



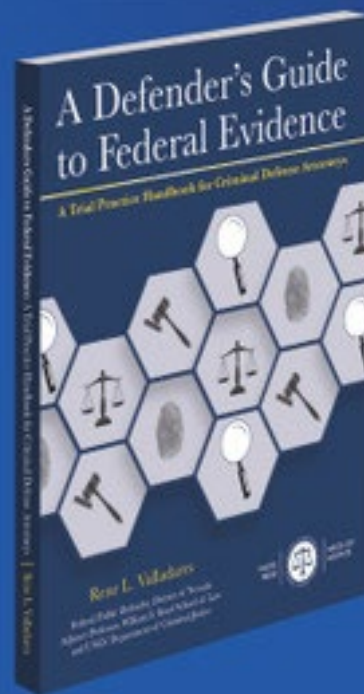
**FEDERAL PUBLIC
DEFENDER**
—— District of Nevada ——

The Busy Lawyer's Framework for Tackling Evidence

Rene L. Valladares, Federal Public Defender, District of Nevada

A Defender's Guide to Federal Evidence

A Trial Practice Handbook for Criminal Defense Attorneys



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This Guide to Federal Evidence is the only federal evidence handbook written exclusively for criminal defense lawyers. The Guide analyzes each Federal Rule of Evidence and outlines the main evidentiary issues that confront criminal defense lawyers. It also summarizes countless defense favorable cases and provides tips on how to avoid common evidentiary pitfalls. The Guide contains multiple user-friendly flowcharts aimed at helping the criminal defense lawyer tackle evidence problems. A Defender's Guide to Federal Evidence is an indispensable tool in preparing a case for trial, and an invaluable resource during trial.

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**FEDERAL PUBLIC
DEFENDER**
— District of Nevada —



THIS WATERSHIP DOES NOT APPEAR ON THE SCENE



Approach to E

- A. Relevance/Prejudice
- B. Character/Bad Acts
- C. Opinion Testimony
- D. Hearsay



Approach to E

- A. Relevance/Prejudice
- B. Character/Bad Acts
- C. Opinion Testimony
- D. Hearsay



A. Relevance/Prejudice Approach

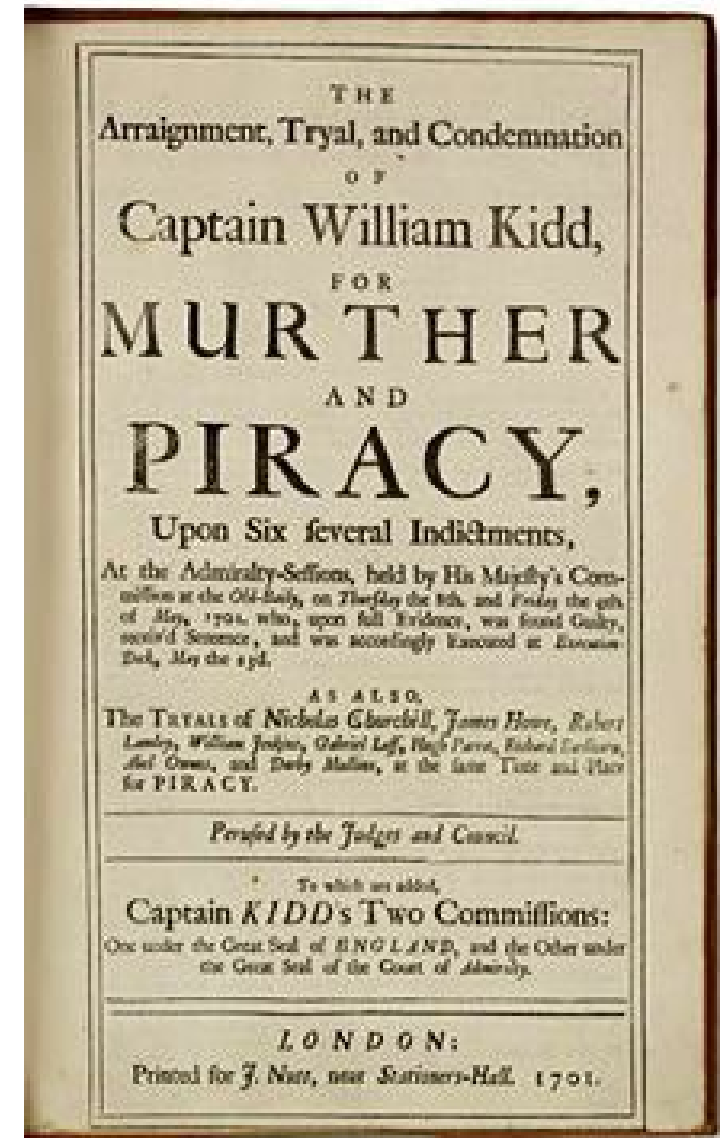
1. Is the E
relevant? FRE 401



2. Is the probative
value of the E
substantially
outweighed by
danger? FRE 403

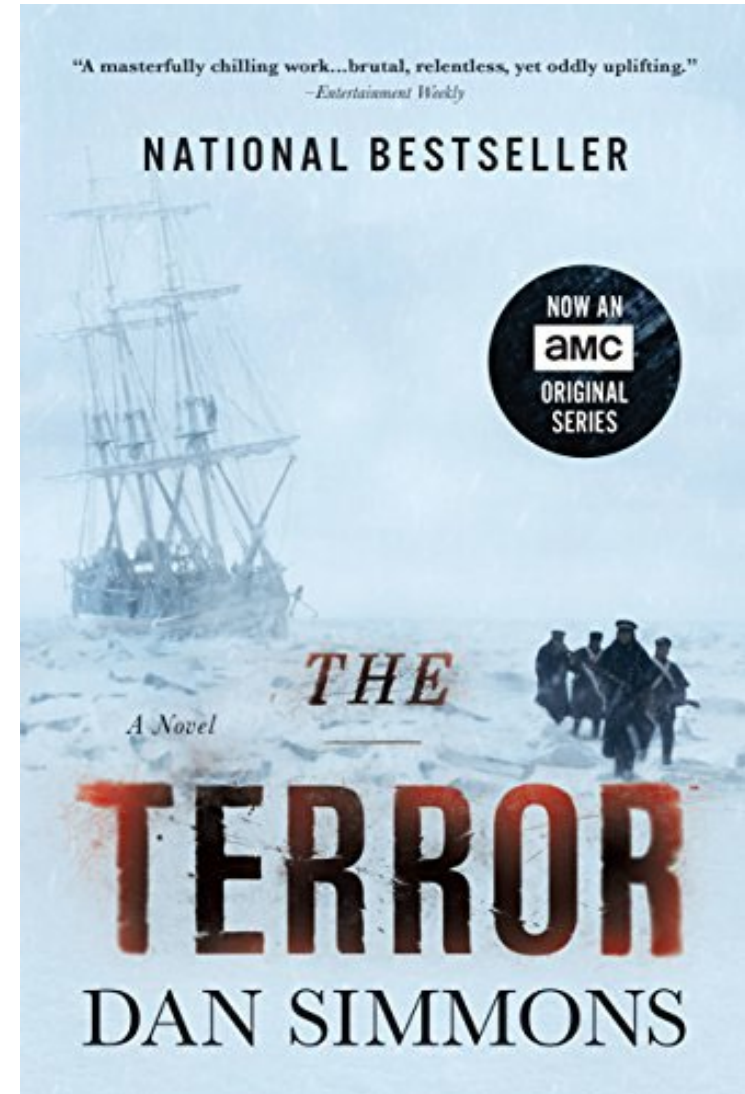
1. Is the item/statement relevant under FRE 401?

- According to **FRE 401**, evidence is relevant if:
 - **a.** It has any tendency to make a fact **more or less probable (FRE401(a))**; and
 - **b.** The fact is of **consequence** in determining the action (**FRE 401(b)**)



Standard is low

- The relevance standard under FRE 401 is low
- This lax relevance standard is **frequently exploited** by prosecutors attempting to introduce evidence of dubious value



Problematic categories of E for the D

- Consciousness of guilt-Flight
- Possession of uncharged weapons
- Gang affiliation
- Proof of financial hardship
- Tattoos



D. Favorable case: Flight-United States v. Glenn, 312 F.3d 58 (2d Cir. 2002)



**D. Favorable case: Uncharged
Weapons-United States v. Ferreira, 821 F.2d 1
(1st Cir. 1987)**



Relevance and theory of D

- When seeking to introduce evidence in the face of a relevance objection by the government, argue that its exclusion would **prevent the defense from presenting a defense in the case**



Bias and credibility are always relevant

- United States v. Abel, 469 U.S. 45, 51 (1984)
- Holding that “[a] successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony.”

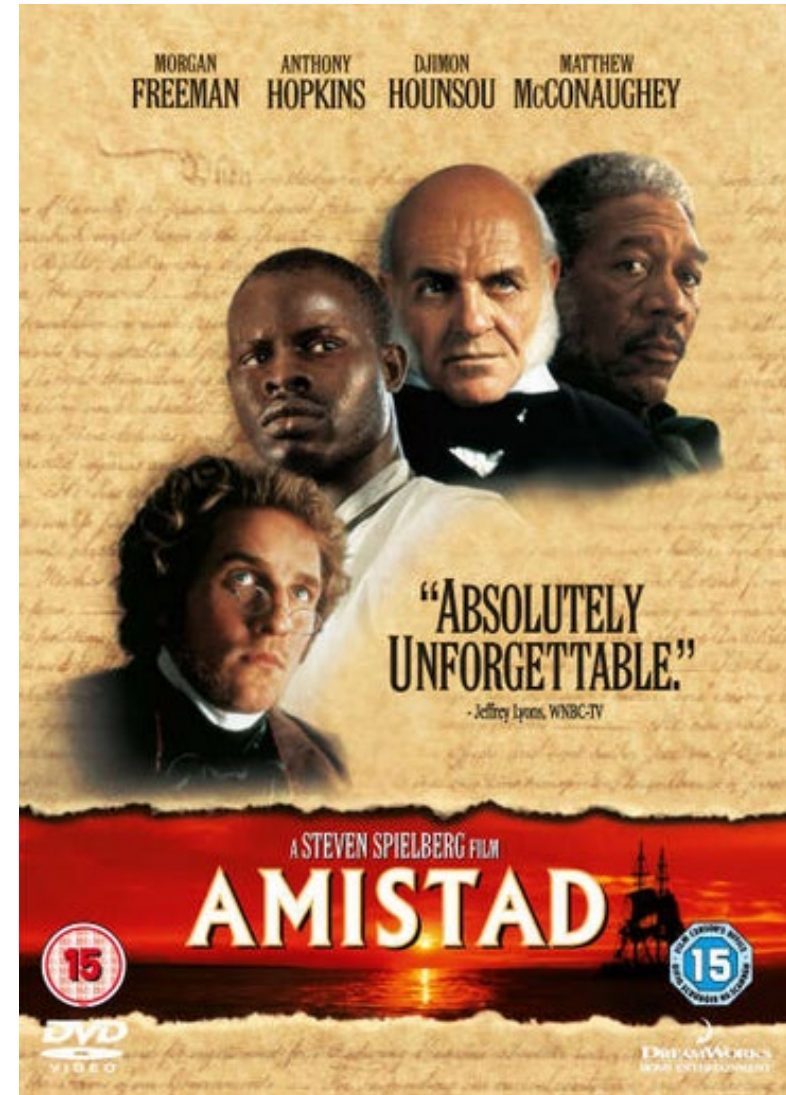


D. Favorable case: United States v. Stever, 603 F.3d 747 (9th Cir. 2010)

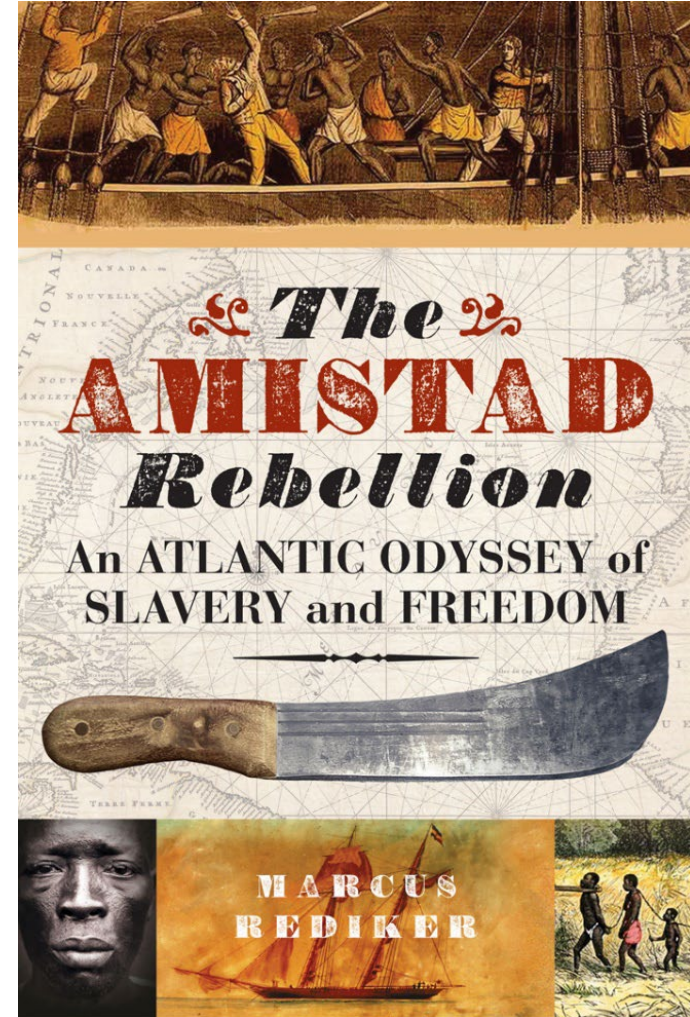


FRE 403-Balancing

- FRE 403 allows courts to exclude relevant evidence if its probative value is **substantially** outweighed by the danger of unfair **prejudice, confusion** of the jury, or waste of time



- Evidence is *unfairly prejudicial* under **FRE 403** if it tends to produce a jury decision based on an improper ground, typically an emotional one, unrelated to whether the defendant is guilty of the crime



D. Favorable case: United States v. Al-Moayad, 545 F.3d 139, 159 (2d. Cir. 2008):

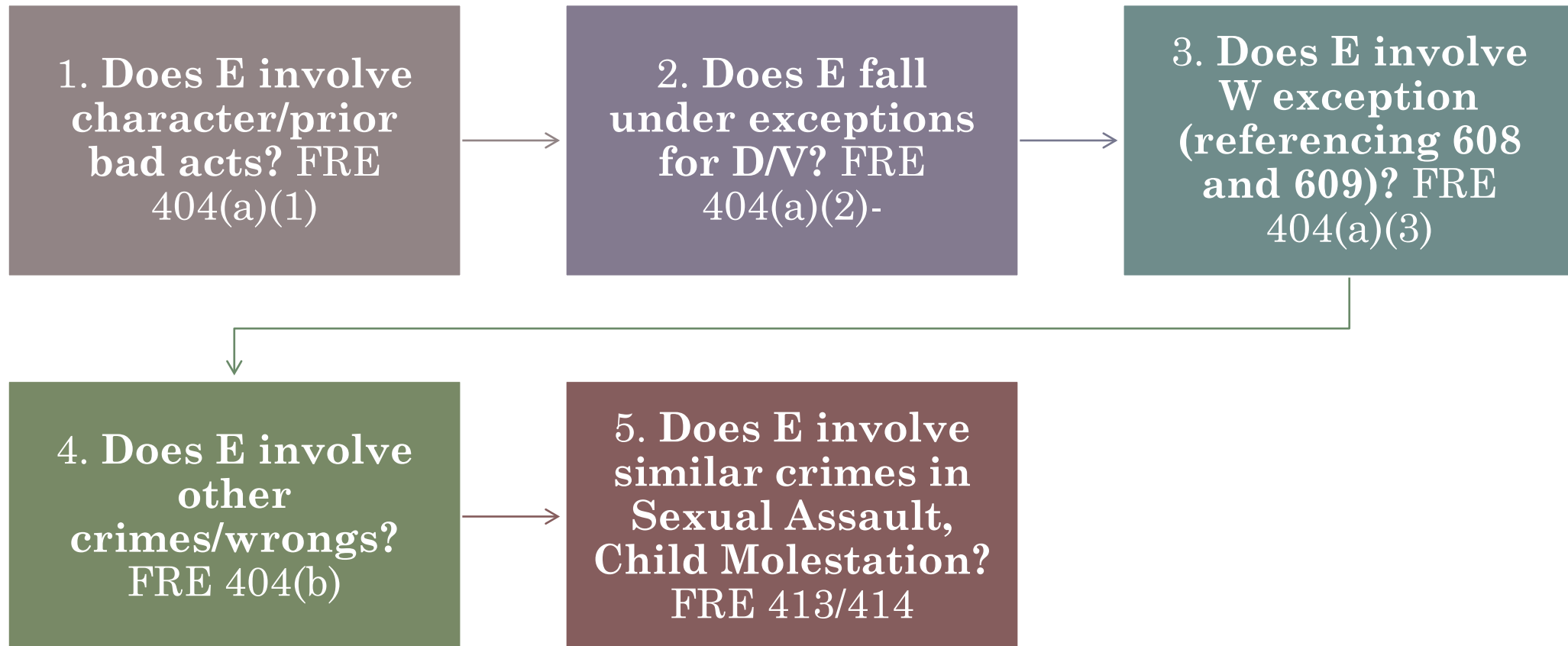


Approach to E

- A. Relevance/Prejudice
- B. Character/Bad Acts
- C. Opinion Testimony
- D. Hearsay



Character and Prior Acts E Approach



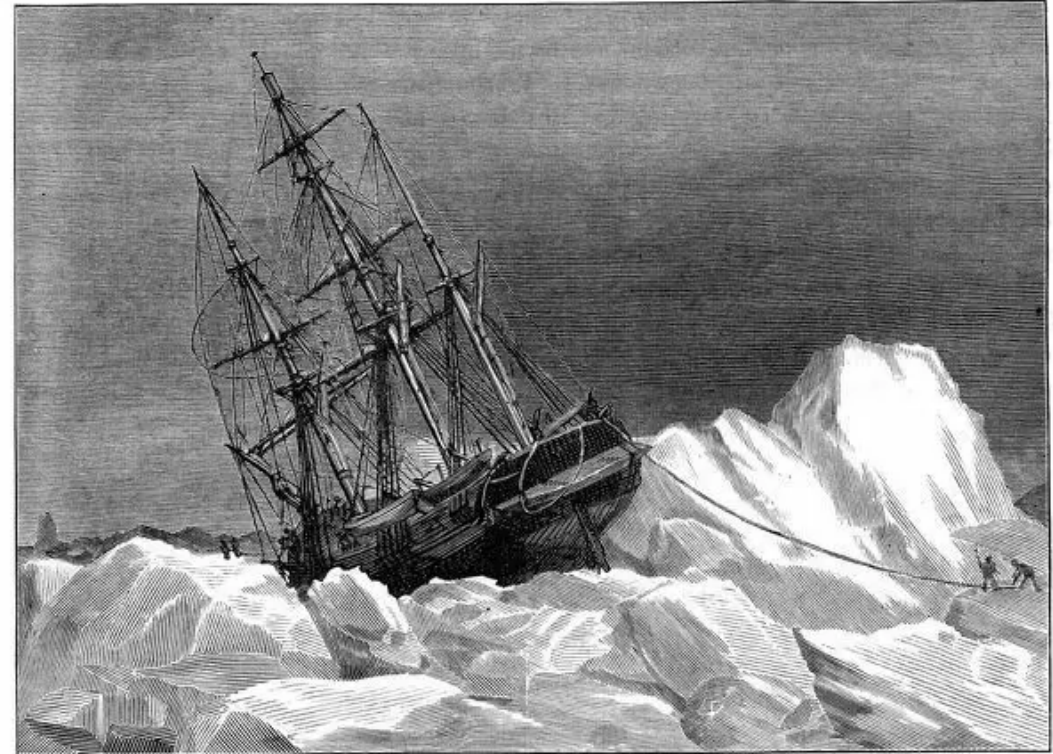
1. FRE 404(a)-Propensity Prohibition

- FRE 404(a)-Character not admissible to prove action in conformity
- FRE 404(b)(1)-propensity prohibition also applies to other crimes, wrongs, or acts



Beware opening the door

- Entrapment
- e.g.: U.S. v. Roper, 135 F3d. 430, 433 (6th Cir. 1998)
(defendant opened door to character E by asserting entrapment D and arguing he had never sold drugs)



THE "TERROR" NIPPED IN THE ICE.



FRE 405-Methods of Proving Character

- FRE 405 (a) By Reputation or Opinion
 - When admissible, character may be proved by testimony about the person's **reputation** or by testimony in the form of an **opinion**
 - On **cross-examination** of the character witness, the court may allow an inquiry into relevant **specific instances** of the person's conduct
- FRE 405 (b) By Specific Instances of Conduct
 - When a person's character or character trait is an **essential element of a charge, claim, or defense**, the character or trait may also be proved by relevant specific instances of the person's conduct

2. Exceptions for a D or V in a Criminal Case-FRE 404(a)(2)

- A. Evidence of D's good character
- B. G's right to rebut
- C. Evidence of V's character
- D. G's right to rebut
- E. G's right to rebut E that V was first aggressor
- F. Prohibited Use of V's sexual behavior or disposition



A. Evidence of D's good character

- FRE 404(a)(2)(A) allows D to offer evidence of D's pertinent trait
- Pertinent is synonymous with relevant
- Reputation for being law-abiding always relevant
- Method of proving: reputation and opinion testimony
- FRE 404(a)(2)(A) gives the G the right to rebut if the D introduces evidence of their character
- G evidence must be for same character trait raised by D
- Method of proving: reputation and opinion testimony
- On cross-examination, court may allow E of specific instances of conduct

Traits likely to be “pertinent” as to a criminal defendant:

- Peacefulness - if crime is one of violence
- Honesty - if crime is one that involves criminal intent or deceit
- Truthfulness - if crime is one that involves deceit or if defendant testifies
- Abstinence - if crime is one that involves drug or alcohol use

C. Victim's character

- FRE 404(a)(2)(B) gives the D the right to offer E of V's **pertinent** trait
- Method of proving: **reputation and opinion testimony**
- **On cross-examination, court may allow E of specific instances of conduct**
- This Rule is subject to the Limitations of **FRE 412** (Victim's predisposition in sex cases)
- FRE 404(a)(2)(B) gives the G the right to rebut if the D introduces evidence of the V's character:
- (1) G can offer E of V's good character, and
- (2) Offer E of D's same trait

E. FRE 404(a)(2)(C)-Gov't right to rebut E that V was first aggressor

- FRE 404(a)(2)(C) allows G to rebut E that V was first aggressor
- Must be a **homicide case**
- By offering E of V's trait for peacefulness



F. FRE 412-Limitations on E re: V's character in Sex Cases

- FRE 412 (a)(1) prohibits evidence that the V engaged in other **sexual behavior**
- FRE 412(a)(2) prohibits evidence of the V's **sexual predisposition**
- **Rule creates exceptions in criminal cases:**
 - FRE 412(b)(1)(A)-**Source of semen, injury or other physical E**
 - FRE 412(b)(1)(B)-**Consent**
 - Rule also creates a procedure to determine admissibility

FRE 412-Limitations on E re: V's character in Sex Cases (cont.)

- “Sexual behavior” is given broad interpretation and includes:
- Evidence of any physical sexual conduct,
- Evidence that might imply sexual conduct (use of contraceptives, birth of out-of-wedlock child, venereal diseases)
- Victim's mode of dress, speech or life-style
- Federal Courtroom Evidence, Fifth Edition, J. Cotchett

FRE 412(c)- Procedure to determine admissibility

- If D intends to offer E under this FRE, it must:
 - 1. File a motion describing the E and its purpose
 - 2. Do so 14 days before trial (unless good cause)
 - 3. Serve motion on all parties
 - 4. Notify V or guardian/representative
 - 5. Court must conduct an *in camera* hearing and give the V and parties opportunity to be heard
 - 6. Motion/hearing must be sealed unless court orders otherwise

3. Character of W- FRE 608(a)

- Only relevant character trait of a witness is **truthfulness or untruthfulness**
- E of truthful character of W only admissible **after character for truthfulness has been attacked**
- **Subject to FRE 403 balancing**
- Opinion/Reputation evidence can support credibility or attack credibility

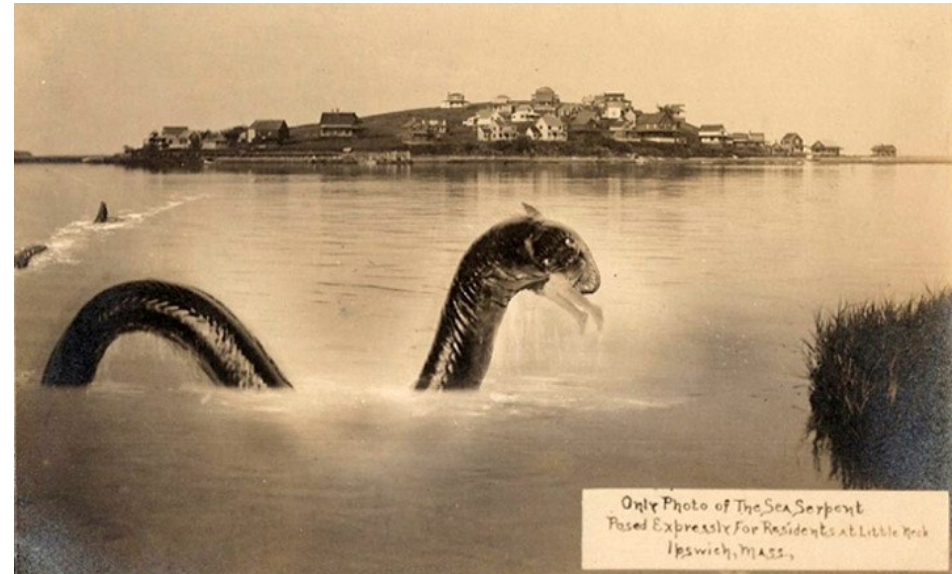


FRE 609-Impeachment by E of Criminal Conviction

- FRE 609 allows a party to attack a W's credibility by E of prior conviction
- **Drivers:**
 - What type of case is it? (Is dishonest act involved)
 - Is the W the D?
 - How much time has passed since conviction/release?
 - Has the conviction been pardoned or annulled?
 - Was adjudication a juvenile one?

FRE 609(a)(2)-Dishonest act element of crime of conviction

- If dishonest act or false statement is **element of crime**: conviction can always be used to impeach W (false pretenses, forgery, fraud, etc.)
- Admissible whether conviction is felony or misdemeanor
- Court has **no discretion to exclude under FRE 403** (probative vs. prejudice)
- Subject to 10-year rule



Only Photo of The Sea Serpent
Passed Expressly For Residents at Little Rock
Ipswich, Mass.

FRE 609(a)(1)-Dishonest act not element of crime of conviction

- If dishonest act is not an element of crime:
- Conviction can be used if felony
- Can be used against D W if **probative value of e outweighs prejudicial evidence**
- Will be used against other W's unless **probative value substantially outweighed by unfair prejudice.**
- Subject to 10-year rule

FRE 609-Specifics of Conviction

- The specifics of a conviction should not be allowed into evidence. Instead, what should be allowed are:
- Date of conviction,
- Jurisdiction of conviction,
- The offense or statute involved
- **BEWARE:** Opening the door

FRE 609(b)-Ten year rule

- If more than 10-years have passed since W's conviction or release from confinement, conviction does not come in unless:
- Probative value **substantially outweighs** prejudicial effect, **and**
- Proponent gives **reasonable written notice**



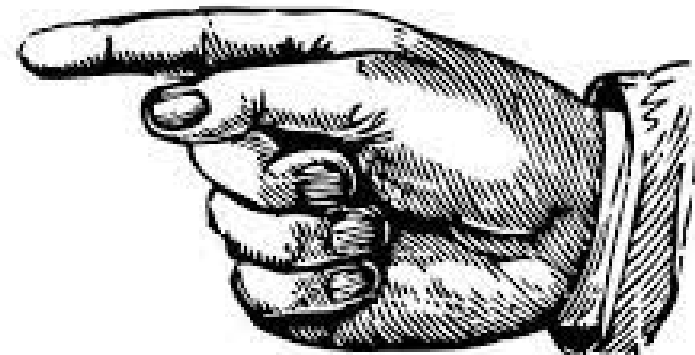
4. FRE 404(b)(1)-Propensity prohibition

- FRE 404(b)(1) sets out prohibition on use of other crimes, wrongs or acts to establish propensity
- FRE 404(b)(2), however, permits other crimes, wrongs or acts E to establish **(MIMIC)**:
 - Motive
 - Intent
 - Modus operandi
 - Identity
 - Common scheme or plan
- FRE 404(b)(3)-Rule subject to **notice requirement**
- **Can be used by D**

FRE 404(b)(3)-Important changes to Notice requirement

- A. Fed. R. Evid. 404(b) was amended effective **Dec. 1, 2020** in ways that should benefit defendants in criminal cases.
- B. Under the Amended Rule:
 - 1. The defendant does not have to request 404(b) notice anymore
 - Prosecution has to provide it if they want to use any 404(b) evidence

Please Notice This



FRE 404(b)(3)-Important changes to Notice requirement (cont.)

- 2. The prosecution now has to:
 - a. Identify the bad act,
 - b. Articulate the non-propensity reason for which the evidence is offered,
 - c. Provide the basis for concluding why the evidence is relevant,
 - d. Do the above in writing before trial (unless excused, for good cause, by the court)

- In arguing that other acts evidence does not fall under the exception under **Fed. R. Evid. 404(b)(2)**, defense counsel should argue that:
- The evidence is **propensity evidence**
- The evidence is **not relevant** to a consequential issue

- The evidence **does not support** a jury conclusion that act was committed by the defendant
- Other acts evidence is not **sufficiently similar**
- **FRE 403**

5. FRE 413-Similar Crimes in Sexual-Assault Cases

- If Defendant accused of sexual assault case, the court may admit evidence that the defendant committed “any other sexual assault.”
- Evidence might be considered for any matter to which it is relevant=propensity
- Evidence is subject to FRE 403 balancing
- The prosecution must disclose its intent to offer the evidence;
- Disclosure includes **“witnesses’ statements or a summary of the expected testimony”**; and
- The prosecution must disclose **15 days prior to trial or at a later time**, if the court allows for good cause

FRE 414-Similar Crimes in Child-Molestation Cases

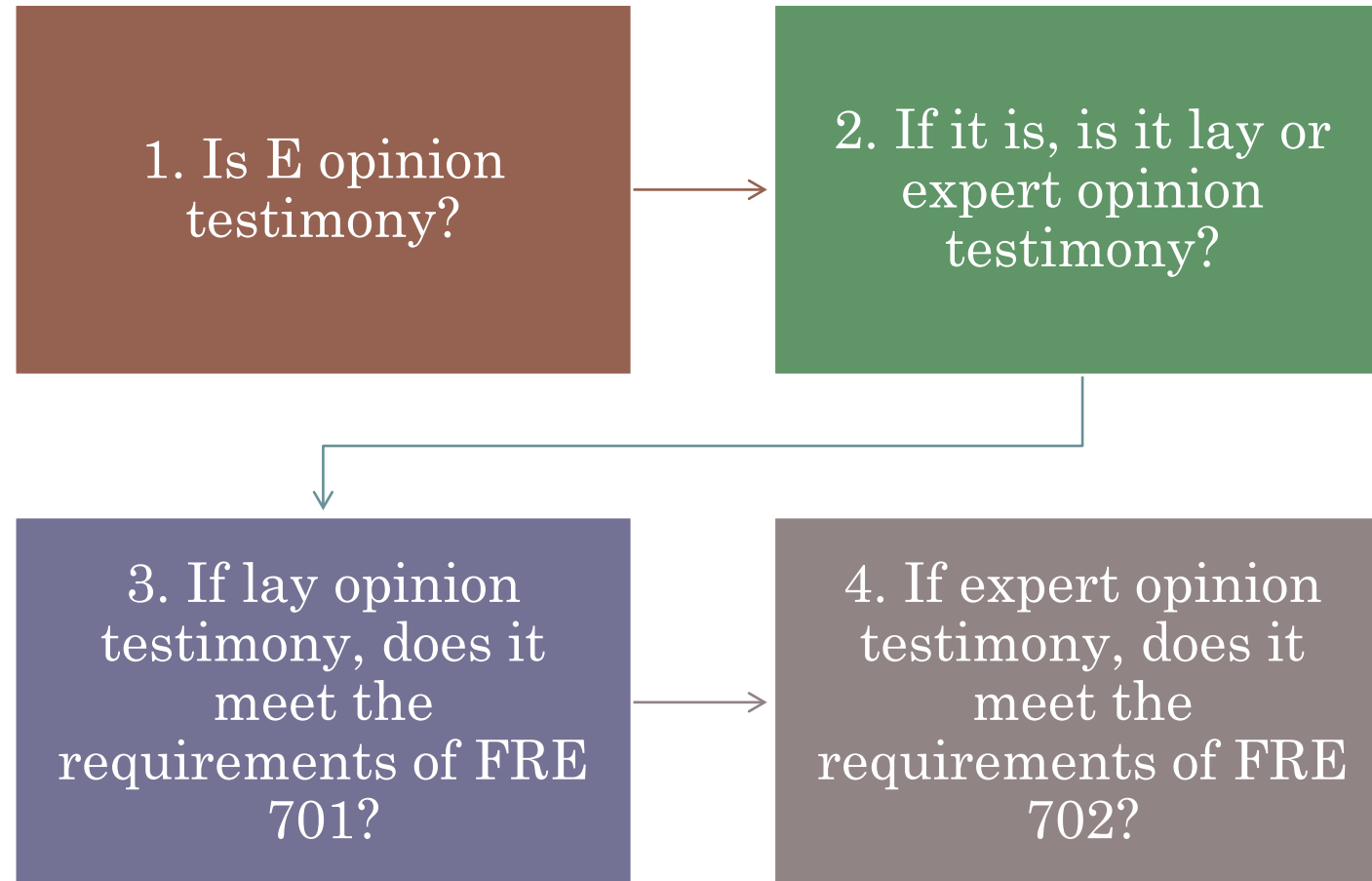
- If Defendant accused of child molestation, the court may admit evidence that the defendant committed “any other child molestation.”
- **Evidence might be considered for any matter to which it is relevant=propensity**
- **Evidence is subject to FRE 403 balancing**
- The prosecution must disclose its intent to offer the evidence;
- Disclosure includes “**witnesses’ statements or a summary of the expected testimony**”; and
- The prosecution must disclose **15 days prior to trial** or at a later time, if the court allows for good cause

Approach to E

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Opinion and expert testimony FREs



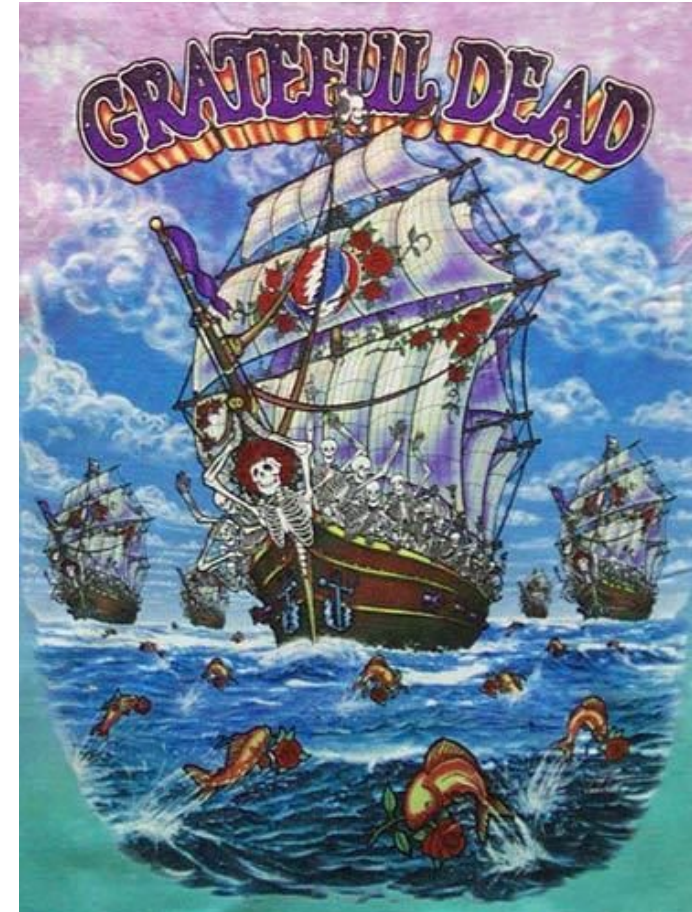
Recent article on Excluding Prosecution Expert Evidence



- The Busy Lawyer's Guide to Excluding Prosecution Expert Evidence, The Champion, August 2022
- Rene Valladares
- Hannah Nelson

FRE 701-Lay opinion testimony

- An opinion presented by a lay witness:
- Must be “rationally based on the witness’s **perception.**” FRE 701(a),
- Must be “**(h)elpful** to clearly understanding the witness’s testimony or to determining a fact in issue.” FRE 701(b), and
- Cannot be “**based on scientific, technical, or other specialized knowledge** within the scope of Rule 702.” Fed. R. 701(c)



D. Favorable case: United States v. Haynes, 729 F.3d 178 (2d Cir. 2013).



FRE 702-Expert witness testimony

- The witness must qualify as an expert
- The expert knowledge must be helpful to the trier of fact. FRE 702 (a)
- It must be based on “sufficient facts or data.” FRE 702 (b)
- It must be the product of “reliable principles and methods.” FRE 702(c)
- The expert must have “reliably applied the principles and methods to the facts of the case.” FRE (d)



D. Favorable case: United States v. Garcia, 752 F.3d 382 (4th Cir. 2014):



FRE 702-Witness must be qualified as an expert-D arguments

- A witness can qualify as an expert based on “**knowledge, skill, experience, training or education.**” FRE 702
- The expert’s experience is **not relevant** to the testimony;
- Their experience in the relevant area is **shallow or anecdotal**;
- The expert **lacks recent** experience in the relevant field; or
- The expert has **provided no methodology or guiding principles** that would support her opinions

D. Favorable case: United States v. Medina-Copete, 757 F.3d 1092 (10th Cir. 2014)





FRE 702(c)-Expert testimony is product of reliable principles and methods

- Reliability is measured by the non-exclusive checklist in Daubert v. Merrell Dow, 509 U.S. 579, 592-593 (1993).
- The factors outlined in Daubert can also apply in cases involving non-scientific evidence. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).



Daubert checklist

- 1. Whether the theory or technique in question can and has been **tested**
- 2. Whether the theory of technique has been subjected to **peer review and publication**
- 3. The theory or technique's known or potential **rate of error**
- 4. The existence and maintenance of **standards** controlling the theory or technique's operation
- 5. Whether the theory or technique has attracted **widespread acceptance** within a relevant scientific community

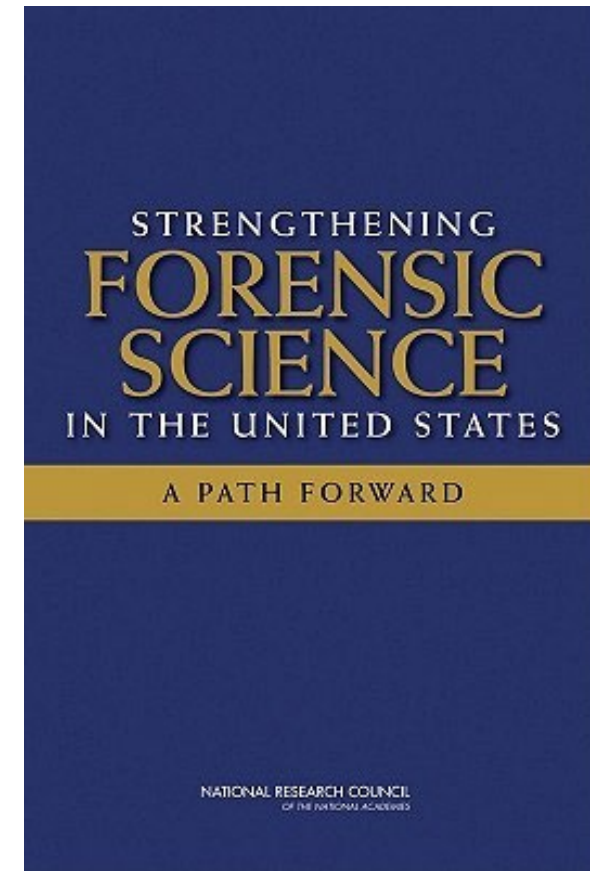
“Junk” science

- National epidemic of faulty forensic science
- Judges have largely disregarded Daubert in criminal cases
- 1. E.G. “Gerry” Morris: *Flawed Science in the Courtroom. Is Excluding it Really that Difficult?*, **THE CHAMPION**, Nov. 2015.
- 2. Janis C. Puracal and Aliza B. Kaplan: *Science in the Courtroom: Challenging Faulty Forensics*, **THE CHAMPION**, Jan.-Feb. 2020.
- 3. Aliza B. Kaplan and Janis C. Puracal, *It's not a Match: Why the Law Can't Let Go of Junk Science*. **ALBANY LAW REVIEW**, Vol 81:3, 895.
- 4. Brandon L. Garrett, *Unpacking the Source of Error in Forensic Evidence*, **THE CHAMPION**, June 2021.



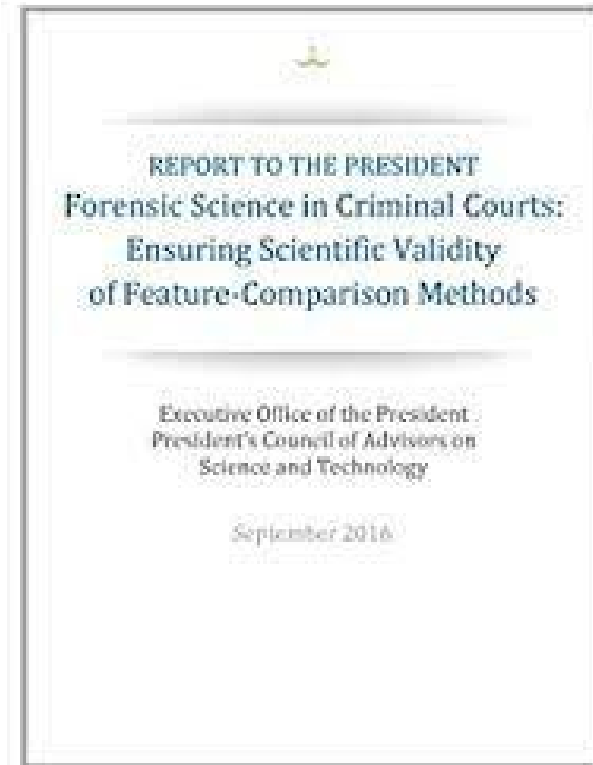
2009 NAS Report

- 2009 NAS released groundbreaking report on the state of forensic science in courtroom
- Except for nuclear DNA analysis, no forensic method has been thoroughly shown to have capacity to connect forensic evidence to specific individuals/sources
- Report concluded significant problems with scientific validation of bitemark, hair, fingerprint, firearm and toolmark identification



2016 PCAST Report

- PCAST 2016 Report reemphasized weaknesses continued to plague forensic science
- Many forensic methods lack validation studies
- PCAST opposed by DOJ, FBI, and the National Association of District Attorneys



- Courts are not performing “gate-keeping” function
- Expected “sea change” in the admissibility of faulty forensic science did not materialize
- Little change in law to prevent admissibility of faulty forensic science
- Instead, courts are leaving “scientific validity” determinations in hands of the jury and cross-examination by defense counsel
- Courts turn blind eye to advances in science insisting on **precedent**
- Appellate courts more willing to question admissibility of scientific evidence in civil cases
- Vast majority of reported opinions in crim. cases show courts rarely exclude or restrict expert testimony offered by prosecutors
- Courts more willing to exclude or restrict expert testimony offered by the defense

Problem areas

- Problem areas:
- DNA Analysis of complex mixtures
- Bitemark analysis
- Latent fingerprint analysis
- Firearms analysis
- Footwear analysis
- Hair analysis

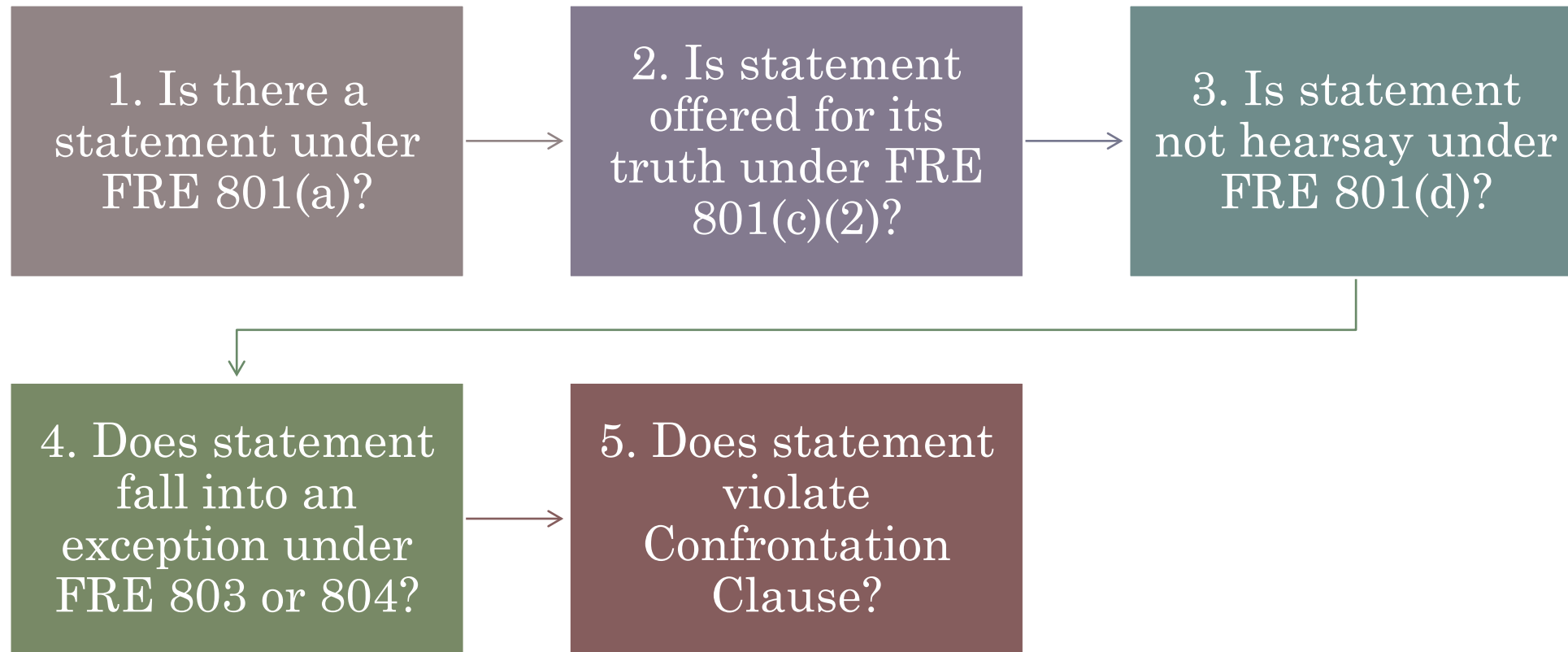


Approach to E

- A. Objection Nutshell
- B. Relevance/Prejudice
- C. Character/Bad Acts
- D. Opinion Testimony
- E. Hearsay



Approach to Hearsay



Hearsay-Definition

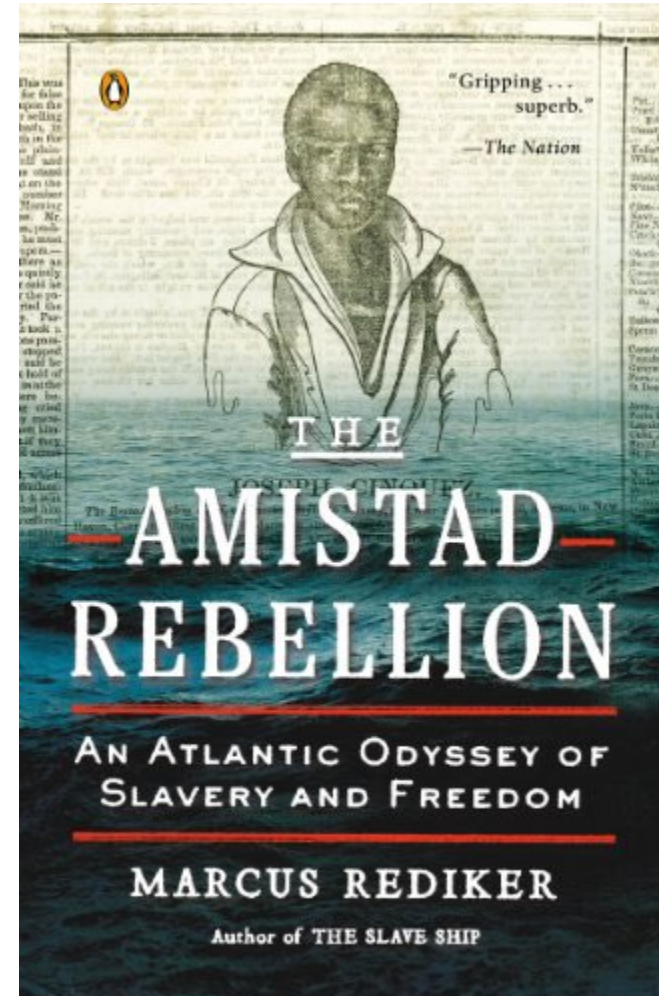
FRE 801(c)

1. A declarant's
2. Out of court
3. Statement
4. Offered for the truth of the matter asserted

FRE 801(c)(1); FRE 801(c)(2)

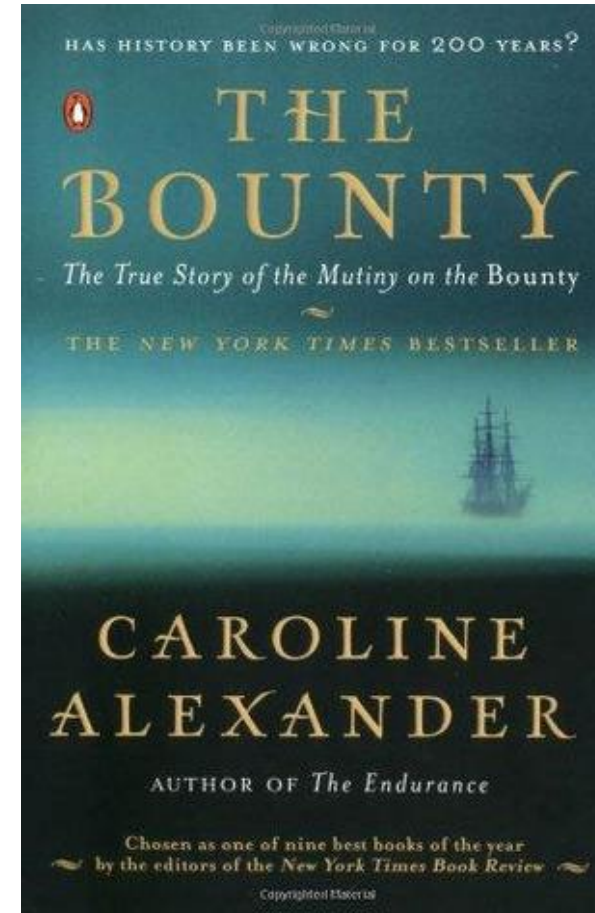
Not for Truth of the Matter Asserted- FRE 801(c)(2)

- Course of investigation
- Effect on hearer/reader
- Knowledge
- Impeachment



Course of investigation-Highly Abused by G

- Statement not hearsay if offered to show why investigation undertaken
- Course of investigation subject to **FRE 403** analysis
- Testimony that Officer acted on information received should suffice

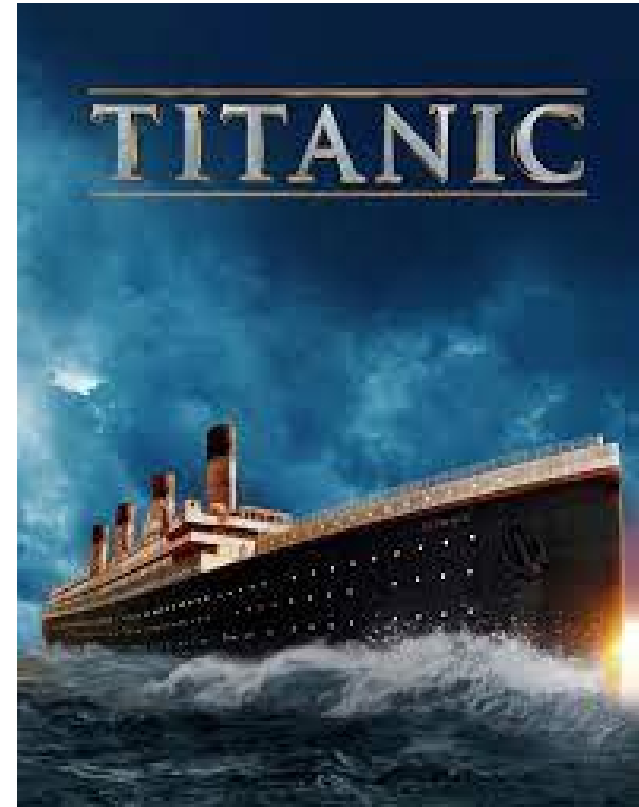


Hearsay Exclusions-FRE 801(d): Declarant/Witness Prior Statements, and Opposing Party Statements



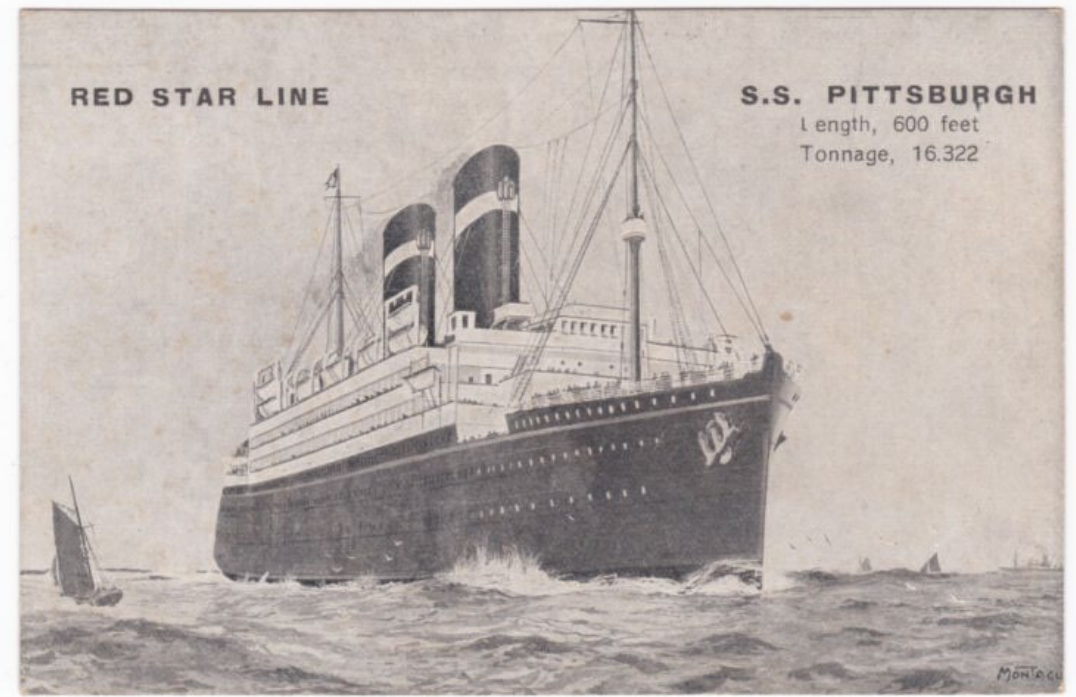
Hearsay Exclusions: FRE 801(d)- Declarant-Witness Prior Statement

- FRE 801(d)(1)(A): Prior **inconsistent** statement given under oath and subject to c/e
- FRE 801(d)(1)(B): Prior **consistent** statement offered to rebut claim of recent fabrication
- FRE 801(d)(1)(C): Statement of **identification**



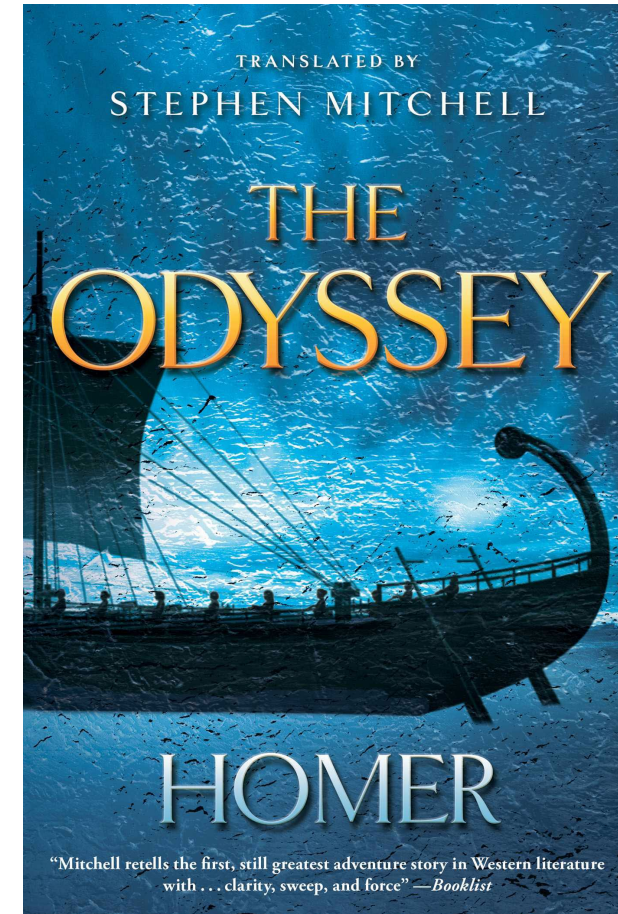
Hearsay Exclusions: FRE 801(d)(2)- Opposing Party Statements

- FRE 801(d)(2)(A):
Personal statement
- FRE 801(d)(2)(B):
Adoptive statement
- FRE 801(d)(2)(C): By
authorized spokesperson
- FRE 801(d)(2)(D): By
agent/employee
- FRE 801(d)(2)(E): By
co-conspirator



FRE 801(d)(2)(e): Co-conspirator Stat

- Government must show that a **conspiracy existed** which involved the declarant and the defendant
- The statement must be **during the course** of a conspiracy, and
- The statement must be **in furtherance** of the conspiracy



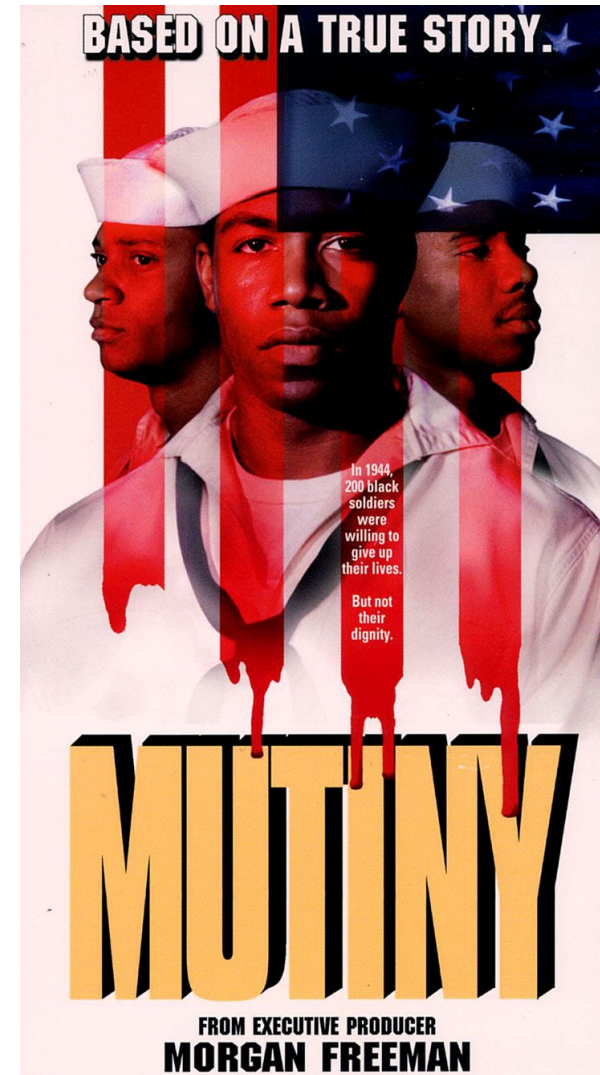
Furtherance of a Conspiracy

- Idle conversation is not sufficient.
- Casual conversation about past events **not** “in furtherance”



Hearsay Exceptions

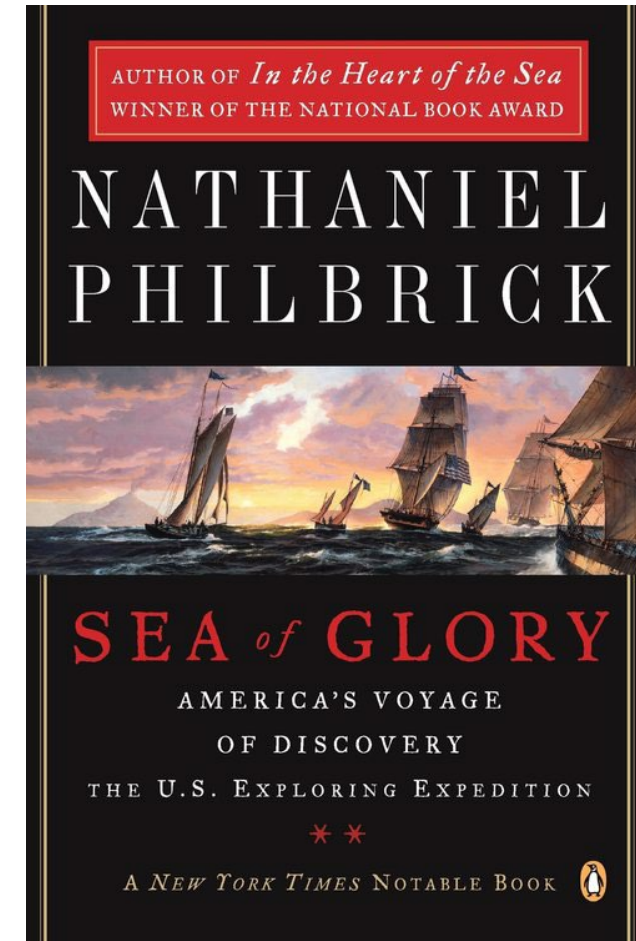
- FRE 803 –
Availability of
declarant
immaterial (23)
- FRE 804 – Declarant
must be
unavailable (5)



Hearsay Exceptions: FRE 803

Availability Immaterial

- Present Sense Impression-FRE 803(1)
- Excited Utterance-FRE 803(2)
- Then-Existing Mental, Emotional or Physical Condition-FRE 803(3)
- Statements made for Medical Diagnosis/Treatment-FRE 803(4)
- Recorded Recollection-FRE 803(5)
- Business Records-FRE 803(6)
- Public Records-FRE 803(8)
- Absence of a Record-FRE 803(7), (10)



FRE 803(1): Present Sense Impression

Present Sense Impression

1. Statement **describing event or condition**
 2. made **while or immediately after declarant perceived it**
- Statement must be **nearly contemporaneous** with incident
 - Statement **need not be startling**

FRE 803 (2): Excited Utterance

- 1. Statement relating to a **startling event or condition**,
- 2. Made while the declarant was under the **stress or excitement** that it caused



FRE 803(3): Then Existing Mental, Emotional, Condition (State of Mind)

1. Statement describes **state of mind** (motive, intent plan), **or emotional/physical condition of declarant** at time made

2. Does not include statement of memory or belief

- Such a statement might be introduced to prove that declarant acted in accordance with stated intent

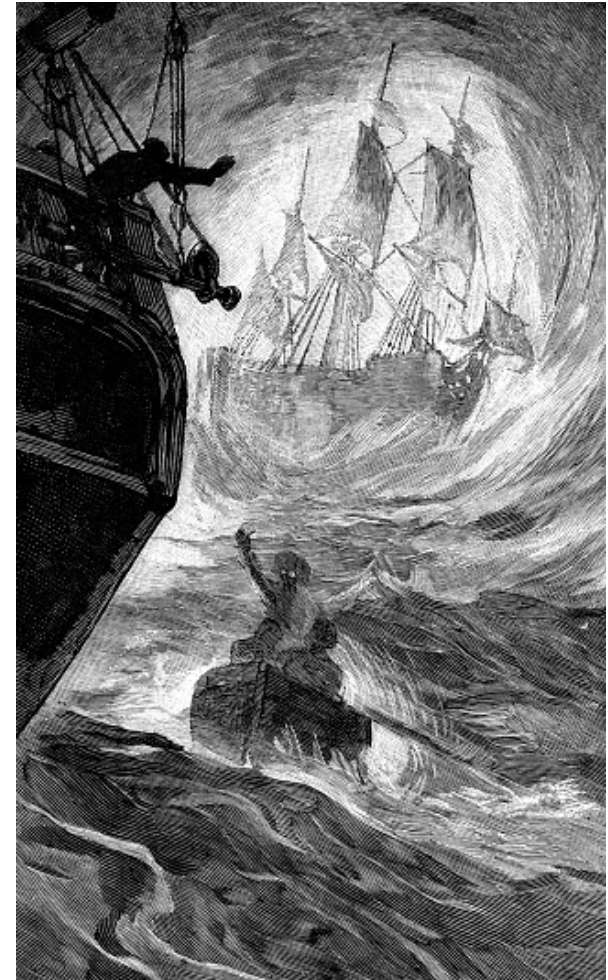
Note: Statement of memory or belief excluded

- Statement of memory or belief excluded:
 - “I’m scared”: OK
 - “I’m scared because Joe Smith threatened me several days ago”: not OK



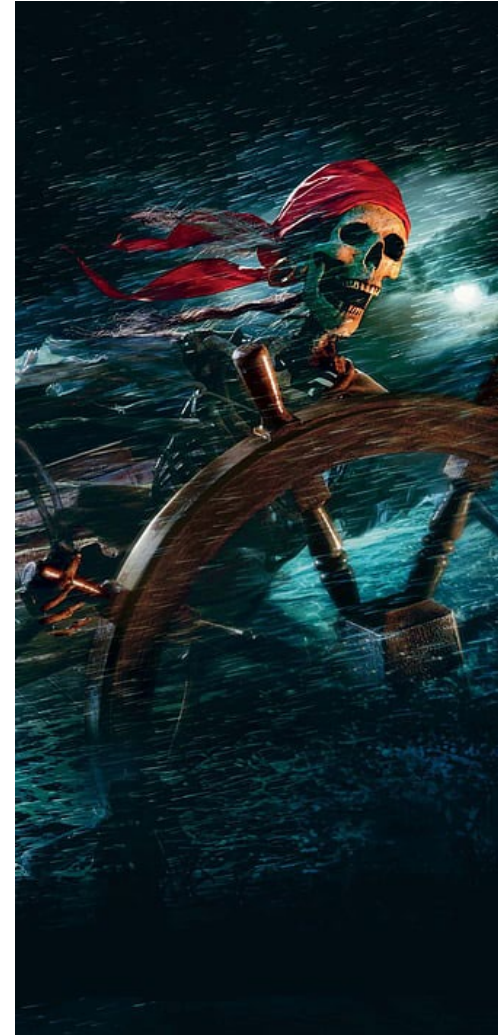
803(4): Statement for Purposes of Medical Diagnosis or Treatment

1. Statement is made for **medical diagnosis/treatment**
2. Statement would be **reasonably** relied upon by health care provider for treatment or diagnosis



Note: A statement that identifies perpetrator usually excluded

- Statement that assigns fault or identifies perpetrator usually excluded



FRE 803(6): Business Records

- 1. Record made at or near **the time**,
- 2. By, or from information transmitted by, **a person with knowledge**,
- 3. If kept in the course of a **regularly conducted business activity**,
- 4. **Regular practice** to keep such records

- 5. As shown by the testimony of the custodian or other qualified witness, or by certification
- 6. Opponent does not show that source of information or method of preparation indicate lack of trustworthiness

FRE 803(6): Business Records (cont.)

- **Cannot** be prepared in anticipation of litigation
- **Lookout** for hearsay within hearsay



FRE 803(8): Public Records

- 1. Records setting forth activities of a public office or agency, or
- 2. matters observed in the course of official duties
- 3. **may be admitted unless opponent shows lack of trustworthiness**
- **Cannot** be prepared in anticipation of litigation
- **Lookout** for hearsay within hearsay

Note: Law Enforcement Exclusion

- FRE 803 (8) bars the prosecution in a criminal case from introducing factual findings resulting from an investigation
- The defendant, however, can use these factual findings



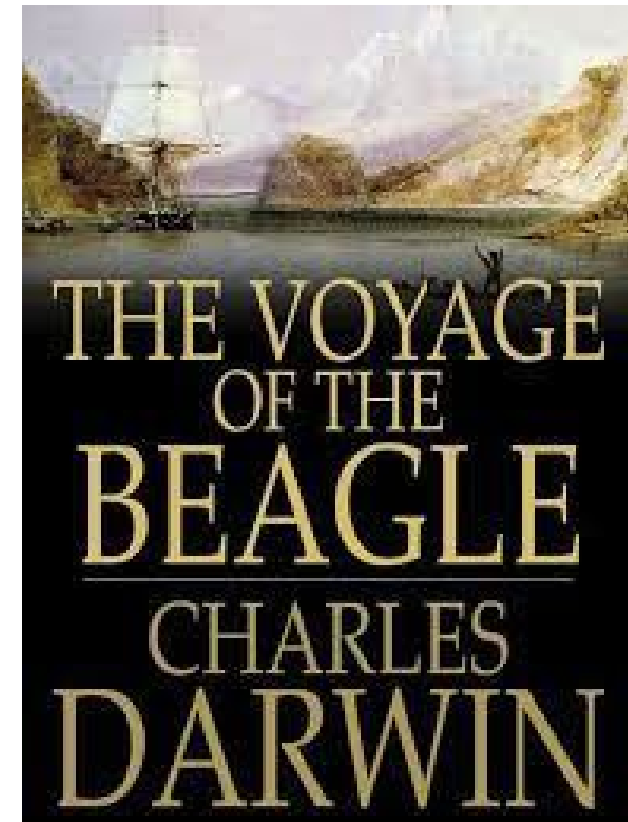
FRE 803 (7), (10): Absence of Record

- Absence of entry may prove non-occurrence. FRE 803(7), (10).
- Unless opponent shows lack of trustworthiness
- Examples:
 - Failure to file tax return
 - Failure to obtain firearms license.
 - Certificate of non-existence of immigration records.

Prudom Forge September 1st 1792.		129
145 147	Genl Charges ^{to} To Wm Smith for 1 Year Salary as Clerk [£] 41. 5 110 Dollars, equal to ... 41. 5	
	" 8. Mo. Boarding himself [£] 7. 0	48 5
113 114	Sundries ^{to} To Bar Iron Wm Mite for 2 nd per day [£] 4. 0	8
119	George Nixon for 7 th [£] 2. 4	2. 4
123 124	Cash rec ^d of Zimmerman for 17 th [£] 5. 8	8 8
127 128	Horse Provender ^{to} To Thomas Braeken for 95 Bundles Straw [£] 7. 11	7 11
127 128	Frederick Apple ^{to} To Genl Charges for 1 Bushel of wheat from Mite	4 6
145 149	Genl Charges ^{to} To Thomas Beale for 6 th Bushels of wheat [£] 1. 6	1 6
127 132	Wm Smith ^{to} To Cash paid him [£] 5. 8	5 8
150 151	Sundries ^{to} To Bar Iron Robert Nelson for 60 th [£] 1. 0. 0	1. 0. 0
152	Robert Irvine for 10 th [£] 3. 4	3. 4
153	Wm Beatty for 2 nd 27 th [£] 1. 3. 9	1. 3. 9
147	Frederick Apple for 8 th [£] 2. 8	2. 8

Hearsay Exceptions: FRE 804 Declarant Unavailable

- Dying Declaration-FRE 804(b)(2)
- Statement Against Interest-FRE 804(b)(3)



FRE 804(b)(2): Dying Declaration

- 1. Homicide case
- 2. Made while declarant believed death was imminent
- 3. Concerning cause of death



FRE 804 (b)(3): Statement Against Interest

- 1. Statement against interest
- 2. Contrary to declarant's pecuniary or proprietary
- 3. Subjects declarant to civil or criminal liability
- If declarant inculpated but offered to exculpate accused, need corroborating circumstances "clearly indicative of trustworthiness."

Compare:

Party Admissions

1. Must be made by the party against whom they are being used
2. Do not have to be against interest when made
3. Declarant can be available

Statement Against Interest

1. Can be made by anyone, party or not
2. Must be against interest when made
3. Declarant must be unavailable

FRE 806: Attacking and Supporting Declarant Credibility

- Hearsay or non-hearsay statements (such as co-conspirator statements) **can be attacked and supported like any other testimony**
- Party against whom offered may call declarant as witness and examine concerning statement as if on cross

Note

- A hearsay objection **will not preserve** a confrontation clause challenge





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**FEDERAL PUBLIC
DEFENDER**
— District of Nevada —