a verdict, the trial judge read it a modified *Allen* charge. On the next day of deliberations, Shymanovitz was convicted on twenty-seven counts and acquitted on eight. He was sentenced to four consecutive terms of life imprisonment for first degree criminal sexual conduct, plus twenty-one years for his convictions on second, third, and fourth degree criminal sexual conduct.

DISCUSSION

Shymanovitz contends that the district court abused its discretion when it permitted the prosecution to adduce oral testimony regarding the contents of the "Stroke" magazines that were seized from his house and to introduce into evidence the texts of the two "Stroke" articles. He further argues that the government's only purpose in doing so was to prejudice the jury by suggesting that he was a homosexual.

We first note that none of the explanations the government proffered during closing arguments for offering the evidence regarding the magazines or introducing the articles is plausible. Although the prosecutor argued primarily that the reading materials in his home proved that Shymanovitz knew that certain forms of sexual conduct were illegal, the defendant never testified at trial that he believed sexual conduct with minors to be legal. Nor was there testimony to indicate that he somehow lacked knowledge of or familiarity with fellatio, anal intercourse, or other general aspects of homosexual sex. Moreover, neither of the illegality of the conduct of which he was accused nor of the nature of the specific acts identified by the prosecutor constituted an element of the offense. More important, such knowledge would in no way tend to prove his guilt on any of the charges brought against him.

There are even more fundamental reasons why the "Stroke" magazines and the fictionalized articles were inadmissible. The mere possession of reading material that describes a particular type of activity makes it neither more nor less likely that a defendant would intentionally engage in the conduct described and thus fails to meet the test of relevancy under Rule 401. Specifically, in this case, neither the defendant's possession of the "Stroke" magazines, nor of any of the articles contained therein, was probative of whether the touching of the alleged victims' genitals was intentional or whether the touching actually was or could be construed as being for sexual purposes. n9 At the very most, Shymanovitz's possession of the sexually-explicit magazines tended to show that he had an interest in looking at gay male pornography, reading gay male erotica, or perhaps even, reading erotic stories about men engaging in sex with underage boys, and *not* that he actually engaged in, or even had a propensity to engage in, any sexual *conduct* of any kind. In any event, propensity evidence is contrary to "the underlying premise of our criminal system, that the defendant must be tried for what he did, not who he is." *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1014 (9th Cir. 1995) (internal citations omitted).

Criminal activity is a wildly popular subject of fiction and nonfiction writing - ranging from the National Enquirer to *Les Miserables* to *In Cold Blood*. Any defendant with a modest library of just a few books and magazines would undoubtedly possess reading material containing descriptions of numerous acts of criminal conduct. Under the government's theory, the case against an accused child molester would be stronger if he owned a copy of Nabokov's *Lolita*, and any murder defendant would be unfortunate to have in his possession a collection of Agatha Christie mysteries or even James Bond stories. Woe, particularly, to the son accused of patricide or incest who has a copy of *Oedipus Rex* at his bedside.

In this case the government offered into evidence the text of two out of the dozens of articles from the four "Stroke" magazines and none of the articles from the "Playboy" or "After Midnight" magazines. Undoubtedly there was other reading material in Shymanovitz' residence that was discovered but neither seized nor introduced into evidence. To allow prosecutors to parade before the jury snippets from a defendant's library - the text of two magazine articles and descriptions of four magazines - would compel *all* persons to choose the contents of their libraries with considerable care; for it is the innocent, and not just the guilty, who are sometimes the subject of good-faith prosecutions.

Even if anything within the magazines were relevant to Shymanovitz' intent, we would find that the evidence would have been highly improper under Rule 403, which bars evidence when "its probative value is substantially outweighed by the danger of unfair prejudice." Most of the evidence regarding the "Stroke" magazines related to adult gay male sex. Thus, the extensive testimony regarding the publications could easily have caused the jury, rightly or wrongly, to infer that Shymanovitz was a gay man. Generally, "evidence of homosexuality is extremely prejudicial." Evidence implicating Shymanovitz's sexual orientation was particularly prejudicial because he was being tried on numerous sex offense charges: the jury's inference that Shymanovitz was gay could in all likelihood have caused it also to infer that he deviated from traditional sexual norms in other ways, specifically that he engaged in illegal sexual conduct with minors.

Further, the contents of the magazines suggested to the jury that Shymanovitz was far more than a plain and unadorned homosexual - the introduction of this evidence also suggested that he might be interested in or even engage in other sorts of sexual activity that the jurors would perceive as deviant: incest, auto-fellatio, use of sex toys and leather, and sadomasochism. Again, the suggestion of such pursuits is also highly prejudicial to any defendant, and particularly prejudicial to a defendant accused of sexual misconduct or other related misconduct with minors. Accordingly, we conclude that the admission of the evidence regarding the "Stroke" magazines, including the text of two of its articles, was so prejudicial as to outweigh substantially any probative value it could have had.

CONCLUSION

The government's introduction of highly prejudicial evidence against Shymanovitz tainted the fundamental fairness of his trial. We find it likely that the jury's verdict was materially affected by this improper testimonial and demonstrative evidence. Accordingly, we reverse Shymanovitz' conviction and remand for further proceedings.

BALLOU v. HENRI STUDIOS, INC.

United States Court of Appeals, Fifth Circuit

656 F.2d 1147 (1981)

On the afternoon of June 14, 1977, an automobile traveling at approximately fifty miles per hour struck the rear of an eighteen-wheel tractor-trailer which was parked entirely on the right hand shoulder of a curved, divided highway in Beaumont, Texas. The driver of the car, Jesse Ballou, was killed instantly; Ballou's sole passenger, twelve-year-old Leonard Herman Clay, was rendered unconscious upon impact and died two days later. The plaintiffs Yolanda Ballou and Terrence Ballou, the children of Jesse Ballou, and Lula Mae LeBlanc, the mother of Leonard Herman Clay filed this diversity suit in Texas federal district court against Appellant Henri Studios, Inc., alleging that the deaths of Jesse Ballou and Leonard Herman Clay were proximately caused by the negligence of Henri Studios' employee, John Woelfel, the driver of the truck. Henri Studios, inter alia, denied that Woelfel's conduct was negligent and asserted that the collision was caused by the negligence of the deceased driver of the car, Jesse Ballou.

Prior to trial, the plaintiffs filed a motion in limine seeking to prevent the introduction at trial of any evidence that Jesse Ballou was intoxicated at the time of the collision. Specifically, the motion in limine sought to exclude the results of a blood alcohol test performed by the Beaumont Regional Crime Laboratory upon a blood sample allegedly taken from the body of Ballou which reflected that his blood contained 0.24% alcohol by weight at the time of his death. On the day the trial of the case began, the district court held a hearing outside the presence of the jury on the issue whether the results of the blood alcohol test should be excluded from evidence at trial. After hearing argument and testimony, the district court sustained the motion in limine and ruled the results of the blood test inadmissible.

At trial, John Woelfel testified that on the morning of the collision, June 14, 1977, he had made a delivery of concrete statuaries to a garden center in Orange, Texas for his employer, Henri Studios. After delivering the statuaries, he set out to Port Arthur, Texas, by way of Interstate 10 West to complete his deliveries. Woelfel took the Port Arthur exit (Highway 69) off Interstate 10 with the intention of continuing on Highway 69 to Port Arthur, but immediately after exiting he experienced accelerator linkage problems which caused a loss of power to his truck. Woelfel drove approximately one-half mile and pulled his truck entirely onto the shoulder of the roadway under an overpass. Woelfel testified that he placed three warning reflectors on the shoulder of the highway behind his vehicle at approximately ten feet, eighty feet and one hundred and eighty feet. Other trial testimony, however, indicated that the third reflector had been placed at either approximately eighty-nine feet or approximately one hundred and three and one-half feet behind the trailer.

While he was waiting for help to arrive and attempting to repair the truck, Woelfel noticed the car driven by Ballou approximately one-quarter of a mile behind his truck driving almost entirely on the shoulder of the highway. Woelfel testified that he watched Ballou's car as it approached his truck and that Ballou did not slow down, change direction, skid or return from the shoulder to the main portion of the highway. Several seconds prior to impact, Woelfel jumped between the tractor and trailer in order to protect himself from injury.

The district court instructed the jury with respect to the Texas law concerning a truck driver's duty to display warning reflectors behind his disabled truck and the distances at which the reflectors are required to be placed. The court also instructed the jury that under Texas law they could award damages to Yolanda and Terrence Ballou only if they found that Jesse Ballou was not more than 50% contributorily negligent. . . The jury was further instructed that Ballou's negligence could not be imputed to Leonard Herman Clay.

The jury returned a general verdict for the plaintiffs, but found that Henri Studios was 40% negligent and that Jesse Ballou was 60% contributorily negligent. Finding a conflict between the general verdict for the plaintiffs and the jury's finding that Ballou was 60% contributorily negligent, the district court gave the jury additional instructions and resubmitted the case for further deliberation. The jury subsequently returned a verdict for the plaintiffs, awarding damages of \$ 100,000 for Yolanda Ballou, \$ 150,000 for Terrence Ballou and \$ 15,000 for Lula Mae LeBlanc individually. The verdict found Henri Studios 55% negligent and Jesse Ballou 45% contributorily negligent. The jury awarded no damages to Lula Mae LeBlanc as administratrix of Leonard Herman Clay's estate for Clay's pain and suffering. Since Jesse Ballou's negligence was not attributable to his passenger, the jury's award of \$ 15,000 to LeBlanc was not subject to reduction and judgment was entered based on the jury's verdict. The district court entered judgment for Yolanda and Terrence Ballou after reducing the amount awarded by the jury by 45% based on the jury's finding of the percentage of Ballou's contributory negligence.

Henri Studios raises several issues on appeal, including the trial court's alleged reversible error in excluding the results of the blood alcohol test. . . Concluding that the district court erred in excluding the results of the blood alcohol test, we reverse the judgment in favor of Yolanda and Terrence Ballou and remand for a new trial. . .

EVIDENCE OF FLIGHT
UNITED STATES V. HANKINS
931 F.2D 1256 (8th Cir. 1991)

Larry Wayne Hankins was convicted of armed bank robbery, in violation of 18 U.S.C. § 2113(a), (d) (1988); use of a firearm during a crime of violence, in violation of 18 U.S.C. § 924(c)(1); and escape from federal custody, in violation of 18 U.S.C. § 751(a). He appeals from his convictions, claiming, * * * that the district court erred in admitting evidence of his escape. * * *

I. BACKGROUND

On Monday, April 17, 1989, the Stone County National Bank in Cape Fair, Missouri, as robbed by two people shortly after closing time (3:00 p.m.). [After an investigation, Hankins was arrested and incarcerated pending trial.]

On the morning of April 27, 1989, seven days after being confined in the Greene County jail in Missouri, Hankins escaped from custody. He was found later the same day and returned to custody. In July 1989, a three-count indictment was returned by a federal grand jury, charging Hankins with the robbery, use of a firearm, and escape. Prior to trial, Hankins pleaded guilty to the escape charge. A jury trial began on September 5, 1989, for the remaining two charges and on September 8, 1989, Hankins was found guilty.

II. DISCUSSION

* * * [W]e consider Hankin's claim that the district court erred in allowing the admission of evidence relating to his escape from the Greene County jail. Hankins argues that evidentiary rules prohibit the admission of evidence concerning his escape and that the prejudicial effect of its admission was "accentuated" by the extensive testimony and by the lack of overwhelming evidence against him. We disagree and hold that the escape evidence was admissible.

It is widely acknowledged that evidence of flight or escape from custody is often "only marginally probative as to the ultimate issue of guilt or innocence." But it is also well established that such evidence is admissible and has probative value as circumstantial evidence of consciousness of guilt. * * * It is for the jury to determine how much weight to give to such evidence. * * * In *United States v. Peltier*, 585 F.2d 314 (8th Cir. 1978), we explained that the admissibility and probative value of flight evidence

"depends upon the degree of confidence with which four inferences can be drawn: (1) from the defendant's behavior to flight; (2) from flight to consciousness of guilt; (3) from consciousness of guilt to consciousness of guilt concerning the crime charged; and (4) from consciousness of guilt concerning the crime charged to actual guilt of the crime charged."

A court must carefully consider whether there are a sufficient number of evidentiary manifestations to support these inferences. *Id.* Most of the cases on this subject, like *Peltier*, involve evidence of *flight*, usually from the scene of a crime or from an arresting officer. The present case involves evidence of *escape*, but we see no distinction that would warrant an analytical approach different from that which is used in flight cases. Flight and escape are similar evasive acts.

The second and fourth inferences, it has been said, are often the most difficult to support, and that is true in this case as well. But given the evidentiary manifestations in this case, the district court did not abuse its discretion in admitting evidence of Hankins's escape. One can confidently infer from Hankins's behavior that he was fleeing from custody. One can also confidently infer that Hankins's behavior was related to the armed bank robbery charges. Hankins gave a number of reasons for why he escaped (e.g., he thought he was being framed and he wanted to see his children) and these are all explanations for the jury to consider in weighing the significance of the escape evidence. But there is nothing in the record to suggest that Hankins escaped because he felt guilty about some other offense (i.e., the third inference above). Before his escape, Hankins had been made fully aware of the charges against him. Thus, "there is a sufficient basis in the evidence to warrant the inference that the flight 'was prompted by considerations related to the issue in question.'"

Hankins also argues that an unnecessarily extensive and prejudicial amount of evidence regarding his escape was received by the district court. Given the often marginally probative value of evidence of flight or escape and the risk of its prejudicial effect, district courts should be wary of the amount of evidence permitted on this subject and the way in which it is presented. The evidence of escape in Hankins's trial was not presented in an inflammatory manner, but it is our impression that more testimony than necessary was received by the district court.⁵ We do not believe, however, that this constitutes an abuse of the district court's discretion.

Hankins's argument that *any* evidence of his escape was too much (or "especially prejudicial") because of the less than overwhelming case against him is without merit. Evidence against a defendant, which is otherwise relevant or admissible, should not be excluded simply because the total evidence is not overwhelming. In fact, the probative value of the evidence is made more significant by the less than overwhelming case and the government's "legitimate need for corroborative evidence."

III. CONCLUSION

We have considered all other issues raised by Hankins and find them to be without merit. For the reasons stated, the convictions are affirmed.

⁵At trial, the government presented testimony from the prison guard who saw Hankins escape (including pictures showing the wall Hankins jumped over, the car on which he landed, etc.); testimony from the law enforcement officer who captured him later that same evening (including six photographs of the area where Hankins was hiding from authorities); testimony from an FBI agent regarding a conversation he had with Hankins, during which Hankins admitted planning the escape; and, finally, the government introduced a tape recording of a telephone call Hankins had with a friend after his capture, during which he stated that he planned the escape. The cumulative effect of the government's evidence was objected to by Hankins's counsel at trial.

EVIDENCE OF PUNITIVE DAMAGES

Hall v. Montgomery Ward & Co.
252 N.W.2d 421 (Iowa 1977)

UHLENHOPP, JUSTICE.

This appeal involves a jury award of damages in an action by plaintiff Thomas C. Hall against defendant Montgomery Ward & Company for mental anguish caused by threatening language by Wards' representatives.

Hall, a borderline mental retardate with an intelligence quotient of 69, worked as a maintenance man in Wards' store at Cedar Falls, Iowa. He "borrowed" Wards' floor scrubber to moonlight by cleaning tavern floors, and also took cleaning material for the scrubber. He testified he did not take other items.

A security officer of Wards came from Chicago and, with the local store manager, interrogated Hall in the manager's office. The officer threatened Hall with jail, among other statements, and emerged from the interrogation with four documents signed by Hall. A clinical psychologist testified that some of the words in the documents were beyond Hall's comprehension and that Hall would probably sign anything in a stressful situation to extricate himself. Hall testified he signed the documents because of the threats of jail. The documents were a consent that Wards' representatives could detain and interview Hall on company business as long as they deemed necessary, a list of items Hall allegedly took from the store (such as shorts, knife, belt, brush), a confession to the theft of store merchandise worth \$ 5000, and a promissory note to Wards for \$ 5000. The store manager testified the items listed in the second document as stolen would come to \$ 25 to \$ 35 but the list did not cover everything and the figure \$ 5000 was Hall's estimate.

Hall testified to his mental anguish from the incident. He stated several times that he had recurring dreams from the incident and that the incident affected his relationship with his family. The psychologist testified that Hall reacted as though the incident was "the end of the world," and Wards' officer testified he had to assure Hall at the conclusion of the interrogation that the situation was not the end of the world. Hall did not introduce evidence of physical injury or of financial loss or expense.

Hall testified regarding the pitifully small amount of property possessed by himself and his wife, as tending to show he did not have the property Wards contended he stole. Over Wards' objection of irrelevant, immaterial, and prejudicial, overruled by the trial court, Hall also introduced Wards' balance sheet and operating statement showing inter alia assets of \$ 1,964,822,000 and net annual sales of \$ 2,640,122,000.

The trial court overruled a motion for directed verdict by Wards. The jury found for Hall and awarded him \$ 12,500 actual and \$ 50,000 exemplary damages.

Wards moved for judgment notwithstanding verdict and alternatively for a new trial. The trial court overruled the former motion but sustained the latter one on the ground that the court erred in overruling Wards' objection to admission of the exhibit containing the balance sheet and operating statement which, according to the court, Hall's attorney used to make a "devastating" jury argument.

Hall appealed from the new trial award. Wards cross appealed from the court's failure to sustain its motions for directed verdict and for judgment notwithstanding verdict. The appeal and cross appeal present several issues.

Hall contends that the trial court erred in granting a new trial for admitting Wards' balance sheet and operating statement into evidence. The rule in this jurisdiction has been that with certain exceptions not involved here, a defendant's pecuniary condition may not be shown although the plaintiff asks smart money * * * This view has the support of a few courts, which state that if pecuniary condition is shown the fact finder will tend to get off on the relative poverty or affluence of the parties; despite trial-court instructions to juries, the issues of liability and damages will become intermixed.

The great weight of authority today, however, holds the other way where the plaintiff seeks and the evidence supports exemplary damages. The rationale employed in these decisions is that the jury needs to know the extent of the defendant's holdings in order to know how large an award of damages is necessary to make him smart. *E.g. Suzore v. Rutherford*, 35 Tenn. App. 678, 684, 251 S.W.2d 129, 131 ("what would be 'smart money' to a poor man would not be, and would not serve as a deterrent, to a rich man").

We are impressed by the large number of courts which have arrived at the conclusion that generally the rule of admissibility is the better one. We are more impressed by the actual need of jurors, in connection with exemplary damages, to have evidence about the defendant's poverty or wealth. We thus hold that the trial court properly admitted the exhibit and erroneously sustained Wards' motion for new trial. In adopting the rule of admissibility, we caution trial courts to confine plaintiffs carefully to the proper use of such evidence -- to the issue of the amount of exemplary damages which is necessary to punish the particular defendant.

* * *

Reversed and Remanded