EVIDENCE

LOUIS F. MEIZLISH[†]

---

† Member of the State Bar of Michigan, 2011-Present; B.A., 2004, University of Michigan; J.D., 2011, *cum laude*, Wayne State University; Editor-in-Chief, *The Wayne Law Review*, 2010-11; Deputy Director of External Affairs, Office of the Majority Leader, Michigan Senate, 2007-08; Legislative Assistant and Press Secretary, Hon. John J.H. "Joe" Schwarz, M.D., U.S. House of Representatives, 2005-07; Editor-in-Chief, *The Michigan Daily*, 2003-04. Any views I express herein are solely my own, and do not carry the endorsement of any other person or entity. I welcome readers' feedback via electronic mail to *meizlish@umich.edu*.

I deeply appreciate the support I received in writing this article from my friends, colleagues, and, in particular, my parents – Sheldon and Aida Meizlish – and my fiancée, Dr. Erin Miller.

I. INTRODUCTION

A. A Brief Introductory Note

The *Survey* period of June 1, 2011 through May 31, 2012 saw no shortage of cases in the U.S. Supreme Court, the U.S. Court of Appeals for the Sixth Circuit, the Michigan Supreme Court, and the Michigan Court of Appeals interpreting the constitutional provisions, statutes and rules governing a trial court's admission of evidence. While this article does not discuss every rule or provision affecting evidentiary decisions, I devoted most of the article to the rules and provisions most in flux.

My intent in writing this article is two-fold. First, I want to provide a service to practitioners in Michigan by updating them as to important developments in evidence law (while relegating my own personal opinions to the footnotes). Second, I sought to educate the reader—and myself—about the policies and purposes behind the constitutional provisions, statutes, and court rules governing a court's admission of evidence. While it may be unusual for a law review author to "break the fourth wall" and directly address the reader, I will do so for the limited purpose of saying the following: I sincerely hope *you* find this useful in your practice.

B. Appeals and Error

"The appellant himself must first adequately prime the pump; only then does the appellate well begin to flow."[1]

In other words: Mind thy appellate flank, even at trial.

Under Rule 103 of the Michigan and federal rules, a party generally may not appeal a trial court's ruling *admitting* evidence unless the party objected on the record while clearly specifying the grounds for its objection, or, if the trial court *excluded* that party's evidence, the party made an offer of proof or through some other means made the trial court aware of the nature of the evidence it was excluding.[2] Upon establishing that the trial court erred, the appellant must demonstrate that the error affected his substantial rights.[3]

The major exception to this default rule is the "plain-error" doctrine.[4] If a party failed to preserve its claim of error in the trial court, it must make three specific showings on appeal to avoid forfeiture of the issue, and they are that "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights."[5] In the 1993 case of *People v. Carines*,[6] the Michigan Supreme Court followed the U.S. Supreme Court's lead and extended the plain-error rule to claims of constitutional error as well as non-constitutional error.[7]

But the inquiry is not over. Once establishing a plain error, in order to secure a reversal, an appellant must establish that "the plain, forfeited error resulted in the conviction of an actually innocent defendant or that the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence.'"[8]

It is important to distinguish waiver from forfeiture. Whereas forfeiture results from a sin of omission (failing to raise a timely objection), waiver results from a sin of commission (the "intentional relinquishment or abandonment of a known right.")[9] "One who waives

---

1. Mitcham v. City of Detroit, 355 Mich. 182, 203; 94 N.W.2d 388 (1959) (emphasis added).

2. MICH. R. EVID. 103(a); FED. R. EVID. 103(a). *See also* KBD & Assocs., Inc. v. Great Lakes Foam Techs., Inc. 295 Mich. App. 666, 676; 816 N.W.2d 464 (2012); People v. Danto, 294 Mich. App. 596, 605; 822 N.W.2d 600 (2011) ("[A]n objection on one ground is insufficient to preserve an appellate argument based on a different ground.").

3. MICH R. EVID. 103(a).

4. MICH. R. EVID. 103(d); FED. R. EVID. 103(e).

5. People v. Carines, 460 Mich. 750, 763; 597 N.W.2d 130 (1999) (citing United States v. Olano, 507 U.S. 725, 731-34 (1993)).

6. *Id.*

7. *Id.* at 763-64.

8. *Id.* (quoting *Olano*, 507 U.S. at 736-737) (internal quotations omitted).

9. *Id.* at 762 n.7 (quoting *Olano*, 507 U.S. at 733).

his rights . . . may not then seek appellate review of a claimed deprivation of those rights, for his waiver has *extinguished any error*."[10]

Assuming a party has preserved the issue, the appellate tribunal reviews the trial court's evidentiary rulings for an abuse of discretion.[11] In Michigan, an abuse of discretion in admitting or excluding evidence occurs when a "decision falls outside the range of principled outcomes."[12]

Before even getting there, however, if the evidentiary ruling involved a preliminary ruling on an issue of law, such as an interpretation of the rules of evidence, statutory law, or constitutional law, the appellate tribunal will subject the preliminary legal ruling to de novo review.[13] On the other hand, appellate courts will accord great deference to *factual findings* by applying the "clear error" standard, "and will uphold those findings unless left with a definite and firm conviction that a mistake was made."[14]

For example, if a party claims that a trial court misapplied Rule 404(b), the appellate court will review de novo the trial court's interpretation of Rule 404(b), but then will review the trial court's *application* of the rule to its determination as to whether to admit the evidence for an abuse of discretion.[15] In *People v. Lukity*,[16] the supreme court had occasion to explain this interchange between de novo review of legal interpretations and abuse-of-discretion review of the ultimate evidentiary ruling:

> [D]ecisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo. *People v Sierb*, 456 Mich. 519, 522; 581 N.W.2d 219 (1998). Accordingly, when such preliminary questions of law are at issue, it must be borne

10. People v. Carter, 462 Mich. 206, 215; 597 N.W.2d 130 (2000) (quoting United States v. Griffin, 84 F.3d 912, 924 (7th Cir. 1996) (internal citations omitted)) (emphasis added).

11. *Danto*, 294 Mich. App. at 599.

12. *Id.* (citing People v. Blackston, 481 Mich. 451, 460; 751 N.W.2d 408 (2008)); People v. Babcock, 469 Mich. 247, 269; 666 N.W.2d 231 (2003)).

13. People v. Benton, 294 Mich. App. 191, 195; 817 N.W.2d 599 (2011) (citing People v. Dobek, 274 Mich. App. 58, 93; 732 N.W.2d 546 (2007)).

14. People v. Brown, 279 Mich. App. 116, 127; 755 N.W.2d 664 (2008) (citing People v. Taylor, 253 Mich. App. 399, 403; 655 N.W.2d 291 (2002)).

15. *Id.*

16. 460 Mich. 484; 596 N.W.2d 607 (1999).

> in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law.[17]

Finally, assuming a party can establish the trial court erred, the reviewing court must consider whether the error is harmless. Under Rule 2.613 of the Michigan Court Rules:

> An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.[18]

Similarly, under federal case law, there is a rebuttable presumption that evidentiary errors are harmless unless the appellant makes a showing of "a reasonable possibility that the evidence complained of might have contributed to the conviction."[19] The harmless-error rule's purpose is "to prevent the reversal of a just conviction due to a technicality."[20]

1. A Roadmap to Appellate Review of Evidentiary Rulings

To summarize the complicated rules and standards of appellate review, below is a chart that may (hopefully) simplify the process of

---

17. *Id.* at 488. In the Sixth Circuit, however, a dispute is brewing about the standard of review an appellate court should apply to a trial court's evidentiary decisions in admitting or excluding evidence of other acts under Rule 404(b). *See* United States v. Clay, 667 F.3d 689 (6th Cir. 2012), *reh'g denied,* 677 F.3d 753 (6th Cir. 2012). Whereas the majority in *Clay* (which I discuss more extensively in Part IV.F.2.e of this Article) emphasized the importance of de novo review when the trial court considered whether the proponent of the evidence offered the evidence for a permissible purpose under Rule 404(b). *Id.* at 694-696. The dissent emphasized that the overall decision should nevertheless remain subject to review for an abuse of discretion. *Id.* at 703 (Kethledge, J., dissenting). Suffice it to say, the Sixth Circuit's guidance lacks a great deal of clarity, and as Judge Raymond M. Kethledge correctly opined, "the . . . important point is that our decisions show one panel after another disagreeing with each other in published opinions discussing the issue. We ought to clean up our law on this issue." *Id.* at 754 (Kethledge, J., dissenting) (footnote omitted).

18. MICH. CT. R. 2.613(A).

19. *Clay*, 667 F.3d at 700 (quoting United States v. DeSantis, 134 F.3d 760, 769 (6th Cir. 1998)) (internal quotations omitted).

20. People v. Fowler, 46 Mich. App. 237, 247; 208 N.W.2d 41 (1973) (citing People v. Wilkie, 36 Mich. App. 607; 194 N.W.2d 154 (1971)).

understanding the means by which appellate courts review a trial's court evidentiary rulings.

APPELLATE REVIEW OF EVIDENTIARY RULINGS

1. Did the appellant waive any error (such as by stipulating to or acquiescing to the court's decision)?[21] ▶	a. If so . . . i. If the case is a civil one, there is no error to review. **STOP.**[22] ii. If the case is a criminal one, then the defendant's only possible avenue of appeal is to establish his counsel's assistance was ineffective, in derogation of his Sixth Amendment rights.[23] Unless he can do so, **STOP.** b. If not, **CONTINUE** to No. 2.	
2. Did the appellant preserve the issue by stating the specific ground for objecting to evidence, or by making an offer of proof as to evidence the court excluded?[24] ▶	a. If so, **CONTINUE** to No. 3. b. If not, then did the court commit plain error?[25] i. If so, ▶	Even if there *was* plain error, did "the plain, forfeited error result[] in the conviction of an actually innocent defendant or . . . 'seriously affect[] the

21. *Carter*, 462 Mich. at 215.

22. *Id.*

23. People v. Buie, 491 Mich. 294, 310; 817 N.W.2d 33 (2012); People v. Toma, 462 Mich. 281, 302; 613 N.W.2d 694 (2000).

24. FED. R. EVID 103(a); MICH. R. EVID. 103(a); *Danto*, 294 Mich. App. at 605 (2011).

	ii. If not, **STOP**.	fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence[?]'"[26] a. If so, **CONTINUE** to No. 3. b. If not, **STOP**.
3. Did the trial court make a preliminary interpretation of a rule, statute or constitution?[27] ▶	Subject this interpretation to *de novo* review.[28] **CONTINUE** to No. 4.	
4. Did the trial court make a preliminary finding of fact?[29] ▶	Subject this preliminary factual finding to review for clear error.[30] **CONTINUE** to No. 5.	
5. Apply the *correct* legal principles (after *de novo* review) to the *correct* facts (after clear-error review): Now, did the trial court abuse its discretion in admitting or excluding the evidence?[31] ▶	a. If so, **CONTINUE** to No. 6. b. If not, **STOP**.	

25. *Carines*, 460 Mich. at 763.
26. *Id.* at 763-64.
27. *Benton*, 294 Mich. App. at 195.
28. *Id.*
29. *Brown*, 279 Mich. App. at 127.
30. *Id.*
31. *Danto*, 294 Mich. App. at 599.

6. If the court abused its discretion, was the error outcome determinative?[32] ▶	a. If so, reversal is quite possible. b. If not, there will be no reversal under the harmless-error doctrine.[33]

2. Michigan Court Rule 7.205(E)(3): Emergency Interlocutory Appeals in Felony Criminal Cases Following an Order Admitting or Excluding Evidence

As of January 1, 2012, the Michigan Court Rules, in new Rule 7.205(E)(3), specifically provide that when a trial court makes an order admitting or excluding evidence in felony cases, it must, in most circumstances, stay the case upon a party's *filing* an emergency interlocutory application for leave to appeal in the court of appeals.[34] Supreme court staff has explained that:

> This amendment addresses the situation that arose in People v Richmond, 486 Mich 29 (2010), in which a prosecutor's dismissal of a case following a trial court's suppression of evidence in the case resulted in a finding that the appeal of the suppression order was moot. Under the amendment above, a party could pursue an interlocutory appeal of a trial court

32. *Clay*, 667 F.3d at 700.

33. MICH. CT. R. 2.613(A); *Clay*, 667 F.3d at 700.

34. MICH. CT. R. 7.205(E)(3). The exact words of the rule are:

> Where the trial court makes a decision on the admissibility of evidence and the prosecutor or the defendant files an interlocutory application for leave to appeal seeking to reverse that decision, the trial court shall stay proceedings pending resolution of the application in the Court of Appeals, unless the trial court makes findings that the evidence is clearly cumulative or that an appeal is frivolous because legal precedent is clearly against the party's position. The appealing party must pursue the appeal as expeditiously as practicable, and the Court of Appeals shall consider the matter under the same priority as that granted to an interlocutory criminal appeal under MCR 7.213(C)(1). If the application for leave to appeal is filed by the prosecutor and the defendant is incarcerated, the defendant may request that the trial court reconsider whether pretrial release is appropriate.

Id.

suppression order and in most cases would be entitled to a stay in the case.[35]

The rule's specific use of the words "Court of Appeals" strongly suggests that this rule applies only to felony cases in the circuit court, in which the court of appeals is the appellate tribunal.[36] It is unclear why the court did not extend the provisions of this rule to incorporate misdemeanor cases in district court, in which the *circuit* court is the appellate tribunal.[37] Whether this distinction between felonies and misdemeanors will remain, and for how long, is unclear at the present time.

II. JUDICIAL NOTICE[38]

In both the Michigan and federal courts, a court may take judicial notice of "facts not subject to reasonable dispute."[39] Such facts are either "generally known within the territorial jurisdiction of the trial court" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[40] The neighboring U.S. Court of Appeals for the Seventh Circuit has explained that "[j]udicial notice is premised on the concept that certain facts or propositions exist which a court may accept as true without requiring additional proof from the opposing parties. It is an adjudicative device that substitutes the

35. Amendment of Rule 7.205 of the Michigan Court Rules, MICH. SUP. CT., Dec. 8, 2011, *available at* http://www.courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2008-36_2011-12-08_formatted%20order.pdf.

36. MICH. CT. R. 7.203.

37. MICH. CT. R. 7.103. In other words, a party's *filing* of an interlocutory evidentiary appeal in the circuit court will not require the district judge to stay a misdemeanor case, whereas a party's *filing* of an interlocutory evidentiary appeal will usually require a circuit judge to stay a felony case. Thus, a district court trial judge need not stay the proceedings in a misdemeanor case until the circuit court grants the application for leave and agrees to hear the appeal. *See* MICH. CT. R. 7.107 ("*After* . . . leave to appeal is *granted*, jurisdiction vests in the circuit court. The trial court or agency may not set aside or amend the judgment, order, or decision appealed except by circuit court order or as otherwise provided by law.") (emphasis added).

38. For his assistance in drafting this section of the article, I am greatly indebted to Matthew Schneider, presently Chief of Legal Counsel to Michigan Attorney General Bill Schuette, former Chief of Staff and General Counsel to the Michigan Supreme Court and former Assistant U.S. Attorney for the Eastern District of Michigan.

39. FED. R. EVID. 201; MICH. R. EVID. 201.

40. FED. R. EVID. 201(b); MICH. R. EVID. 201(b).

acceptance of a universal truth for the conventional method of introducing evidence."[41]

The effect of the court taking judicial notice differs in criminal and civil cases. Whereas a jury in a civil case must accept the judicially noticed fact as conclusive, a judge in a criminal case must "instruct the jury that it *may, but is not required to*, accept as conclusive any fact judicially noticed."[42]

Neither the Michigan Supreme Court nor the Michigan Court of Appeals addressed significant issues relating to judicial notice during the Survey period. However, there was a scattering of cases involving judicial notice before the U.S. Court of Appeals for the Sixth Circuit.

A. Judicial Notice of a Party's Compliance with Judicial Decisions, and Judicial Notice of Sociological Developments in the United States

In *Ohio Citizen Action v. City of Englewood*,[43] the City of Englewood, Ohio asked the Sixth Circuit to take judicial notice of two sets of facts.[44] The court declined either invitation.[45]

In 2004, Englewood enacted an ordinance that restricted door-to-door soliciting and canvassing by requiring that "anyone desiring to 'peddle, vend, solicit or request contributions for any purpose, charitable or otherwise,' . . . obtain a license from the City, with exceptions for newspaper sellers, certain vendors of goods or services and persons under the age of 18."[46] Additionally, the ordinance "contained a curfew provision, which prohibited 'all canvassing, peddling, vending, soliciting, and requests for contributions'" after 6:00 p.m. and before 9:00 a.m., "unless a later hour is approved by the City Manager for good cause."[47] The following year, in April 2005, Ohio Citizen Action (OCA), a non-profit anti-pollution advocacy group, began canvassing in Englewood after 6:00 p.m., in violation of the ordinance.[48] In response, Englewood's police chief notified OCA it was in violation of the ordinance and that the city intended to enforce the 6:00 p.m. curfew.[49]

In July 2005, the Englewood City Council enacted a revised

41. GE Capital Corp. v. Lease Resolution Corp., 128 F.3d 1074, 1081 (7th Cir. 1997).

42. FED. R. EVID. 201(f); MICH. R. EVID. 201(f) (emphasis added).

43. 671 F.3d 564 (6th Cir. 2012).

44. *Id.*

45. *Id.*

46. *Id.* at 567 (quoting ENGLEWOOD, OHIO, CODIFIED ORDINANCES §§ 854.03, 854.08 (2004)).

47. *Id.* (quoting ENGLEWOOD, OHIO, CODIFIED ORDINANCES § 854.11 (2004)).

48. *Id.* at 567-68.

49. *Ohio Citizen Action*, 671 F.3d at 568.

canvassing ordinance, which retained the 6:00 p.m. curfew, but eliminated the city manager's authority to grant a curfew waiver.[50] The 2005 ordinance further required the city to maintain a do-not-solicit list and, under the new ordinance, canvassers were not to contact registrants, nor were they to contact non-registrants who posted a "NO SOLICITORS" or similar sign at the entrance to their home.[51]

In late July 2005, OCA filed an action in the U.S. District Court for the Southern District of Ohio, claiming that the 2004 and 2005 Englewood ordinances violated the First and Fourteenth Amendments, either on their face or as applied to OCA, and thereby sought an injunction to prevent the city from enforcing the ordinance.[52] In February 2010, the district court invalidated each part of the ordinances, excepting the 6:00 p.m. curfew provisions.[53] Approximately three weeks later, before the district court terminated the case, the City of Englewood enacted a third canvassing ordinance.[54] Englewood asked the district court to take judicial notice that the 2010 ordinance cured the constitutional infirmities in the 2004 and 2005 ordinances and requested that the district court deny as moot OCA's request for injunctive relief.[55] The district court, however, "declined the City's requests and, consistent with its prior opinion, enjoined enforcement of the 2005 Ordinance's do-not solicit provision and the licensing requirement of the 2004 and 2005 Ordinances."[56] Both parties appealed.[57]

The Sixth Circuit agreed with the district court that judicial notice in such a circumstance was improper, as "[a] defendant's voluntary cessation of allegedly unlawful conduct ordinarily does not suffice to moot a case."[58] The court explained that, "the defendant bears 'the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur.'"[59]

In response to Ohio Citizen Action's First Amendment claim, the city argued that the soliciting ordinance, (particular the curfew

---

50. ENGLEWOOD, OHIO, CODIFIED ORDINANCES § 851.11 (2005).

51. *Ohio Citizen Action*, 671 F.3d at 568. (citing ENGLEWOOD, OHIO, CODIFIED ORDINANCES §§ 854.11, 854.12).

52. *Id.* at 568-69.

53. *Id.* at 569.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Ohio Citizen Action*, 671 F.3d at 569.

58. *Id.* at 583 (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., 528 U.S. 167, 174 (2000); Akers v. McGinnis, 352 F.3d 1030, 1035 (6th Cir. 2003)) (internal quotations omitted).

59. *Id.* (quoting *Friends of the Earth*, 528 U.S. at 190).

limitation) was a necessary component of its crime-fighting strategy and such concerns weighed against the First Amendment's purpose of encouraging free expression.[60] Englewood asked the court to take judicial notice of "'the fearful times we live in . . . the unprecedented and difficult economic times facing the geographic region where Englewood is located,' and of the fact that 'door-to-door communications are no longer a centerpiece of communications in this country.'"[61] The court declined the City's invitation.[62]

The court in *Ohio Citizen Action* noted that a court could take judicial notice of developments such as the existence of an economic depression or a drop in market values,[63] since such developments are "'not subject to reasonable dispute[,]'"[64] but to "take judicial notice of the transformation of American society since 1943 to conclude, as the City urges, that the safety of Englewood's residents depends upon prohibiting door-to-door canvassing after 6 P.M. . . . would 'turn [judicial notice] into a pretext for dispensing with a trial.'"[65]

B. Judicial Notice of Legal Documents

While a court may take judicial notice of documents in the record, as well as other legal documents in the files of other courts and other organizations, "it may only take notice of the *undisputed* facts therein, which do not include the 'facts' asserted in various affidavits and depositions."[66] Recall that an out-of-court statement is not hearsay "[i]f the significance of an offered statement lies solely *in the fact that it was made* [and] no issue is raised as to the truth of anything asserted[.]"[67] Similarly, a court may take judicial notice of the existence of legal documents, but may not take judicial notice of the truth of the statements therein if the truth of the statements is in dispute.[68]

---

60. *Id.* at 574-76.

61. *Id.* at 579 (quoting Brief for Appellee at 32, 33).

62. *Id.*

63. *Ohio Citizen Action,* 671 F.3d at 579 (citing Ohio Bell Tel. Co. v. Pub. Util. Comm'n of Ohio, 301 U.S. 292, 301 (1937)).

64. *Id.* (quoting FED. R. EVID. 201(b)).

65. *Id.* at 579-80 (quoting Garner v. Louisiana, 368 U.S. 157, 173 (1961)).

66. Kaye v. Lone Star Fund V (U.S.), L.P., 453 B.R. 645, 665 (N.D. Tex. 2011) (emphasis added).

67. FED. R. EVID. 801(c) cmt.(c) (citing Emich Motors Corp.v. Gen. Motors Corp., 181 F.2d 70 (7th Cir. 1950)) (emphasis added).

68. Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430, 442 (6th Cir. 2012) (citing Scotty's Contracting & Stone, Inc. v. United States, 326 F.3d 785, 790 n.1 (6th Cir. 2003)), *reh'g denied*, Nos. 07-6052 and 07-6114, 2012 U.S. App. LEXIS 11815, at *2-3 (6th Cir. April 30, 2012).

1. Judicial Notice of Foreign Government Organizations' Rulings

In *Carrier Corp. v. Outokumpu Oyj*, the plaintiff sued a copper-tubing manufacturer for anti-trust violations, alleging Outokumpu engaged in price-fixing relative to its products in the U.S. market.[69] Carrier pointed to 2003 and 2004 decisions by the European Commission, which found that Outokumpu and its subsidiary, "along with several other companies, participated in a conspiracy in which they 'agreed on price targets and other commercial terms for industrial tubes, coordinated price increases, [and] allocated customers and market shares' in violation of European law."[70] Neither decision, however, involved a finding that the defendant's conspiracy involved the U.S. market for copper tubing.[71]

In its U.S. lawsuit, Carrier alleged that the defendant violated federal law when this conspiracy extended to the U.S. market.[72] The district court dismissed the complaint for want of subject-matter jurisdiction[73] and failure to state a claim meriting relief,[74] leading to Carrier's appeal.[75] The Sixth Circuit panel of Judge Karen Nelson Moore, writing for herself, Judge Deborah L. Cook and U.S. District Judge Thomas L. Ludington,[76] quickly reversed the district court's conclusion that the plaintiff failed to state a valid antitrust claim.[77]

In its motion to dismiss, Outokumpu had attached a copy of the European Commission's decision regarding the EU antitrust proceedings against the defendant, and argued:

> [T]hat many of the details contained in [Carrier's] complaint are drawn from the EC industrial-tube decision that found no evidence that the cartel's focus extended beyond Europe. Like the district court, Outokumpu argue[d] that Carrier's complaint includes misleading quotes from the EC decision and omits language explaining that the conspiracy applied only to European markets. As a consequence, Outokumpu argue[d] that any details regarding specific meetings and agreements

69. *Id.* at 437.
70. *Id.* at 436 (internal citations omitted).
71. *Id.*
72. *Id.*
73. *Id.* at 437.
74. *See* FED. R. CIV. P. 12(b)(6).
75. *Carrier*, 673 F.3d at 437-38.
76. *Id.* at 433. Judge Ludington, of the U.S. District Court for the Eastern District of Michigan, sat by designation on the Sixth Circuit panel. *Id.*
77. *Id.* at 438-40.

occurring during the Cuproclima meetings are of no assistance to Carrier because they relate only to a European conspiracy.[78]

The Sixth Circuit reversed the district court's dismissal, observing that, even if there was a conflict between the European Commission's decision and the plaintiff's complaint, it was the plaintiff's allegations, and not a weighing of the evidence, that controlled the court's determination to grant or deny a motion to dismiss at the pleading stage.[79] "Carrier should be free to draw facts from the EC decision to provide a 'starting point' and then use those facts to construct a theory that differs from or even contradicts that of the EC."[80] The panel observed that the plaintiff pleaded additional allegations that the conspiracy extended to the U.S. market.[81] Accordingly, it would be improper for the court to take judicial notice of the EC decision as evidence that the conspiracy did not extend into the United States (thus depriving the court of subject-matter jurisdiction), as "judicial notice would be appropriate only to prove the fact that the [EU] decisions . . . existed, not the truth of the matters stated therein."[82] Accordingly, for this and other reasons, the appellate panel reversed the district court's dismissal of Carrier's suit.[83]

2. Judicial Notice of Previous Criminal Convictions at Sentencing for Subsequent Crimes

In *United States v. Ferguson*,[84] the Sixth Circuit reaffirmed that a court may take judicial notice of a prior action by another court because court records have "'reasonably indisputable accuracy' when they record some judicial action such as dismissing an action, granting a motion, or finding a fact."[85] That means that "'[t]he court may judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.'"[86]

---

78. *Id.* at 441.
79. *Id.* at 441-42.
80. *Id.* at 442.
81. *Carrier*, 673 F.3d at 442.
82. *Id.* at 442 n.6.
83. *Id.* at 452.
84. United States v. Ferguson, 681 F.3d 826 (6th Cir. 2012).
85. *Id.* at 834 (6th Cir. 2012) (quoting 21B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5106.4 (2d ed. 2005) (footnote omitted)).
86. *Id.* (quoting FED. R. EVID. 201(b)).

Following a bench trial in *Ferguson*, the district court convicted the defendant of knowingly possessing child pornography in violation of 18 U.S.C.A. § 2252A(b)(2), and thereafter sentenced David Ferguson to a mandatory minimum sentence of ten years.[87] The Presentence Investigation Report (PSR), upon which the district court relied at sentencing, noted that the defendant's criminal record reflected a previous conviction for an offense involving sexual abuse.[88] The court held that the federal statute required it to sentence the defendant to a mandatory minimum term of ten years imprisonment.[89] On appeal, the defendant argued that the court committed plain error by relying on the PSR to find that the defendant had a previous conviction related to sexual abuse because the portion of the PSR explaining the defendant's past acts derived from police reports of the prior sexual abuse incidents.[90] In response, the government abandoned its sole reliance on the PSR, and asked the court of appeals to take judicial notice of two court records: the felony information from the defendant's prior sexual abuse conviction and the plea agreement from the same.[91] The government argued that those judicial documents conclusively established the defendant's prior sexual abuse conviction and, therefore, the defendant had earned the ten-year mandatory minimum sentence under 18 U.S.C.A. § 2252A(b)(2).[92]

The panel of Judge Arthur L. Alarcón, writing for himself and Judges Julia Smith Gibbons and Karen Nelson Moore,[93] agreed to take judicial notice of the court records the government proffered.[94] In so doing, the court relied on *Shepard v. United States*,[95] in which the U.S. Supreme Court held that lower courts may rely upon:

> [T]he 'charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information' to

87. *Id.* at 828.
88. *Id.* at 830.
89. *Id.*
90. *Ferguson*, 681 F.3d at 831-32.
91. *Id.* at 833.
92. *Id.*
93. *Id.* at 828. The opinion's author is a Ninth Circuit appellate judge, who sat on the Sixth Circuit panel by designation. *Id.*
94. *Id.* at 835.
95. 544 U.S. 13 (2005).

determine whether the qualifying or non-qualifying aspect of the statute was violated.[96]

Because the court records at issue in *Ferguson* were the same type of records the *Shepard* Court approved for judicial-notice purposes, this Sixth Circuit panel concluded it was proper to take judicial notice of the records in considering the propriety of the district court's determination that the defendant had a prior sexual-abuse conviction that triggered an automatic ten-year sentence for the instant offense.[97] For this and other reasons, the court affirmed the defendant's conviction and sentence.[98]

III. PRESUMPTIONS IN CIVIL AND CRIMINAL CASES

There were no significant cases discussing Rules 301 and 302[99] during the *Survey* period.

IV. RELEVANCE AND ITS LIMITS

Only relevant evidence is admissible.[100] In fact, *all* relevant evidence is admissible, unless another rule or a statutory or constitutional provision renders it inadmissible.[101] Federal and state courts issued various opinions during the *Survey* period explaining the circumstances that will render certain evidence relevant or irrelevant, as well as the various circumstances that will render otherwise relevant and admissible evidence inadmissible.[102]

A. Relevancy Generally

Relevancy is a low threshold, as it requires only a showing that the evidence "ha[s] 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."[103] This definition of relevancy has two components—that the evidence is a) probative of a

96. *Ferguson*, 681 F.3d at 832 (quoting *Shepard*, 544 U.S. at 26).
97. *Id.* at 835.
98. *Id.* at 836.
99. *See* FED. R. EVID. 301, 302; MICH. R. EVID. 301, 302.
100. FED. R. EVID. 402; MICH. R. EVID. 402.
101. FED. R. EVID. 401; MICH. R. EVID. 401.
102. *See, e.g.*, Hardrick v. Auto Club Ins. Ass'n, 294 Mich. App. 651, 668; 819 N.W.2d 28 (2011); Dortch v. Fowler, 588 F.3d 396 (6th Cir. 2009).
103. MICH. R. EVID. 401. *See also* FED. R. EVID. 401.

fact, and b) that fact is one that "is of consequence" —that is material to the action.[104]

"'The threshold is minimal: 'any' tendency is sufficient probative force.'"[105] In other words, in Michigan, "evidence is relevant if it 'in some degree advances the inquiry[.]'"[106] The Sixth Circuit, similarly, has held that "[t]he standard for relevancy is 'extremely liberal' under the Federal Rules of Evidence."[107]

In ruling on relevancy questions, the Sixth Circuit has adopted a de facto totality-of-the-circumstances approach, as it recently held that "[t]he *purpose* of an item of evidence cannot be determined solely by reference to its *content*. That's because '[r]elevancy 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.'"[108]

1. The Relevance of the Market Rate for Attendant Care in Determining Proper Compensation for Family-Provided Attendant Care

In *Hardrick v. Auto Club Insurance Association*, the sole subject of litigation was the amount the insurer owed plaintiff William Hardrick as a "reasonable charge" for the attendant care his family provided him after a car struck him while he walked home, causing "a traumatic brain injury resulting in cognitive deficits and emotional instability."[109] The defendant insurer did not dispute plaintiff's need for the care, rather, only the rate at which it should pay the plaintiff's family for providing such care.[110]

Auto Club took the position that "the pertinent rate for determining the value of the family-provided attendant care is a similar worker's wage, not the hourly fees that a health-care agency might charge to provide such services because that charge would include operating expenses as well as wages."[111] To that end, Auto Club argued that "the

104. *Id. See also* People v. Crawford, 458 Mich. 376, 388; 582 N.W.2d 785 (1998).

105. *Hardrick*, 294 Mich. App. 651, 668 (2011) (quoting *Crawford*, 458 Mich. at 390), *appeal denied* 493 Mich. 687; 821 N.W.2d 542 (2012).

106. *Id.* (quoting 1 MCCORMICK, EVIDENCE § 185, at 736 (6th ed. 2007)).

107. *Dortch*, 588 F.3d at 400 (6th Cir. 2009) (quoting United States v. Whittington, 455 F.3d 736, 738 (6th Cir. 2006)).

108. United States v. Parkes, 668 F.3d 295, 304 (6th Cir. 2012) (quoting FED. R. EVID. 401 advisory committee's notes, 1972)) (emphasis original).

109. *Hardrick*, 294 Mich. App. at 656.

110. *Id.*

111. *Id.* at 664-65.

rates charged by health-care agencies for attendant-care services are irrelevant to establish the reasonable rate for unlicensed, family-provided services."[112] A two-to-one majority of the court of appeals— Judge Elizabeth L. Gleicher writing for herself and Judge David H. Sawyer[113]—disagreed and discovered no error in the trial court's admission of such evidence. The panel majority explained:

> The fact that an agency charges a certain rate for precisely the same services that Hardrick's parents provide does not prove that the rate should apply to the parents' services. However, an agency rate for attendant-care services, routinely paid by a no-fault carrier, is a piece of evidence that throws some light, however faint, on the reasonableness of a charge for attendant-care services.[114]

The weight of such evidence was a question for the jury, the panel explained, as "the fact that different charges for the same service exist in the marketplace hardly renders one charge irrelevant as a matter of law."[115] Accordingly, the panel upheld the trial court's admission of such evidence,[116] although it vacated the trial court's judgment on other grounds, and accordingly remanded the matter for a new trial.[117]

2. The Relevance of Government Legal Circulars in Criminal Cases in Which the Defendant Asserts a Good-Faith Defense

In *United States v. Morales*, a jury convicted the defendant of two counts of making false statements while purchasing firearms from a federally licensed dealer.[118] At trial, the court excluded a government notice that the defendant argued was probative of his good-faith defense—that "he reasonably believed that it was lawful to purchase a firearm and complete Form 4473 on behalf of another eligible purchaser."[119]

The defendant had lied in 2009 when he told the dealer that he was not purchasing the guns on behalf of another person.[120] He then

112. *Id.* at 664.
113. *Id.* at 654. Judge Jane E. Markey dissented on this issue.
114. *Id.* at 669 (citation omitted).
115. *Hardrick*, 294 Mich. App. at 669.
116. *Id.* at 678.
117. *Id.* at 681.
118. 687 F.3d 697, 699 (6th Cir. 2012).
119. *Id.* at 699-701.
120. *Id.* at 699.

unsuccessfully sought to admit a 1979 circular from the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives, which "explained that the Gun Control Act 'does not necessarily prohibit a dealer . . . from making a sale to a person who is actually purchasing the firearm for another person.'"[121]

A panel of the Sixth Circuit affirmed the trial court's exclusion of the ATF circular, noting that the defendant did not claim he was aware of the circular at the time of the transactions, and further observed that the circular was no longer in effect at the time of the transactions.[122] Accordingly, Judge Alan E. Norris, writing for a unanimous panel of himself, and Judges Danny J. Boggs and Raymond M. Kethledge,[123] concluded that the circular was not probative of the defendant's good-faith defense—he could not have relief on it in good faith at the time of the illegal transactions—and affirmed the trial court's exclusion of the circular on relevancy grounds.[124] The panel affirmed the conviction for this and other reasons.[125]

B. Conditional Relevance

Rule 104(b) of the Michigan Rules of Evidence provides that, "[w]hen the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition."[126]

The Sixth Circuit took a liberal view of the virtually identical federal rule in *V&M Star Steel v. Centimark Corp.*[127] The plaintiff's expert would have testified that Centimark's negligence in securing roofing panels while repairing the roof at V&M's Ohio plant caused the panels to slide down the roof and damage V&M's facility.[128] The district court excluded the expert's testimony.[129]

---

121. *Id.* at 701.

122. *Id.* at 702.

123. *Id.* at 698.

124. *Morales,* 687 F.3d at 702 (citing FED. R. EVID. 401).

125. *Id.*

126. MICH. R. EVID. 104(b). *See also* FED. R. EVID. 104(b) ("When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.").

127. 678 F.3d 459 (6th Cir. 2012), *reh'g denied,* No. 10-3584, 2012 U.S. App. LEXIS 13714 (6th Cir. 2012).

128. *Id.* at 46-655.

129. *Id.* at 465. I discuss the facts of this case in further detail in Part VII.B.

The panels arrived banded together, and the plaintiff's expert, Daniel C. Mester, reported that "[a]s soon as the bands are cut, when you go to put them down they are going to want to slide down."[130] Among the trial court's reasons for excluding Mester's testimony was that the plaintiff failed to establish the conditional relevance of Mester's opinion because "V&M had not produced any evidence that the metal bands around the bundle in question had been cut[.]"[131]

The appellate panel disagreed with the district court's interpretation of Rule 104(b), as "Mester did not state or imply that the metal bands on the bundle at issue had been cut; rather, he simply described what ordinarily occurs if metal bands are cut while the bundle sits unsecured on a sloped surface."[132] For this and other reasons, the panel reversed the order of summary judgment for Centimark and remanded the matter for trial.[133]

C. Relevance of Impeachment Evidence

If evidence has the tendency of impeaching a witness, "'[t]here is a general canon that on cross examination the *range* of evidence that may be elicited for any purpose of discrediting is to be *very liberal.*'"[134] Thus, "as long as some rational jury could resolve the issue in favor of admissibility, the court must let the jury weigh the disputed facts. Specifically, the court must allow the jurors to assess the credibility of the evidence presented by the parties."[135]

In *Howard v. Kowalski*, Mercy Hospital Cadillac admitted the decedent, Barbara Johnson, after one of her horses bit her face, causing heavy bleeding.[136] The per curiam opinion for a unanimous panel of Judges Jane E. Markey, Deborah A. Servitto and Amy Ronayne Krause[137] further summarized the facts as follows:

---

130. *Id.* at 467 (internal citations omitted).

131. *Id.* (citing FED. R. EVID. 104(b)).

132. *Id.*

133. *V&M Star Steel*, 678 F.3d at 470.

134. Howard v. Kowalski, 296 Mich. App. 664, 681; 823 N.W.2d 302 (2012) (quoting Wilson v. Stilwill, 411 Mich. 587, 599; 309 N.W.2d 898 (1981)) (additional internal citations omitted). See the brief discussion on rebuttal evidence in Part IV.D.

135. *Id.* at 683. This case is also instructive for the distinctions the judges drew between evidence that is hearsay and evidence that is relevant for impeachment purposes. *See infra* Part VIII.A.I.

136. *Id.* at 667.

137. *Id* at 666.

> [Defendant Dr. Robert F.] Kowalski testified that between 2:50 and 2:52 p.m., he requested the assistance of an ENT and an anesthesiologist "STAT" to help manage Mrs. Johnson's airway and that a medical helicopter be summoned to transport her to a larger hospital with better trauma treatment capability. Dr. Charles Urse, an anesthesiologist, responded, and shortly thereafter, Dr. Lisa Jacobson, an ENT specialist, also responded to the "STAT" call for assistance. Both Drs. Kowalski and Urse testified in their pretrial depositions and at trial that Mrs. Johnson had been relatively stable when they were at her bedside discussing the best medical procedure to maintain the patency of Mrs. Johnson's airway. About 3:00 p.m., Dr. Kowalski was called away to another emergency room patient who had gone into cardiac arrest. Thereafter, at about 3:05 p.m., Mrs. Johnson began having more serious difficulty breathing, crying out that she could not breathe. Dr. Urse administered medications and attempted to orally intubate Mrs. Johnson, but the amount of blood in her mouth and throat made it impossible. Dr. Urse, with Dr. Jacobson's assistance, performed a cricothyroidotomy to ventilate the patient's lungs by inserting breathing tubes directly through her throat. The procedure was only partially successful, and Mrs. Johnson suffered a cardiac arrest. She was resuscitated and placed on life support, but she had sustained permanent brain damage. Five days later, she was removed from life support and died.[138]

The plaintiff's theory at trial was that Kowalski neglected his duty of care by "failing to immediately intubate Mrs. Johnson before being called away to the other patient and leaving Mrs. Johnson unattended."[139] The plaintiff further theorized that Dr. Urse did not arrive to render care to Johnson "until after the patient's fatal deterioration began at about 3:05 p.m."[140] The plaintiff's counsel explained to the jury during his opening statement that "Dr. Urse signed an affidavit . . . before this lawsuit was filed and didn't say anything about being on the scene with Dr. Kowalski."[141]

At trial, the plaintiff sought to admit e-mail communications between himself and Urse's insurer.[142] Before the lawsuit commenced, the

138. *Id.* at 667-68.
139. *Id.* at 668.
140. *Kowalski,* 296 Mich. App. at 668-69.
141. *Id.* at 668.
142. *Id.* at 669.

attorney had written Urse's insurer about the circumstances of the patient's death:

> [T]hat on the basis of his understanding of the facts, Dr. Kowalski bore sole responsibility for the medical accident. After setting forth his understanding of the facts of the case, plaintiff's counsel indicated that he was planning to file a lawsuit only against Dr. Kowalski, assuming that his information was accurate. Counsel stated in his letter that he needed "some kind of verification perhaps in the form of an affidavit by Dr. Urse" that would confirm his understanding of the facts and that counsel "could draft such an affidavit."[143]

Counsel provided such an affidavit, which Dr. Urse subsequently executed, and it read, in pertinent part:

> 4. . . . I was contacted, by beeper or through the [operating room] front desk staff (I can't recall completely which one) in regards to a STAT ER page on patient Barbara Johnson on the afternoon of April 4, 2005. Then I immediately proceeded to the [post anesthesia care unit] to obtain the anesthesia department airway box, and then immediately proceeded to the Emergency Room, arriving within approximately two to three minutes after I was notified.
>
> 5. That my findings and treatment are summarized in my hand-written progress note contained in the medical record.[144]

At trial, plaintiff's counsel argued that this "'whole case rest[ed] upon the medical records which contradict the testimony' of Dr. Urse and Dr. Kowalski that they were both present with Mrs. Johnson before the onset of fatal respiratory distress."[145] It was error for the trial court to exclude these communications for impeachment purposes, the appellate panel explained, because:

> If Dr. Urse was aware of the substance of the e-mail exchanged between [Urse's insurer] and plaintiff's counsel, the jury might have concluded that the phrasing of the affidavit was a deliberate attempt to obfuscate the central issue of the case. Similarly, even

143. *Id.*
144. *Id.* at 670.
145. *Id.* at 671.

> if Dr. Urse was unaware of the e-mail exchange, if the affidavit was nonetheless prepared by his insurer and he signed it at his insurer's direction, his testimony, while honest, might nonetheless lack credibility because the witness himself was misled and therefore the accuracy of both his affidavit and his trial testimony are suspect.[146]

Second, the panel observed that the trial court erred when it excluded the e-mails on the ground that the plaintiff failed to establish, as a condition precedent to admissibility, that Dr. Urse was aware of the e-mails between his insurer and plaintiff's counsel.[147] The panel explained that

> [I]n assessing the sufficiency of the evidence under Rule 104(b), the trial court must consider all evidence presented to the jury. "[I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts."[148]

The panel thus concluded that the error in excluding the e-mails was not harmless because "the sum of the evidentiary presentation in this case could lead a rational jury to find that Dr. Urse, either wittingly or unwittingly, participated in an effort to 'sandbag' the plaintiff. It is impossible to ignore the timing and the substance of the e-mail between plaintiff's counsel and Croze."[149] Accordingly, the court of appeals reversed the trial court's judgment and remanded the matter for a new trial consistent with this ruling.[150]

D. Relevance of Rebuttal Evidence

While there is no rule devoted to rebuttal evidence, it is surprising, and perhaps unfortunate, that few appellate cases have involved a discussion as to the admissibility of rebuttal evidence, even though rebuttal evidence often comes into play at trial.[151]

---

146. *Kowalski*, 296 Mich. App. at 680.

147. *Id.* at 681-84. *See supra* Part IV.B for a discussion on conditional relevancy.

148. *Id.* at 683 (quoting People v. VanderVliet, 444 Mich. 52, 68-69 n.20; 508 N.W.2d 114 (1993) (quoting Bourjaily v. United States, 483 U.S. 171, 179-80 (1987))).

149. *Id.* at 683.

150. *Id.* at 684.

151. *See generally* People v. Figgures, 451 Mich. 390; 547 N.W.2d 673 (1996); City of Westland v. Okopski, 208 Mich. App. 66; 527 N.W.2d 780 (1994).

1. Rebuttal Evidence Generally

As they sometimes do with impeachment evidence, Michigan courts relax the rules of evidence when applying them to rebuttal evidence, after a party has "opened the door" to a discussion of an issue by introducing the issue himself.[152] The Michigan Supreme Court explained in *People v. Figgures* that "[r]ebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'"[153] However, "contradictory evidence is admissible only when it directly tends to disprove a witness' exact testimony."[154]

The 1994 case of *City of Westland v. Okopski* perfectly illustrates the principle of rebuttal evidence.[155] The City of Westland cited Lavern Okopski with the municipal offenses of being a disorderly person and assaulting a police officer, and cited his son, Jon, with the same offenses as well as a third offense of interfering with a police officer.[156]

> On October 6, 1990, the Okopski family and approximately two hundred of their friends and relatives gathered at the Knights of Columbus Hall in Westland to celebrate the wedding of Lavern Okopski, Jr.
>
> * * *
>
> The problem apparently started when the disk jockey hired for the occasion failed to follow orders. Both defendants had warned the disk jockey that he should not play any "black" music, but to play only country and western music. The disk jockey nevertheless played several hit tunes by "rap" performer M. C. Hammer. Lavern Okopski took great exception to this, and an altercation ensued, which escalated to numerous physical confrontations and resulted in twenty-three police officers from three jurisdictions eventually arriving at the scene. At that point, confrontations developed between the celebrants and the police and resulted in the eventual subduing and arrest of defendants.

---

152. *See, e.g., Figgures*, 451 Mich. at 390.

153. *Id.* at 399 (quoting People v. De Lano, 318 Mich. 557, 570; 28 N.W.2d 909 (1947)) (additional internal citations omitted).

154. *See generally Okopski*, 208 Mich. App. at 66.

155. *Id.* at 72.

156. *Id.* at 68.

> The police administered preliminary breath tests (PBT) to Lavern and Jon after they were taken to the police station. According to the testimony of one of the officers, Lavern showed a blood alcohol level of 0.15 percent and Jon a level of 0.06 percent.[157]

On appeal, both Okopskis contended that the trial court erred in admitting the officer's testimony regarding the PBT results.[158] There was no dispute that Michigan statutes provided that PBT results were admissible at trial only in drunk-driving cases, and then only in very limited circumstances, none of which applied to the Okopskis' situation.[159] The court of appeals, however, found no error, because "[a]t trial, both defendants denied that they were intoxicated. Lavern testified that he consumed only a couple of beers, and Jon testified that he had consumed only a champagne glass of beer. The trial court then allowed the prosecutor to admit the PBT test results to impeach defendants."[160] The panel invoked a cardinal rule of evidence that "[e]vidence that is admissible for one purpose is not inadmissible because its use for a different purpose is precluded."[161] Similarly, "constitutionally inadmissible evidence may be admissible for the purpose of rebutting a defendant's false assertions at trial."[162]

Accordingly, the panel held that:

> [The] defendants' testimony about not being intoxicated caused the prosecutor to present rebuttal evidence of defendants' blood alcohol content. *The evidence was not used to prove substantively that defendants were intoxicated; rather, the test results were used to impeach defendants' testimony on that point.* We find that this procedure was permissible.[163]

The panel affirmed the defendants' convictions and sentences, for this and other reasons.[164]

---

157. *Id.* at 68-69.
158. *Id.* at 70.
159. *Id.* (citing MICH. COMP. LAWS ANN. § 257.625a(1) (West 2006)).
160. *Okopski,* 208 Mich. App. at 70.
161. *Id.* at 71 (quoting *VanderVliet,* 444 Mich. at 73).
162. *Id.* (citing People v. Sutton (After Remand), 436 Mich. 575, 592; 464 N.W.2d 276 (1990)).
163. *Id.* at 71 (emphasis added).
164. *Id.* at 79.

2. The Relevance, and Admissibility, of Previously Suppressed Evidence for Rebuttal and/or Impeachment Purposes

"Generally, evidence which is otherwise suppressed or excluded becomes admissible when the defendant opens the door to the issue."[165] For example, a defendant who takes the stand and contradicts prior statements which the trial court had suppressed on constitutional grounds, opens the door to the trial court's admission of those statements for impeachment purposes.[166] This holding is consistent with the principle that "[e]vidence that is admissible for one purpose is not inadmissible because its use for a different purpose is precluded."[167]

Aaron Harvey learned this lesson the hard way.[168] During the government's investigation of his illegal gun purchases, law-enforcement personnel secretly recorded Harvey making various inculpatory statements,[169] and the tape contained various inadmissible statements to which both parties, at times, objected.[170] At trial, "the court excluded the whole tape, but warned that if any part of the recording was introduced by either party, the entire recording would be admitted under the rule of completeness."[171] Then:

> [D]efense counsel attacked [an ATF agent]'s credibility regarding what Harvey had told the agents about the Smith & Wesson during [an earlier, unrecorded] encounter in March 2008. The defense pointed to statements made during the second interview to impeach Agent Miller's testimony that Harvey had not disclosed the Smith & Wesson during the March interview. Consistent with its pretrial order, the district court then admitted almost the entire recorded statement[.][172]

Having concluded that the defendant should sleep in the bed he made, the court affirmed the conviction, for this and other reasons.[173]

---

165. United States v. Harvey, 653 F.3d 388, 394 (6th Cir. 2011) (quoting United States v. Crawford, 86 F. App'x, 834, 838 (6th Cir. 2004)).

166. Kansas v. Ventris, 556 U.S. 586, 593-94 (2009).

167. *Okopski*, 208 Mich. App. at 71 (citing *VanderVliet*, 444 Mich. at 73).

168. *Harvey*, 653 F.3d at 392.

169. *Id.* at 392.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 399.

E. Rule 403 Balancing

Rule 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[174] In interpreting this rule, the Michigan Supreme Court has explained that "[a]ll evidence offered by the parties is 'prejudicial' to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded."[175] The rule serves to prevent a court's admission of "evidence with little probative value [that] will be given too much weight by the jury."[176] "'This unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock.'"[177]

Because Rule 403 balancing in most cases ties particularly closely to a court's application of other rules (such as the provision of Rule 404(b) allowing evidence of other acts of conduct[178]), and is very specific to the facts, it is difficult to devote a lengthy section solely to this rule. Below I list the *Survey* period cases in this article that involved a more-than-de-minimis amount of Rule 403 balancing, with cross-references to the Sections of this article in which I discuss the cases and their importance for Rule 403 jurisprudence. Below the table is a discussion of a case where the Rule 403 analysis was isolated from the court's application of other rules.[179]

Case	Related issues	Cross-reference
People v. Danto[180]	Rule 404(b): Other	Part IV.F.2.c[182]

174. MICH. R. EVID. 403. *See also* FED. R. EVID. 403.

175. People v. Mills, 450 Mich. 61, 75; 537 N.W.2d 909 (1995) (emphasis in original).

176. People v. McGhee, 268 Mich. App. 600, 614; 709 N.W.2d 595 (2005) (citing *Mills*, 450 Mich. at 75).

177. People v. Fisher, 449 Mich. 441, 452; 537 N.W.2d 577 (1995) (quoting People v. Goree, 132 Mich. App. 693, 702-03; 349 N.W.2d 220 (1984)).

178. MICH. R. EVID. 404(b).

179. People v. Cortez, 294 Mich. App. 481; 811 N.W.2d 25 (2011), *opinion vacated by*, 491 Mich. 925; 813 N.W.2d 293 (2012) (vacating a portion of the opinion that held "that failure to provide *Miranda* warnings did not violate the defendant's Fifth Amendment rights.").

180. People v. Danto, 294 Mich. App. 596; 822 N.W.2d 600 (2011).

	Acts of Conduct: The Defendants' Other Acts of Selling Drugs to Establish Their Intent to Deliver Drugs[181]	
People v. Novak[183]	Rule 404(b): Other Acts of Conduct[184]	Part IV.F.2.g.ii[185]
People v. Watkins[186]	MCL 768.27a: Other acts of sexual misconduct involving minors[187]	Part IV.F.2.h.i[188]
United States v. Clay[189]	Rule 404(b): Other Acts of Assault and Larceny to Establish a Carjacker's Intent and Identity[190]	Part IV.F.2.e[191]
United States v. Fisher[192]	Rules 803(5) and (6): Hearsay Exceptions: Recorded recollection and records of regularly conducted activity[193]	Part VIII.B.2[194]
United States v. Poulsen[195]	Rule 404(b): Other Acts of Conduct: The	Part IV.F.2.f[197]

182. *See infra,* Part IV.F.2.c.
181. MICH. R. EVID. 404(b); FED. R. EVID. 404(b).
183. People v. Novak, No. 284838, 2010 WL 293005 (Mich. Ct. App. Jan. 26, 2010), *vacated,* 489 Mich. 941; 798 N.W.2d 17 (2011).
184. MICH. R. EVID. 404(b); FED. R. EVID. 404(b).
185. *See infra,* Part IV.F.2.g.ii.
186. People v. Watkins, 491 Mich. 450; 818 N.W.2d 296 (2012), *appeal denied,* 492 Mich. 859; 817 N.W.2d 111 (2012).
187. MICH. COMP. LAWS ANN. § 768.27a (West 2006).
188. *See infra,* Part IV.F.2.h.i.
189. *Clay,* 667 F.2d 689.
190. MICH. COMP. LAWS ANN. § 768.27a (West 2006).
191. *See infra,* Part IV.F.2.c.
192. United States v. Fisher, 449 Mich. 441; 537 N.W.2d 577 (1995).
193. *See generally* MICH. R. EVID. 803; FED. R. EVID. 803.
194. *See infra,* Part VIII.B.2.

Defendant's Other Act of Witness Tampering (Evidence Spoliation) to Establish Consciousness of Guilt[196]

In the summer of 2009, Burton Cortez was a state prisoner at the Carson City Correctional Facility.[198] Prison officials located two weapons in his cell while searching it and, during a recorded interview with a prison official, Cortez admitted that the metal shanks were his and also made references to gangs.[199] Specifically:

> [The] defendant said that the weapons were his and that gang members had forced him to make them. One weapon was for his own protection, and the other was to be sold. He also admitted selling a third weapon the previous day. Defendant also talked about gangs that operated within the prison. The interview lasted approximately 15 minutes, and defendant never sought to end the interview.[200]

On appeal, the defendant argued that the jury should not have heard this recording, because it suggested he was a gang member.[201] The defendant argued that the trial court should have excluded the evidence, applying Rule 403, on the ground of unfair prejudice.[202]

A court of appeals panel of Judges Peter D. O'Connell, Jane M. Beckering and Patrick M. Meter[203] disagreed, observing in their per curiam opinion:

> [T]hat other evidence of defendant's gang affiliation was presented to the jury before the recording was played. [Michigan Department of Corrections] Lieutenant [Mike] Vashaw [, the interviewer,] testified that the MDOC keeps a list of suspected

---

195. United States v. Poulsen, 655 F.3d 492 (6th Cir. 2011).
197. *See infra,* Part IV.F.2.f.
196. MICH. R. EVID. 404(b); FED. R. EVID. 404(b).
198. *Cortez*, 294 Mich. App. at 482-83.
199. *Id.* at 486.
200. *Id.*
201. *Id.* at 487.
202. *Id.* at 503.
203. *Id.* at 481.

> gang members and that defendant's name was on the list. Lieutenant Vashaw also testified that, because of the increased violence in the prison, he directed a search of cells belonging to suspected gang members, including defendant's cell. The evidence of defendant's suspected gang affiliation was relevant to explaining why his cell was searched and possible reasons for him to be in possession of a weapon.[204]

Accordingly, for this and other reasons, the court of appeals affirmed Cortez's conviction.[205]

F. Character Evidence

Subject to various exceptions in Michigan rules and statutes (which I discuss in subsequent sections of this article), "[e]vidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion[.]"[206] In other words, character evidence "is inadmissible to prove a propensity to commit such acts."[207]

In criminal cases, the federal courts observe that "'[a]lthough . . . propensity evidence is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.'"[208] (Character evidence of *witnesses* generally "must be limited to the particular character trait of truthfulness or untruthfulness."[209])

1. Character Evidence of Homicide Victims

In Michigan homicide cases, under Rule 404(a), a defendant who presents a claim of self-defense may offer evidence pertaining to the alleged victim's character for aggression.[210] Under the federal rules, regardless of whether the crime is one of homicide, the defendant may

---

204. *Cortez*, 294 Mich. App. at 505.

205. *Id.* at 506, *vacated in part and remanded on other grounds*, 491 Mich. 925; 813 N.W.2d 293 (2012).

206. MICH. R. EVID. 404(a).

207. *Crawford*, 458 Mich. at 383 (1998).

208. Old Chief v. United States, 519 U.S. 172, 181 (1997) (quoting United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982) (Breyer, J.)) (internal citations omitted).

209. People v. Slovinski, 166 Mich. App. 158, 174; 420 N.W.2d 145 (1988) (citing People v. Bouchee, 400 Mich. 253, 266-67; 253 N.W.2d 626 (1977)).

210. MICH. R. EVID. 404(a)(2).

offer evidence pertaining to "an alleged victim's pertinent trait[.]"[211] This evidence must be in the form of opinion testimony or testimony pertaining to the person's reputation.[212] Extrinsic evidence of specific acts of conduct is inadmissible, but the opposing party, during cross examination, may *inquire* of the character witness as to his knowledge of specific acts of conduct.[213]

Once a defendant offers such evidence in his own favor, under both the state and federal rules, the prosecution may offer evidence to rebut the defense evidence as to the victim or the defendant's character.[214]

In *People v. Orlewicz*,[215] the court of appeals held, in a case of first impression, that an individual's social-networking page, while it may contain references to specific acts of conduct, "is more in the nature of a semipermanent yet fluid autobiography presented to the world. In effect, it is self-directed and self-controlled general-character evidence."[216] The unanimous panel of Judge Amy Ronayne Krause, writing for herself and Judges Karen Fort Hood and Pat M. Donofrio,[217] explained that:

> [B]ecause people change over time, its relevance might be limited only to recent additions or changes; furthermore, it is obviously possible for people to misrepresent themselves, which could present a fact issue. But in the abstract, social-networking and personal websites constitute general reputational evidence rather than evidence concerning specific instances of conduct[.][218]

A jury convicted Jean Pierre Orlewicz of first-degree premeditated murder, first-degree felony murder, and mutilation of a dead body, resulting in a life sentence.[219] The court of appeals explained the relevant facts at issue as follows:

---

211. FED. R. EVID. 404(a)(2)(B). However, in sexual-misconduct cases, the federal rape-shield rule limits the defendant's ability to offer evidence of the alleged victim's character. FED. R. EVID. 404(a)(2)(B); FED. R. EVID. 412.

212. FED. R. EVID. 405(a); MICH. R. EVID. 405(a).

213. FED. R. EVID. 405(b); MICH. R. EVID. 405(b).

214. FED. R. EVID. 404(a)(2); MICH. R. EVID. 404(a)(1), (2).

215. 293 Mich. App. 96; 809 N.W.2d 194 (2011), *appeal denied but remanded on other grounds*, 493 Mich. 916, 823 N.W.2d 428 (2012).

216. *Id.* at 104-05.

217. *Id.* at 114.

218. *Id.* at 105.

219. *Id.* at 99.

> There is no dispute that defendant killed the victim, dismembered the victim's body, and attempted to dispose of it by burning it. *The gravamen of the dispute in this matter is why defendant did so.* At the time, defendant was 17 years old, 5 feet 7 inches tall, and weighed approximately 150 pounds. The victim was 26 years old, six-feet tall, weighed approximately 250 pounds, and was intimidating; additionally, the victim had a reputation for physical and verbal violence, association with guns, aggression, a quick temper, and for being confrontational. In essence, the prosecution's theory was that defendant did not like the victim and was upset that the victim refused to repay a debt, and he devised a plan to commit the "perfect crime" of killing the victim and leaving no evidence. Defendant contended that he was coerced into involvement in a robbery scheme devised by the victim and that, when the plan failed, the victim threatened defendant's life, whereupon defendant killed the victim in self-defense and attempted to conceal the body out of panic. The jury found the prosecution's case more credible.[220]

In his motion for a new trial, and on appeal, Orlewicz contended that the original trial judge erred in excluding the defense's evidence of (a) the victim's social-network page on MySpace and (b) court-issued personal-protection orders against the victim.[221]

The appellate panel agreed in part, observing that because the victim's MySpace page constituted admissible character evidence of the victim in this homicide case, the trial court erred in excluding it.[222] Nevertheless, the judges found that the error was harmless given that "[d]efendant was able to testify about the page and the contents thereof" and that "the victim's violent and aggressive character was not seriously in doubt."[223] Turning to the issue of the PPOs the defendant sought to introduce, the court found no error, as "[t]he PPOs concerned specific instances of conduct and were properly excluded on that basis."[224] The panel, however, noted that "defendant would have been free to call the plaintiffs in the PPO actions as witnesses to testify with regard to reputation only and not with regard to the specific instances of conduct."[225] Accordingly, for this and other reasons, the panel affirmed

220. *Id.*
221. *Orlewicz*, 293 Mich. App. at 103 (emphasis added).
222. *Id.* at 104-05.
223. *Id.* at 105.
224. *Id.* at 104.
225. *Id.* at 104 n.2.

the defendant's convictions and reversed the trial court's decision ordering a new trial.[226] The Michigan Supreme Court subsequently denied the defendant's application for leave to appeal, but remanded the case to the trial court to consider whether the defendant's life sentence, as a juvenile offender, was consistent with the Eighth Amendment's prohibition of cruel and unusual punishment in light of the U.S. Supreme Court's recent opinion in *Miller v. Alabama*.[227]

2. *Other Acts of Conduct*

a. *Other Acts Generally*

Consistent with the policy underlying the prohibition of propensity evidence, Rule 404(b) forbids a party's use of "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith."[228] However, the rules do not bar such evidence for a *non*-propensity purpose, "such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material[.]"[229] While many often refer to such evidence as "prior bad-acts,"[230] the Michigan rules specifically provide that such acts need be neither "prior" nor "bad" to trigger Rule 404(b)'s application, and the wording of the federal rules point directly to the same conclusion.[231] Accordingly, this article refers to such evidence merely as "other acts."

In Michigan, to admit such other-acts evidence, its proponent must establish to the court that: "(1) the evidence is offered for a proper purpose; (2) the evidence is relevant; and (3) the probative value of the evidence is not substantially outweighed by unfair prejudice."[232] The sixth circuit's approach differs slightly. There, the applicable test:

---

226. *Id.* at 114.

227. People v. Orlewicz, 493 Mich. 916; 823 N.W.2d 428 (2012) (citing Miller v. Alabama, 132 S. Ct. 2455 (2012)).

228. MICH. R. EVID. 404(b)(1); *see also* FED. R. EVID. 404(b)(1).

229. MICH. R. EVID. 404(b)(1); *see also* FED. R. EVID. 404(b)(2).

230. People v. VanderVliet, 444 Mich. 52, 84 n.43; 508 N.W.2d 114 (1993) ("Rule 404(b) permits the government to prove intent by evidence of prior bad acts.") (citations omitted).

231. *See* MICH. R. EVID. 404(b)(1) (providing that the rule applies "whether such other crimes, wrongs, *or acts* are *contemporaneous* with, or prior *or subsequent* to the conduct at issue in the case.") ("Evidence of a crime, wrong, *or other act* is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.") (emphasis added).

232. People v. Kahley, 277 Mich. App. 182, 184-85; 744 N.W.2d 194 (2007) (citing People v. Knox, 469 Mich. 502, 509; 674 N.W.2d 366 (2004)). The third requirement is

> [R]equires the district court to: (1) "make a preliminary determination as to whether sufficient evidence exists that the prior act occurred," (2) "make a determination as to whether the 'other act' is admissible for a proper purpose under Rule 404(b)", and (3) "determine whether the 'other acts' evidence is more prejudicial than probative under Rule 403."[233]

Subject to Rule 403, Michigan courts take an "inclusionary" approach to other-acts evidence:

> Evidence relevant to a noncharacter purpose is *admissible* under MRE 404(b) *even if* it also reflects on a defendant's character. Evidence is *inadmissible* under this rule *only* if it is relevant *solely* to the defendant's character or criminal propensity. Stated another way, the rule is not exclusionary, but is inclusionary, because it provides a nonexhaustive list of reasons to properly admit evidence that may nonetheless also give rise to an inference about the defendant's character. Any undue prejudice that arises because the evidence also unavoidably reflects the defendant's character is then considered under the MRE 403 balancing test, which permits the court to exclude relevant evidence if its "probative value is substantially outweighed by the danger of unfair prejudice . . . ."[234]

b. Other Acts of Personal-Protection-Order Violations

Defendant Dawn Marie Kabanuk, along with her husband, Kenneth David Kabanuk, were involved in long-running disputes with the defendant's brother and sister-in-law, Ronald and Mary Nordstrom, who had obtained guardianship over the defendant's son following child-

---

superfluous as *all* evidence is subject to exclusion on grounds of unfair prejudice. *See* MICH. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

233. *Poulsen*, 655 F.3d at 508 (quoting United States v. Mack, 258 F.3d 548, 552-53 (6th Cir. 2001)).

234. *Danto*, 294 Mich. App. at 599-600 (quoting People v. Mardlin, 487 Mich. 609, 615-16; 790 N.W.2d 607 (2010)) (citations omitted).

neglect proceedings.[235] Mary Nordstrom had obtained personal-protection orders against the Kabanuks in earlier proceedings.[236]

On the day of a show-cause hearing against Ronald in the guardianship proceedings, Mary Nordstrom and her sister saw the Kabanuks in the courthouse and attempted to serve them with court papers.[237]

> Mary and Jaya testified that as they approached the judge's courtroom, they could hear and see Kenneth speaking very loudly with a woman. Dawn was beside him. Both testified that when Kenneth caught sight of Mary, he called her a "f***ing bitch" and screamed that he could not believe she was doing this to them after they had reached a settlement. Mary testified that he used profanity against her at least 10 times. According to Mary, she began to look around the hall for a deputy, and the woman to whom Kenneth was speaking cautioned him to settle down or she would go into the courtroom and summon a deputy. Kenneth persisted in his verbal assault and the woman disappeared into the courtroom. Mary testified that Dawn lunged forward, pointing her finger at Mary and stated, "I have one thing to say to you, you're a f***ing bitch and I hate you." The judge's law clerk, Laura McLane, testified that she heard the commotion outside of the courtroom, and an attorney reported that deputies were needed in the hallway. According to McLane, she called for the deputies and then went out into the hallway, hoping to defuse the situation, where she saw Kenneth yelling at Mary. McLane testified that she told everyone that deputies had been summoned and she suggested that Kenneth "take a walk" and pointed down the hallway.[238]

At some point after the incident, the court held a PPO-violation hearing for both Kabanuks.[239] The appellate panel of Judge Kirsten Frank

---

235. *In re* Kabanuk, 295 Mich. App. 252, 254; 813 N.W.2d 348 (2012), *appeal denied,* 492 Mich. 854; 817 n.W.2d 110 (2012).

236. *Id.* A personal-protection order (PPO) is essentially a court order prohibiting one from stalking another person. MICH. COMP. LAWS ANN. § 600.2950a (West 2010). The statute treats PPO violations as acts of contempt toward the court, with a maximum penalty of ninety-three days in jail and a fine of up to $500. MICH. COMP. LAWS ANN. § 600.2950a(23).

237. *Kabanuk,* 295 Mich. App. at 254. Kenneth refused service and the papers fell to the ground. *Id.*

238. *Id.* at 254-55.

239. *Id.* at 255.

Kelly, writing for herself and Judges Kurtis T. Wilder and Kathleen Jansen,[240] observed that:

> The testimony of Dawn and Kenneth was in stark contrast to that of Mary, Jaya, and McLane. Dawn and Kenneth testified that at no time did they approach, confront, or use profanity against Mary. Rather, according to their testimony it was Mary who approached the two of them in the hallway, told them they were in violation of the PPO, and threatened to have them arrested, Kenneth merely told Mary to stop talking to them and to leave them alone. Kenneth further testified that he reminded Mary that she was in violation of a PPO they had against her and that when McLane came out into the hall and suggested that Kenneth "take a walk," they took her advice and left.[241]

The trial court convicted both Kabanuks of contempt of court and husband and wife both appealed.[242] Addressing Dawn Kabanuk's first argument on appeal, the appellate judges held that "[t]here was sufficient evidence for the trial court to find beyond a reasonable doubt that Dawn violated the PPO when she lunged at Mary with her finger pointed and yelled, 'I have one thing to say to you, you're a f***ing bitch and I hate you.'"[243]

Second, Dawn Kabanuk argued that the trial court erred in considering Kenneth Kabanuk's prior acts when evaluating his testimony.[244] The panel observed that "[t]he trial court essentially found that because Kenneth had been disruptive in the past, he was likely disruptive in this case, and, therefore, he was lying about the circumstances of the incident."[245] Thus, the appellate panel concluded that the trial court erred when it impermissibly considered other acts for propensity purposes.[246] Nevertheless, the panel affirmed Dawn

240. *Id.* at 252.

241. *Id.* at 255.

242. *Id.* at 256. The same appellate panel reversed Kenneth Kabanuk's contempt conviction in a separate opinion. *In re* Kabanuk, 295 Mich. App. 252; 813 N.W.2d 348 (2012), *appeal denied*, 492 Mich. 854; 817 N.W.2d 110 (2012).

243. *Kabanuk*, 295 Mich. App. at 259.

244. *Id.*

245. *Id.* at 260.

246. *Id.* The judges may have cited the wrong rule to achieve the correct result. Here, both defendants, Kenneth and Dawn, were on trial for contempt. *Id.* at 256. The panel correctly held that Kenneth's other acts were inadmissible to prove he acted in conformity therewith. *Id.*; *see also* MICH. R. EVID. 404(b)(1). However, to the extent that co-defendant Kenneth was a *defense witness* for his wife, Dawn, the question became not whether the court could consider his other acts to show he acted in conformity therewith,

Kabanuk's conviction, finding that the error was harmless given what it characterized as "overwhelming evidence" of Dawn's guilt.[247]

c. Defendants' Other Acts of Selling Drugs to Establish Their Intent to Deliver Drugs When Possessing It

In *People v. Danto*, the court of appeals granted the prosecutor's interlocutory application for leave to appeal after the trial court excluded certain other-acts evidence prior to Michael Danto and Andrew Nater's trial for the offense of possession of a controlled substance with intent to deliver the same.[248] At trial, the underlying evidence establishing Danto and Nater's possession with intent would have been a quantity of marijuana police found at a home they associated with the two defendants.[249]

i. Danto's Other Act of Selling Marijuana

The other-act evidence the trial court barred upon Danto's request was evidence that the police:

> [E]xecuted a search warrant at a café in which marijuana was sold and smoked. At the café, Danto was found at a table with 323 grams of marijuana packaged for sale, hashish, THC (tetrahydrocannabinol) candy, packaging material, a scale, a tally sheet, a cell phone, and $2,434 in cash. A document in the

---

but whether such acts were admissible to *impeach his credibility* when testifying as to Dawn's innocence. Accordingly, Rule 404(b) was not the correct rule.

The appellate panel *should* have looked to Rule 608, which pertains to impeachment of witnesses, and provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence." MICH. R. EVID. 608(b). The rule, while prohibiting a party's use of extrinsic evidence, permits the impeaching party to cross-examine the witness concerning acts that reflect upon the witness' truthfulness. *Id.*

Had Kenneth testified that he had committed no disruptive acts in the past, cross-examination that sought to establish he was *lying* would be appropriate, as would cross-examination about past lies or other dishonest conduct. *Id.* However, because the evidence was both (a) extrinsic, and (b) not probative of Kenneth's character for honesty, it was inadmissible. Thus, the court should not have considered his past acts. Having said that, the outcome was the same, as the other-acts evidence was inadmissible either to show Kenneth's propensity under Rule 404(b) or pertaining to his character for truthfulness as a defense witness for Dawn under Rule 608(b).

247. *Id.* at 261-62.

248. *Danto*, 294 Mich. App. at 601, 604.

249. *Id.* at 600-01.

> cashbox at the front door of the café indicated that Danto had paid an entrance fee to sell marijuana at the café.[250]

The appellate panel of Judge Jane E. Markey, writing for herself and Judge Henry William Saad,[251] held that such evidence was relevant to establish Danto's knowledge of and control over the marijuana in the home.[252] Furthermore, the court held the evidence was relevant to establish Danto's intent to distribute the marijuana in the home:

> Here, a reasonable inference exists that the marijuana grown in Danto's home was the source of the marijuana he possessed at the café given the identical packaging and the substantial number of plants being grown in the residence. Also, Danto's packaging of the marijuana for sale and possession of other accouterments of drug trafficking at the café tends to increase the likelihood that he intended to distribute the marijuana found at his residence.[253]

As a fallback position, Danto argued that even if the other-act evidence was admissible under Rule 404, the trial court should have excluded it on the ground of unfair prejudice after conducting Rule 403 balancing.[254] Danto contended, first, that if the court admitted such evidence, he would not be able to cross-examine undercover officers who accessed the café using false medical-marijuana cards given the trial court's ruling precluding his assertion of a medical-marijuana defense.[255] Second, Danto argued that the evidence would unfairly prejudice his defense because "the Oakland County Prosecuting Attorney and law enforcement officials are engaged in a concerted and well-publicized attack on the medical use of marijuana."[256] The appellate panel rejected the argument, explaining that "[w]hether an undercover officer used a false medical-marijuana card to gain entry into the café has no bearing on whether Danto knew about, possessed, or intended to distribute the marijuana found in his home."[257] Second, the court held that Danto failed

---

250. *Id.* at 600.

251. *Id.* at 597. Judge Elizabeth L. Gleicher concurred with the aspects of the majority's opinion I discuss in this article, but dissented on other issues. *Id.* at 614-16 (Gleicher, J., concurring in part and dissenting in part).

252. *Id.* at 601.

253. *Id.*

254. *Danto*, 294 Mich. App. at 602.

255. *Id.*

256. *Id.*

257. *Id.* at 604.

to establish prejudice, much less *unfair* prejudice, by his allegation that police officers and prosecuting officials were overzealously enforcing the law.[258] Accordingly, the court of appeals reversed the trial court's decision excluding the other-acts evidence to establish Danto's guilt.[259]

ii. Nater's Other Act of Selling Marijuana

The other act the trial court barred against Nater was evidence that he "had sold marijuana to undercover officers at the same café three times in the approximately one-month period preceding the execution of the search warrant on his and Danto's home."[260] Such evidence, the panel held, was relevant to establish "the marijuana operation in Nater's home was the source of the marijuana that he sold on the prior occasions and that as part of his ongoing scheme to manufacture and sell marijuana, he intended to sell the marijuana found in the home."[261]

Like Danto, Nater argued that, given the trial court's order precluding his assertion of a medical-marijuana defense, the other-acts evidence would be unfairly prejudicial in that he could not effectively cross-examine the undercover officers about their use of false medical-marijuana cards to enter the café.[262] The appellate court disagreed. "The right to present a defense extends only to relevant evidence."[263] The court explained that the undercover officers' use of false medical-marijuana cards "has no bearing on whether Nater knew about, possessed, or intended to distribute the marijuana found in his home."[264] Accordingly, "because the MMA did not authorize Nater's sales to the officers, no unfair prejudice would arise from precluding cross-examination of those officers regarding marijuana for medical use."[265] The panel reversed the trial court's decision excluding evidence of Nater's other act of selling marijuana.[266]

258. *Id.* at 603.
259. *Id.* at 603-04.
260. *Danto*, 294 Mich. App. at 603.
261. *Id.* at 604.
262. *Id.*
263. *Id.* (citing People v. Likine, 288 Mich. App. 648, 658; 794 N.W.2d 85 (2010)).
264. *Id.*
265. *Id.* at 605.
266. *Danto*, 294 Mich. App. at 605.

d. Other Acts of an Alleged Co-Conspirator to Establish the Co-Conspirator's Motive and Prove He Did Not Require the Defendant's Assistance to Perpetrate the Crime

The government charged and obtained a conviction of Benton, Tennessee, businessman James Parkes for ten counts of bank fraud.[267] Parkes was a co-owner of a manufacturing enterprise, Remington Industries, which encountered significant financial difficulties in the early 2000s, causing him to call on Jim Goddard, president of the local Benton Bank, to secure financing.[268] Even though the bank's capital was less than $10 million, Remington's debt at times amounted to as much as $4 million.[269] The substantial amount of credit the bank had extended the company, however, violated bank policies as well as Federal Deposit Insurance Corp. (FDIC) regulations.[270] Accordingly, the bank encouraged Remington to secure other sources of financing so as to reduce the lender's exposure.[271] A third party, Livingston Co., eventually agreed to loan Remington $2.25 million to reduce its obligations to the bank, but the private-equity lender nevertheless required the bank to guarantee the loans if Remington defaulted.[272] Remington defaulted within a year or two, and the private-equity firm called on the bank to discharge its obligation as the guarantor and cover the loss, which it did.[273]

Shortly thereafter, Remington's owners—Parkes and a co-defendant—executed forty-five-day promissory notes to the bank, with each individual to cover half, or $1.125 million, of the bank's $2.5 million loss as guarantor.[274] Forty-five days later, Parkes and his co-defendant were unable to pay the amount owing.[275]

Goddard, the bank president, then recorded on the bank's books ten entries to fictitious entities, which, in total, amounted to $2.5 million.[276] A Sixth Circuit panel observed:

> Goddard had played games with the Benton Bank books before. At a time when he was also embezzling from Benton Bank,

267. *Parkes*, 668 F.3d at 297.
268. *Id.* at 297-98.
269. *Id.* at 298.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Parkes*, 668 F.3d at 298.
274. *Id.*
275. *Id.*
276. *Id.* at 298-99.

> Goddard had changed the notes of other, unrelated borrowers: At trial, Parkes tried—but was denied the opportunity—to offer evidence that Goddard had falsely documented more than three hundred loans to other borrowers and had done so without the borrowers' knowledge or participation.
>
> Generally, Goddard's schemes worked like this: When a large loan (*e.g.*, Remington's) looked like it was going bad, Goddard would repackage the large loan into a number of smaller loans, usually in the name of fictitious entities with fake taxpayer-identification numbers. Goddard assigned these loans to thirteen addresses that he stocked for this purpose, many of which were Post Office boxes. By hiding large loan defaults, Goddard tried to avoid careful scrutiny of the Bank's records, scrutiny that would have revealed Goddard's violation of the Bank's capital-lending limits. Likely more important for Goddard, FDIC review would threaten disclosure of his embezzlement of more than a million dollars of the Bank's money.[277]

Importantly, the bank president used this scheme to cover-up the bank's $2.5 million exposure from its Remington loans.[278] Goddard's activities were eventually discovered, as was a printout of an e-mail from someone at Remington to its outside corporate counsel, which listed the names of the ten fictitious entities and stressed that counsel should act quickly in incorporating the entities.[279] Shortly thereafter, the bank president "fraudulently designated these entities as Benton Bank borrowers."[280] At trial, the defendant's attorney argued for an acquittal on the ten counts of bank fraud (one count for each false entry), saying there was no evidence showing Parkes' knowledge or participation in Goddard's scheme of making false entries on the bank's books.[281]

On appeal, a Sixth Circuit panel of U.S. District Judge James S. Gwin, writing for himself and Judges Jane Branstetter Stranch and Raymond M. Kethledge,[282] reversed the defendant's conviction on the ground that there was insufficient evidence establishing his knowledge of Goddard's scheme or an intent to defraud.[283] While this ruling was

277. *Id.* at 299.
278. *Id.*
279. *Parkes*, 668 F.3d at 299-300.
280. *Id.* at 300.
281. *Id.*
282. *Id.* at 296. Judge Gwin holds office in the Northern District of Ohio, and was sitting on the appellate panel by designation. *Id.*
283. *Id.* at 300-03.

dispositive,[284] the court went further in pointing out the trial court's errors in misapplying Rule 404(b) and excluding evidence of the bank president's various fraudulent acts.[285]

The first piece of evidence the trial court excluded was the testimony of a Benton-area businessman and bank customer, Carl Stephens, who:

> [L]earned that 'without any notice to Mr. Stephens, Mr. Goddard and the bank had prepared false notes and placed them in the records of Benton Banking Company so that it looked like there were legitimate notes, but at no time did Mr. Stephens ever authorize the use of his name, his company's name, his address, or did he have any knowledge of' the fraudulent notes or entries in Benton Bank's records.[286]

The second piece of evidence was an FDIC listing of:

> 300 suspicious loans on the bank's books. According to that list, each of the loans was made to a person or entity at one of thirteen addresses, mostly Post Office boxes. Goddard used some of these same addresses for the fraudulent December 2002 loan documentation involving Remington. Parkes said he would offer evidence that Bank President Goddard falsified these three hundred loans without customer approval.[287]

The trial court denied the defendant's Rule 404(b) motion, holding that Parkes proffered the evidence for improper propensity purposes—"to show that Mr. Goddard, who at least thus far has not been a witness in the case, acted in conformity with evidence of other crimes, wrongs, and acts that he may have committed."[288] This was error, the Sixth Circuit held, because the defendant offered the evidence for a proper non-propensity purpose, which was, the panel explained:

> To show that Goddard had both his own means and his own *motive* to carry out the scheme to create the smaller, fake Remington loans on Benton Bank's books. Specifically, if

284. An appellate court's reversal of a criminal defendant's conviction on the ground of insufficient evidence operates to bar a retrial as though a jury or judge had acquitted the defendant at trial. Burks v. United States, 437 U.S. 1, 17-18 (1978).

285. *Parkes*, 668 F.3d at 303-06.

286. *Id.* at 303.

287. *Id.* at 303-04.

288. *Id.* at 304 (quoting United States v. Parkes, 2009 WL 5205370 (E.D. Tenn. Dec. 23, 2009) (citing FED. R. EVID. 404(b)).

> Goddard did not change the loans, the FDIC would undertake a more intense review that would expose Goddard's embezzlement. If by December 2002 the Remington loans had not already exceeded the Bank's capital-lending limits, they soon would, and Goddard couldn't survive a rigorous examination of the Bank's books—he had been falsifying them (and embezzling the Bank's money) for years. So Goddard had *strong individual and independent reasons* to disguise Remington's troubled loan history, and to do it in secret. Moreover, Goddard's prior frauds were convincing evidence that his *scheme didn't require the cooperation of the borrowers*; Goddard, as Bank President, could write the notes himself and forge whatever signatures he needed.[289]

Assuming arguendo that the evidence *also* was probative for an improper (propensity) purpose, the trial court should have subjected the evidence to a Rule 403 balancing analysis and considered whether any unfair prejudice outweighed its probative effect.[290] Even then, in light of the evidence's "great probative value[,]" a proper Rule 403 analysis would have resulted in the trial court's admitting the evidence, the panel held.[291]

e. Other Acts to Establish a Carjacker's Intent and Identity

Sixth Circuit jurisprudence appears to be less favorable toward the admission of other-acts evidence than Michigan state courts.[292] In Michigan, again, the evidence must be relevant, probative of a non-character/non-propensity purpose and, finally, under Rule 403, if the evidence is *also* probative (as other-acts evidence often is) of the defendant's character and/or propensity, its probative value of that impermissible character purpose must not substantially outweigh its probative value of a permissible Rule 404(b) purpose.[293]

In *United States v. Clay*, a Sixth Circuit panel considered whether a defendant's other acts of assault and theft were admissible to establish, first, his identity as *the* carjacker, and second, his intent.[294] The latter

289. *Id.* at 305 (emphasis added).

290. *Id.* at 305-06.

291. *Parkes*, 668 F.3d at 305-06.

292. *See Clay*, 667 F.3d 689.

293. People v. Waclawski, 286 Mich. App. 634, 671; 780 N.W.2d 321 (2009) (citing People v. Knox, 469 Mich. 502, 509; 674 N.W.2d 366 (2004); *VanderVliet*, 444 Mich. at 74-75).

294. *Clay*, 667 F.3d at 695.

purpose was important because carjacking, under federal law,[295] is a specific-intent crime, thus the government bears the burden to prove "that the defendant would have at least attempted to seriously harm or kill the driver if that action had been necessary to complete the taking of the car."

i. Intent

A gunman approached Internal Revenue Service employee Kathryn White while she exited her vehicle one November morning in 2007 and demanded she start her engine and exit the vehicle or else he would "put a cap" in her.[296] White acquiesced and the gunman drove away in her vehicle.[297] In order to establish the defendant's specific intent, citing Rule 404(b), the government elicited the other-act testimony of Karissa Marshall, who told the jury that:

> [W]hen she was 15, a car driven by Clay pulled alongside her as she was walking to a bus stop and asked her if she wanted a ride. When she resisted, the driver got out of the car, grabbed her, and hit her in the face with a gun. The blow knocked her unconscious, and she told the jury, "I thought I was going to die that day."[298]

In support of its position, the government argued that the prior assault "shows that Clay could develop the intent to cause serious bodily harm to innocent strangers who resist his demands."[299]

The appellate panel, however, rejected this argument, holding that such a view of Rule 404(b) "perches perilously close to proving specific intent by showing propensity, as it suggests that a person who engages in bad behavior toward another is likely to do so again."[300] Carjacking and assault are "too unrelated[,]" the opinion read, and other-acts evidence "is probative of intent only 'when the prior [acts] were part of the same scheme or involved a similar modus operandi as the present offense[.]'"[301] Thus, U.S. District Judge Algernon L. Marbley wrote for a two-member majority of himself and circuit Judge Karen Nelson

295. 18 U.S.C.A. § 2119 (West 1996).
296. *Clay*, 667 F.3d at 691.
297. *Id.*
298. *Id.* at 694.
299. *Id.* at 696.
300. *Id.*
301. *Id.* at 696 (quoting United States v. Bell, 516 F.3d 432, 443 (6th Cir. 2008)).

Moore,[302] a non-theft-related assault is inadmissible for Rule 404(b) purposes in establishing an individual's assaultive intent in a carjacking.[303]

Although the panel thus held that the evidence was admitted for an improper purpose, it nevertheless proceeded to a Rule 403-balancing analysis.[304] It began this analysis by quoting a prior sixth circuit case, in which a predecessor panel held that:

> When prior acts evidence is introduced, regardless of the stated purpose, the likelihood is very great that the jurors will use the evidence precisely for the purpose it may not be considered: to suggest that the defendant is a bad person, a convicted criminal, and that if he "did it before he probably did it again."[305]

The government had other means of proving the defendant's intent—such as the gunman's threatening words, and the prior assault evidence was only of "slim probative value."[306] Thus, the evidence's unfairly prejudicial effect substantially outweighed its probative value and mandated the court's exclusion of same.[307]

Judge Raymond M. Kethledge dissented, and wrote that "[t]he test for admissibility in this circuit and elsewhere has long been more permissive: whether the defendant's conduct in prior crimes is 'sufficiently analogous to support an inference' that the defendant

---

302. *Clay*, 667 F.3d at 690.

303. *Id.* at 696. The panel appeared to ignore a plain reading of the rules. *See* FED. R. EVID. 404(b)(2) ([Other-acts] evidence may be admissible for another purpose, such as proving motive, opportunity, *intent*, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.") (emphasis added).

304. *Clay*, 667 F.3d at 696. The majority's Rule 403 analysis was superfluous. Rule 403 comes into play when a court would otherwise admit "relevant evidence" with "probative value." FED. R. EVID. 403. If the court determines other-acts evidence is not admissible for a proper non-character purpose, then it is inadmissible under Rule 404(b). FED. R. EVID. 404(b)(1). Accordingly, such evidence has no "probative value." Once the court has determined that evidence lacks probative value, there is *no probative value* to weigh against considerations of unfair prejudice, as Rule 403 assumes the evidence has at least a modicum of probative value. FED. R. EVID. 403. That the majority conducted a Rule 403 analysis after determining that the evidence was inadmissible under Rule 404(b) suggests it may not understand the rules as well as it should. Judge Raymond M. Kethledge, in dissent, demonstrated quite well the flaws in the majority's analysis. *See Clay*, 667 F.3d at 702-05 (Kethledge, J., dissenting).

305. *Clay*, 667 F.3d at 696 (quoting United States v. Johnson, 27 F.3d 1186, 1193 (6th Cir. 1994)).

306. *Id.*

307. *Id.*

intended to do something similar later."[308] Explaining his conclusion opposite to the panel majority as to Rule 404(b) and Rule 403 analysis, he wrote:

> The government had to prove that Clay *was not bluffing* when he made it—that he actually intended to shoot one of those women if White did not hand over her car. And given the nature of what the government had to prove—beyond a reasonable doubt, no less—the proof was going to be ugly no matter what form it took. The pistol-whipping evidence was undoubtedly prejudicial, but sometimes prejudice is fair. It was here.[309]

ii. Identity

The Sixth Circuit then considered whether the trial court erred in admitting, under Rule 404(b), evidence of a theft the government attributed to Clay for the purpose of establishing his identity as the carjacker, and to prove he brandished a firearm in doing so.[310]

When police located the Grand Prix in a parking lot near Clay's apartment they found, in nearby bushes, the case for a handgun whose owner was Steve Mosher.[311] Mosher had been the victim of a larceny from his truck, days before the carjacking at issue, and, in addition to missing the handgun case, Mosher was also missing the handgun that belonged inside the case.[312] Video surveillance of the lot where Mosher had parked his car showed a black man wearing a red-and-white-patterned shirt breaking into the vehicles and walking away with Mosher's handgun case.[313] Importantly, "[i]nside the Grand Prix, officers found a compact disc containing pictures of Clay with friends and family. In several of the pictures, he was wearing a red and white patterned shirt."[314]

While the evidence was tenuous, in the panel's view, that Clay had committed the larceny, it nevertheless concluded that there was some evidence and thus the trial court did not "clearly err" in finding sufficient evidence that defendant had committed the other act of stealing Mosher's

---

308. *Id.* at 705 (Kethledge, J., dissenting) (quoting United States v. Benton, 852 F.2d 1456, 1468 (6th Cir. 1988)).
309. *Id.*
310. *Id.* at 698.
311. *Clay*, 667 F.3d at 692.
312. *Id.*
313. *Id.*
314. *Id.* at 691.

handgun from his truck.[315] However, this determination resulted from an inference, and in asking the jury to also infer that defendant used *the same gun in the carjacking*, this "piling of inference upon inference is calling for exactly the kind of propensity determination that Rule 404(b) was intended to prevent."[316] The evidence was inadmissible to establish the defendant's plan or preparation in carrying out the carjacking.[317]

Similarly, the trial court also erred in admitting the truck-larceny evidence under Rule 403 to establish Clay's *identity* as the carjacker, the panel held.[318] It observed:

> While the government suggests that the red and white patterned shirt connects both offenses and shows that the same man was responsible, without a substantiated evidentiary link or shared methodology, a mass-produced shirt does not establish a unique identity. In sum, the crimes are not so similar that they establish a pattern or distinctive modus operandi.[319]

The court then proceeded to a Rule 403 balancing analysis, and opined that:

> [E]vidence of the theft of the handgun was of limited probative value. Additionally, there was other, less prejudicial, evidence admitted in the trial that Clay had possession of a gun. Abernathy testified that she saw Clay with a handgun before the carjacking occurred. If the government's goal was to show that Clay had obtained a handgun before the charged offense, it successfully achieved that goal with Abernathy's testimony.[320]

Because of its "high[ly]" prejudicial impact, "[t]here was a great risk . . . [t]hat the jury used the evidence for precisely the reasons it was counseled not to: that Clay was a bad person and a threat to society."[321] Rule 403, therefore, would have dictated the trial court's exclusion of this evidence.[322] The trial court's errors were not harmless and dictated

315. *Id.* at 699.
316. *Id.*
317. *Clay*, 667 F.3d at 699.
318. *Id.* at 699-700.
319. *Id.*
320. *Id.* at 700.
321. *Id.*
322. *Id.*

the appellate panel reverse the defendant's conviction and order a new trial.[323]

Judge Raymond M. Kethledge dissented, arguing that the majority applied an incorrect standard of review to the trial court's decisions.[324] With respect to the identity evidence, he observed that "the test is merely whether the evidence 'tends to make it more probable' that [Clay] was" the carjacker.[325] "The improbability that two different men—wearing the same distinctive shirt and possessing guns that 'look[ed] like' the same one—committed these crimes only three days and two miles apart, does 'tend[] to make it more probable' that Clay was the criminal in both."[326]

f. Other Acts of Witness Tampering (Evidence Spoliation) to Establish Consciousness of Guilt

In the sixth circuit, under Rule 404(b), courts will admit "'spoliation evidence, including evidence that a defendant attempted to bribe . . . a witness,' because such spoliation evidence shows 'consciousness of guilt.'"[327] As the court explained, "'[e]vidence of witness tampering [i]s admissible as an 'other purpose' under Rule 404(b) because it 'tends to establish consciousness of guilt without any inference as to the character of the spoliator.'"[328] Michigan law agrees on this point, although state courts simply conclude such evidence is relevant as probative of guilt without resorting to considering witness tampering as "other acts" that triggers a Rule 404(b) analysis.[329]

In *United States v. Paulsen*, the government charged, and obtained convictions, of Lance Paulsen for the offenses of securities fraud and obstruction of justice, after separate trials on each charge.[330] The defendant's business had involved financing health-care providers by purchasing their accounts receivable.[331] Paulsen's firm, National Century Financial Enterprises, then issued bonds to investors and backed the bonds with the accounts receivable they had purchased from the

323. *Clay*, 667 F.3d at 701, 702.

324. *Id.* at 703 (Kethledge, J., dissenting).

325. *Id.* (quoting United States v. Bonds, 12 F.3d 540, 572 (6th Cir. 1993)).

326. *Id.* (emphasis in original).

327. *Poulsen*, 655 F.3d at 508 (quoting United States v. Mendez-Ortiz, 810 F.2d 76, 79 (6th Cir. 1986)).

328. *Id.*

329. People v. Schaw, 288 Mich. App. 231, 237; 791 N.W.2d 743 (2010) (citing People v. Mock, 108 Mich. App. 384, 389; 310 N.W.2d 390 (1981)).

330. *Poulsen*, 655 F.3d at 497-98.

331. *Id.* at 498.

healthcare providers.[332] Important from the bond-buyers' standpoint, "NCFE and its representatives reported that those obligations were supported by adequate reserves and consistently maintained investment grade, primarily triple-A ratings."[333] In violation of this promise to investors, however, NCEF would at times finance health-care providers without taking accounts receivable in return, and, not coincidentally, some of the beneficiaries of this apparently one-way transaction were providers in which Paulsen or other principals at NCEF had an interest.[334] "[T]he majority of advanced funds were to six providers owned by Poulsen through his stakes in NCFE and other entities. Monthly reports were issued to indenture trustees to verify that minimum reserve account balances were met."[335] This house of cards collapsed in late 2002, and ratings agencies downgraded NCFE's bonds from triple-A to junk-bond status.[336]

Four years into the investigation and prosecution, NCFE's former compliance chief, Sherry Gibson, pled guilty to at least one count of conspiracy, and "[h]er plea agreement, which listed Poulsen as an unindicted co-conspirator, required her to meet with prosecutors and truthfully answer all questions about her own and others' involvement with NCFE."[337] She also agreed to forfeit $420,000.[338]

> While Gibson was incarcerated, she and [Karl] Demmler [a friend of Poulsen's] stayed in contact. After Gibson was released from prison, she contacted Demmler on June 19, 2007, and they met. Demmler informed Gibson that Poulsen intended to make her 'whole.' In this conversation, Demmler also suggested that Gibson ask Poulsen to pay her for what she lost while incarcerated; Demmler suggested that they meet on a weekly basis; and Demmler stated that Poulsen asked him to contact Gibson to help him "win his case."[339]

Gibson contacted the FBI and cooperated with the agency.[340] On July 13, 2007, Demmler and Gibson met again, and their conversation was recorded. Demmler suggested that she not "change her story" at trial but

---

332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.*
336. *Poulsen*, 655 F.3d at 499.
337. *Id.* at 499.
338. *Id.*
339. *Id.*
340. *Id.*

rather conveniently forget things and "prevaricate." On July 18, 2007, Demmler informed Gibson that he had called Poulsen's cellular telephone and indicated that he had informed Poulsen about their conversations. On July 25, 2007, Demmler informed Gibson that Poulsen wanted to "sit down and talk to" her, but he wanted to do so under the right circumstances.[341]

The government then obtained a search warrant to surveil Poulsen's telephonic communications.[342] As the Sixth Circuit summarized, Poulsen and Demmler's conversations covered:

> [D]iscussions between Poulsen and Demmler about getting Gibson a new attorney who was preapproved by Poulsen; multiple conversations between Poulsen and Demmler and Demmler and Gibson about how Gibson would be paid; instructions on how Gibson should answer prosecutors' questions and how she should testify; and Poulsen's and Demmler's concerns about discussing Gibson over the telephone.[343]

Demmler met Gibson again in October 2007 and Demmler "gave Gibson a signed, blank check that she would eventually be able to use to procure her payment."[344] Resultingly, a jury convicted Poulsen of conspiracy, witness tampering, witness tampering by influencing testimony and obstruction of justice.[345]

Next came Poulsen's trial on the securities-fraud charges, at which the trial court denied the defense's motion to exclude the evidence from the obstruction and witness-tampering case on the ground that such evidence constituted "improper propensity evidence and [w]as unfairly prejudicial."[346] The trial court denied the motion and Poulsen's second trial resulted in convictions for conspiracy, securities fraud, wire fraud, conspiracy to commit money laundering and concealment of money laundering.[347]

A circuit panel of Judge Julia Smith Gibbons, writing for a unanimous panel of herself, Judge Helene N. White, and U.S. District

---

341. *Id.* at 500.
342. *Poulsen*, 655 F.3d at 500.
343. *Id.*
344. *Id.*
345. *Id.* at 500-01.
346. *Id.* at 501.
347. *Id.*

Judge Paul L. Maloney,[348] held that the trial court did not err in admitting the witness-tampering evidence in Poulsen's securities-fraud trial.[349] The panel held that the trial court did not err because "[t]his evidence was not offered to prove Poulsen's character in conformity with this prior bad act but rather was offered as evidence of his consciousness of guilt."[350] The district was correct because "evidence of Poulsen's 'attempts to bribe Gibson to testify favorably at his fraud trial is probative of his consciousness of guilt[.]'"[351]

The panel then briefly considered whether the trial court erred in admitting the evidence over the defendant's Rule 403 objection that the evidence constituted unfair prejudice.[352] The panel observed that:

> Poulsen argues that this evidence is prejudicial because it suggests his consciousness of guilt, but the district court found that "the probative value of a defendant's spoilation attempt is precisely that it indicates consciousness of guilt." Thus, "any inference that Poulsen's attempt to bribe Gibson evidences a guilty conscience is not unfair prejudice."[353]

The panel agreed and found no error.[354] For this and other reasons, it affirmed the defendant's conviction and sentence.[355]

g. The Limits of Rule 404(b)(i). The Res Gestae Exception

The Sixth Circuit recently had occasion to explain that Rule 404(b) does not operate to bar "res gestae" evidence—evidence that is "'inextricably intertwined' with evidence of the crime charged,' . . . or when the acts are 'intrinsic,' or 'part of a continuing pattern of illegal activity.'"[356] Michigan courts have similarly held that "'[e]vidence of

348. *Poulsen*, 655 F.3d at 496. The last of the three jurists, presently the chief judge of the U.S. District Court for the Western District of Michigan, sat by designation on the sixth circuit panel. *Id.*

349. *Id.* at 508-10.

350. *Id.* at 508.

351. *Id.* at 509.

352. *Id.*

353. *Id.*

354. *Poulsen*, 655 F.3d at 509.

355. *Id.* at 516, *reh'g denied*, Nos. 08-4218/09-3658, 2011 U.S. App. LEXIS 21894 (6th Cir. Oct. 17, 2011), *cert. denied*, 132 S. Ct. 1772 (2012). Judge White would have granted rehearing at the Sixth Circuit. *Poulsen*, 2011 U.S. App. LEXIS 21894, at *1.

356. United States v. Rozin, 664 F.3d 1052, 1063 (6th Cir. 2012) (quoting United States v. Everett, 270 F.3d 986, 992 (6th Cir. 2001); United States v. Barnes, 49 F.3d 1144, 1149 (6th Cir. 1995)).

other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime.'"[357]

In *United States v. Rozin*,[358] the government charged defendant Leif Rozin, owner of a carpet retail operation, with various offenses relating to his filing of false federal tax returns.[359] As part of the scheme, the defendant purchased "loss-of-income" insurance from a third party, deducted the premium payments against his income to reduce his taxes, but then retained control over the premiums he allegedly "paid."[360] Under the policy, the defendant would recover an overwhelming proportion of the premium payments if he never filed a claim against the policy, unlike almost all other insurance policies.[361] In other words, Rozin took a substantial tax deduction for a fictitious expense.[362]

The district court recognized the suspicious or 'dubious nature' of the LOI policies. Though peddled as "insurance," [Rozin's insurance agent] admitted during testimony that the covered risks—corporate downsizing, employee layoffs, and technological obsolescence—were unlikely to happen to Rozin because he was an owner of a carpet company. Many of the most obvious causes of loss of income, such as death, disability, voluntary termination, and breach of contract, were not covered, and Rozin, Inc. was not under any immediate threat of bankruptcy. In addition, unlike other legitimate insurance policies, Rozin maintained control of the funds; when pitching the LOI policies to potential buyers, Rozin described them as 'a way to lower your taxes' while also receiving "a large percentage of that money back." Finally, the district court described the high premium-to-coverage ratio as suspect, suggesting improper motives on the part of Rozin.[363]

Following his conviction for subscribing a false tax return, attempting to evade taxes and conspiracy to defraud the government,[364] Rozin argued that the trial court erred in admitting evidence of his business activities subsequent to the 1998 tax filing in question.[365] However, Judge John M. Rogers, writing for a Sixth Circuit panel comprising himself and Judges Deborah L. Cook and David W.

357. People v. Austin, 95 Mich. App. 662, 671; 291 N.W.2d 160 (1980) (quoting People v. Delgado, 404 Mich. 76; 273 N.W.2d 395 (1978)).

358. 664 F.3d 1052 (6th Cir. 2012).

359. *Id.* at 1054.

360. *Id.*

361. *Id.* at 1053-55.

362. *Id.*

363. *Id.* at 1059.

364. *Rozin*, 664 F.3d at 1054.

365. *Id.* at 1063.

McKeague, explained that the evidence "directly addressed charges in the indictment and elements of the crimes with which Rozin was found guilty," rendering Rule 404(b) inapplicable.[366] The evidence, the panel concluded, was part of an "extensive conspiracy[.]"[367] The judges explained that:

> Activities after the filing of the 1998 tax return that were pertinent to proving the conspiracy included, among other things, purchasing LOI policies in December 1999 and then backdating them to 1998, establishing the reinsurance schemes in 1999 and 2000, and preparing and signing tax return forms for 1999 that reported $1.7 million spent on fraudulent LOI policies.[368]

Accordingly, the court found no error[369] and affirmed the defendant's conviction, for this and other reasons.[370]

Similarly, in *United States v. Marrero*,[371] the circuit found no error in the trial court's admission of evidence that defendant Juan Marrero struggled with police when they attempted to arrest him for possession of crack cocaine.[372] Officers began a search for Marrero in his apartment building after they had found crack cocaine residue and a digital scale next to an active burner in his unit.[373] Their search for Marrero ensued and:

> In a common-area laundry room down the hall from the apartment, Trooper Bush discovered Marrero hiding inside of a dryer. Trooper Bush ordered Marrero to emerge, called Trooper Watson into the room, and attempted to handcuff Marrero. At that point, Marrero began to resist arrest by punching and kicking the troopers and trying to run away. In the resulting melee, Marrero—undeterred by multiple stuns from Trooper Bush's taser—managed to pull the troopers into the hall. Sergeant Kenny, who had remained in the apartment to speak with Walters, joined the scuffle upon hearing the troopers' calls for help, and the three officers finally managed to subdue

366. *Id.*
367. *Id.*
368. *Id.*
369. *Id.*
370. *Rozin*, 664 F.3d at 1067.
371. 651 F.3d 453 (6th Cir. 2011), *cert. denied*, 132 S. Ct. 1042 (2012).
372. *Id.* at 460-61, 470-71.
373. *Id.* at 460. The defendant's girlfriend consented to the officers' search of the dwelling. *Id.*

> Marrero. The officers each sustained minor injuries; Marrero emerged with several rug burns on his face, more than a dozen taser stuns, and complaints about pain in his shoulder, which had been injured prior to his encounter with the officers.[374]

Police later recovered over twenty-seven grams of crack cocaine from a nearby washing machine, and more than 200 grams of marijuana from Marrero's apartment.[375] Among the defendant's post-*Miranda* admissions was one that "he had fought the officers because he did not want to go to prison[.]"[376] Reaching a similar conclusion as their counterparts in *Rozin*, a Sixth Circuit panel of Judge Cornelia G. Kennedy, writing for herself and Judge Raymond M. Kethledge,[377] held that the evidence of the defendant's "struggle" did not fall within Rule 404(b)"s ambit.[378] Such evidence was "'inextricably intertwined' with evidence of[] the crime charged[.]"[379] The judges explained that "Marrero's attempt to hide from police officers inside a dryer, the officers' discovery of Marrero, and the ensuing struggle all have a temporal connection to, and completes the story of, the charged offense."[380] Thus, the trial court did not err in admitting the officers' testimony about the struggle, and the court affirmed Marrero's conviction for this and other reasons.[381]

Finally, unlike the Rozin and Marrero courts, a different Sixth Circuit panel in *Clay* found the res gestae exception to be inapplicable.[382] When police located the Grand Prix in a parking lot near Clay's apartment, they found, in nearby bushes, the case for a handgun whose owner was Steve Mosher.[383] Mosher had been the victim of a larceny from his truck, and, in addition to missing the handgun case, Mosher was also missing the handgun that belonged inside the case.[384] Video surveillance of the lot where Mosher had parked his car showed a black man wearing a red-and-white-patterned shirt breaking into the vehicles

---

374. *Id.*
375. *Id.*
376. *Id.*
377. *Marrero,* 651 F.3d at 458. Judge Eric L. Clay would have reversed the defendant's conviction on non-evidentiary grounds. *Id.* at 476-82 (Clay, J., dissenting).
378. *Id.* at 471.
379. *Id.* (quoting United States v. Henderson, 626 F.3d 326, 338 (6th Cir. 2010)).
380. *Id.*
381. *Id.* at 471, 476.
382. *Clay*, 667 F.3d 689. *See supra*, Part IV.F.2.e.
383. *Clay*, 667 F.3d at 692.
384. *Id.*

and walking away with Mosher's handgun case.[385] Importantly, "[i]nside the Grand Prix, officers found a compact disc containing pictures of Clay with friends and family. In several of the pictures, he was wearing a red and white patterned shirt."[386]

To establish the defendant's guilt as to the second count of brandishing a firearm during the carjacking, the prosecution admitted evidence of the theft from Mosher's vehicle.[387] However, in reviewing this trial-court decision, the Sixth Circuit noted that the res gestae exception "contains severe limitations as to 'temporal proximity, causal relationship, or spatial connections' among the other acts and the charged offense."[388] Applying the "severe limitations[,]" it observed that:

> There is no evidence that firmly establishes a relationship between the carjacking and the theft. The gun stolen from Moser's car was never recovered, and nothing confirms that stolen weapon was the gun Abernathy saw with Clay, or the gun used during the carjacking. Without confirmation that the gun is the same, the car theft is neither a prelude to the charged offense, nor probative of it. It does not arise from the same events as the carjacking; in fact, it is a completely separate and distinct offense that is not essential for providing a "coherent and intelligible description of the charged offense."[389]

Furthermore, "the gun has never been found and no such link [between the larceny from Mosher's truck and the carjacking] exists."[390] Accordingly, the trial court erred in admitting the truck-larceny evidence under the res gestae exception.[391] Having found the res gestae exception inapplicable to this evidence, the panel proceeded to consider its admissibility under Rule 404(b).[392]

---

385. *Id.*
386. *Id.* at 691.
387. *Id.* at 698.
388. *Id.* (quoting United States v. Hardy, 228 F.3d 745, 749 (6th Cir. 2000)).
389. *Clay*, 667 F.3d at 698 (quoting MCCORMICK ON EVIDENCE § 190 (6th ed. 2006)).
390. *Id.*
391. *Id.*
392. *Id.* at 700. I discuss Rule 404(b) in Part IV.F.2.e of this Article.

i. Writing a 'Sex Manual': An Admission, Not an 'Other Act' When the Author is on Trial for Sexual Molestation

A recent case before the Michigan Supreme Court illustrates the extent to which courts struggle with their interpretation of Rule 404(b), particularly in sex-offense cases.[393]

Following his convictions for first and second-degree criminal sexual conduct,[394] defendant George Thomas Novak argued that the trial court erred when it admitted a "'sex manual' [—] a fictional story written by defendant, himself, that tended to show his interest in sexual activity with minor children."[395] A two-to-one majority of the court of appeals held that the manual did not trigger application of Rule 404(b) because, in the majority's view, *writing* the manual did not constitute an "act," rather, it constituted the defendant's admission of his interest in sex with minors.[396] For this and other reasons, a *per curiam* panel of Judges Kathleen Jansen and Karen Fort Hood,[397] over Judge Elizabeth L. Gleicher's dissent,[398] affirmed.[399]

The supreme court initially granted the defendant's application for leave to appeal,[400] then vacated that order and denied leave.[401] The concurrence and dissent in the supreme court's ultimate order denying leave revealed sharp disagreements between the court's majority and minority wings.[402] Justice Stephen J. Markman, in an opinion concurring with the court's denial of leave, observed, first, that the prosecution had offered the other-acts evidence for a proper purpose: "In order to prove CSC-II, the prosecutor had to establish that defendant engaged in 'sexual contact,' which is defined as 'intentional touching . . . for the purpose of sexual arousal or gratification[.']"[403] He added, "the fact that defendant had written an incest story involving minor children was highly relevant to, and probative of, whether defendant's touching of the complainant was done for the purpose of sexual arousal or gratification."[404] This

393. People v. Novak, No. 284838, 2010 WL 293005, at * 4 (Mich. Ct. App. Jan. 26, 2010), *appeal granted,* 486 Mich. 1068 (2010), *appeal denied,* 489 Mich. 941 (2011).

394. MICH. COMP. LAWS ANN. §§ 750.520b, 750.520c (West 2010).

395. *Novak,* 2010 WL 293005, at *1.

396. *Id.* at *2.

397. *Id.* at *1.

398. *Id.* at *24-51.

399. *Id.* at *1-23.

400. *Novak,* 486 Mich. at 1068.

401. *Novak,* 489 Mich. at 941.

402. *Id.* at 941-47.

403. *Id.* at 941. (quoting MICH. COMP. LAWS ANN. § 750.520a(q)) (Markman, J., concurring).

404. *Id.* at 942.

testimony also served to rebut defense counsel's theory of mistake or accident—that the minor accuser was "mistaken in her belief that defendant penetrated her anus with his penis and that defendant possibly had accidentally touched her breast."[405]

Addressing the dissent, Justice Markman wrote that Rule 404(b) did not obligate the prosecutor to establish the similarity of defendant's other act of writing the work of fiction to the evidence of his committing the offense "[b]ecause the story here was offered as evidence of intent and the absence of mistake or accident, *rather* than as evidence of a common plan or scheme, distinctive similarity is not required."[406]

Finally, Justice Markman, applying Rule 403's balancing test, explained the evidence was more than "marginally probative."[407] "[T]he fact that defendant wrote a story about an adult male having sexual relations with minor children helped refute defendant's claim that the complainant was mistaken about the touching or, if the touching did take place, that it was accidental."[408]

Justice Marilyn J. Kelly, dissenting, wrote that the court erred in admitting the book and that the error was not harmless.[409] She summarized the book's "graphic" nature:

> [The book] depicts teenagers engaging in sexual behavior and incest. It begins with a teenage brother, sister, and female cousin performing sex acts with each other. Later, the father/uncle character also engages in sex acts with the two teenage girls. The story is highly prejudicial.
>
> The prosecutor brought it up on multiple occasions during trial. Not only did she ask every witness about the story, she quoted lengthy portions of it both during her opening statement and during her closing argument. She had a police detective reread a portion of the story to the jury. She told the jury that the story was a "window into defendant's mind."[410]

Justice Kelly disagreed with Justice Markman, and would have held that the prosecution did not offer the evidence for a proper purpose, as "[i]t did not refute fabrication. Instead, the prosecutor repeatedly used the

---

405. *Id.*
406. *Id.* (citing *VanderVliet*, 444 Mich. at 69).
407. *Novak*, 489 Mich. at 942.
408. *Id.* at 942-43.
409. *Id.* at 943 (Marilyn J. Kelly, J., dissenting).
410. *Id.* at 944.

story as a springboard for broad inferences about defendant's bad character."[411] She added, "[t]the only fact that the story tended to prove was that defendant had a preoccupation with incestuous relationships."[412] In other words, the prosecutor was telegraphing to the jury that the defendant "possessed a morally repugnant character and a lustful disposition."[413]

Turning to the probative-value-against-unfair-prejudice balancing, Justice Kelly opined that the evidence had minimal probative value:

> Many people write fictional fantasies but never act them out. In this case, defendant's fictional story does not track the acts he was accused of performing. As the Court of Appeals dissent observed:
>
> [V]irtually no similarities exist between the sexual acts described in the story and the acts of criminal sexual conduct that defendant allegedly inflicted on [the complainant]. The children described in the story were at least 16-years-old, and most of the story detailed sexual relationships among the children, rather than between the father and his children.[414]

Justice Kelly would have reversed the court of appeals and ordered a new trial.[415] The case against the defendant was "weak[,]" as it relied on a "nine-year-old complainant whose testimony was far from clear. In fact, it was the inherent weakness of her account of events that prompted the prosecutor to rely on defendant's inflammatory fictional story to persuade the jury of defendant's guilt."[416]

h. Statutory Admissibility of Character and Propensity Evidence

Michigan has enacted various statutes that permit courts to admit propensity evidence in certain types of "vulnerable-victim" crimes.[417] I discuss them below.

---

411. *Id.* at 945.
412. *Id.* at 945-46.
413. *Novak,* 489 Mich. at 945-46 (Marilyn J. Kelly, J., dissenting).
414. *Id.* at 946 (quoting *Novak,* 2010 WL 293005, at *40 (Gleicher, J., dissenting)).
415. *Id.* at 946-47.
416. *Id.*
417. *See, e.g.*, MICH. COMP. LAWS ANN. § 768.27a (West 2006).

i. Offenses Against Minors: Section 27a

Section 27a of the Code of Criminal Procedure carves out an exception to Rule 404(b)'s prohibition on propensity evidence, having the effect of permitting evidence to prove an individual's propensity or predispositition to commit sexual misconduct against minors.[418] Similarly, Congress, by statute, amended the federal rules to achieve a similar result, in Rules 414 and 415.[419] In such cases, the statute provides, "evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing *on any matter to which it is relevant.*"[420] To emphasize that section 27a is an exception to the general prohibition on propensity evidence, the court of appeals has held: "'A defendant's propensity to commit criminal sexual behavior can be relevant and admissible under the statutory rule to demonstrate the likelihood of the defendant committing criminal sexual behavior toward another minor.'"[421]

Subsequent to the *Survey* period, the Michigan Supreme Court specifically held, in *People v. Watkins*,[422] that Section 27a trumps Rule 404(b), and that "[b]ecause a defendant's propensity to commit a crime makes it more probable that he committed the charged offense, MCL 768.27a permits the admission of evidence that MRE 404(b) precludes."[423] Evidence of:

> [A] defendant's character and propensity to commit the charged offense is highly relevant because "an individual with a substantial criminal history is more likely to have committed a crime than is an individual free of past criminal activity." Indeed, "it is because of the human instinct to focus exclusively on the relevance of such evidence that the judiciary has traditionally limited its presentation to juries." Thus, the language in MCL 768.27a allowing admission of another listed offense "for its bearing on any matter to which it is relevant" permits the use of evidence to show a defendant's character and propensity to

418. MICH. COMP. LAWS ANN. § 768.27a (West 2012).

419. FED. R. EVID. 414, 415.

420. MICH. COMP. LAWS ANN. § 768.27a(1) (West 2012) (emphasis added).

421. People v. Brown, 294 Mich. App. 377, 386; 811 N.W.2d 531 (2011), *appeal denied,* 492 Mich. 852, 817 N.W.2d 77 (2012) (quoting People v. Petri, 279 Mich. App. 407, 411; 760 N.W.2d 882 (2008)).

422. 491 Mich. 450; 818 N.W.2d 296 (2012).

423. *Id.* at 470.

> commit the charged crime, precisely that which MRE 404(b) precludes.[424]

Furthermore, the *Watkins* court held that while Section 27a evidence remains subject to Rule 403 balancing,[425] "courts must *weigh the propensity inference in favor of the evidence's probative value* rather than its prejudicial effect. That is, other-acts evidence admissible under MCL 768.27a may not be excluded under MRE 403 as overly prejudicial merely because it allows a jury to draw a propensity inference."[426] Finally, the court, in an opinion by Justice Brian K. Zahra on behalf of himself, Chief Justice Robert P. Young Jr., and Justices Stephen J. Markman and Mary Beth Kelly,[427] held that while a court may not exclude Section 27a propensity evidence on Rule 403 grounds because it constituted propensity evidence, such evidence could be excludable in light of, among many reasons:

> (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony.[428]

Prior to the *Watkins* decision, in *People v. Brown*,[429] the six-year-old victim disclosed to a friend that her mother's boyfriend, Bryan Brown, to whom the victim referred as "dad," "made her 'suck his wiener every night' and that he 'videotapes them, like, doing it.'"[430] The friend's mother telephoned police, who visited the defendant's home to investigate, and therein found the young girl sleeping in the defendant's bed while wearing only underpants.[431] While executing a search warrant, police found the defendant in possession of videos containing child

---

424. *Id.* (quoting People v. Pattison, 276 Mich. App. 613, 620; 741 N.W.2d 558 (2007); People v. Allen, 429 Mich. 558, 566; 420 N.W.2d 499 (1988)).

425. *Id.* at 456.

426. *Id.* at 487 (emphasis added).

427. *Id.* at 496.

428. *Watkins*, 491 Mich. at 488.

429. 294 Mich. App. 377; 811 N.W.2d 531 (2011), *appeal denied,* 492 Mich. 852, 817 N.W.2d 77 (2012).

430. *Id.* at 380.

431. *Id.*

pornography.[432] Furthermore, "[a]t trial, [the victim,] MO[,] testified that defendant put his 'private parts' in hers and that it felt bad when he did. MO indicated this happened in her mother's bed. However, MO could not recall ever seeing defendant with a camera and denied making a movie with defendant."[433]

The court admitted the defendant's various convictions for sexual misconduct involving minors from Illinois.[434] The court also permitted a former gymnastics student to testify that, when she was five years old, the defendant, her coach, "would grab her and pull her close and then put his hand underneath her leotard and touch her vaginal area on the outside."[435] The defendant admitted the Illinois conduct but denied that he committed the pending charge.[436] The jury convicted Brown of first-degree criminal sexual conduct.[437]

Citing Section 27a, the appellate panel of Judges Donald S. Owens, Kathleen Jansen and Peter D. O'Connell[438] found no error in the trial court's admission of this propensity evidence.[439] While the court acknowledged that the sexual misconduct toward the prior and the most-recent victims may have been dissimilar, Section 27a contained no requirement of "similarity."[440] Relatedly, the fact that eleven years separated the two acts of misconduct had no bearing on the prior act's admissibility, as "MCL 768.27a does not contain a temporal limitation. The remoteness of the other act affects the weight of the evidence rather than its admissibility."[441] For this and other reasons, the court of appeals affirmed the defendant's conviction.[442] The Supreme Court denied leave to appeal.[443]

ii. Other Acts of Domestic Violence

The Legislature enacted Section 27b of the Code of Criminal Procedure, which provides that, in criminal domestic-violence actions, "evidence of the defendant's commission of other acts of domestic

---

432. *Id.* at 381.
433. *Id.*
434. *Id.*
435. *Brown*, 294 Mich. App. at 381.
436. *Id.* at 381-82.
437. *Id.* at 379 (citing MICH. COMP. LAWS ANN. § 750.520b(1)(a) (West 2008)).
438. *Id.* at 378.
439. *Id.* at 386.
440. *Id.* at 386-87.
441. *Brown*, 294 Mich. App. at 385 (citing People v. McGhee, 268 Mich. App. 600, 611-12; 709 N.W.2d 595 (2005)).
442. *Id.* at 392.
443. *Brown*, 492 Mich. 852.

violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under MRE 403."[444] Furthermore, "[p]rior acts of domestic violence can be admissible under MCL 768.27b, regardless of whether the acts were identical to the charged offense."[445]

Subsequent to the *Survey* period, the supreme court issued its opinion in *People v. Mack*, in which it held that, in a similar manner as Section 27a trumps Rule 404(b)'s prohibition on propensity evidence in child-molestation cases, Section 27b trumps Rule 404(b)'s prohibition on propensity evidence in domestic-violence actions.[446]

iii. Rape-Shield Statutes and Rules

I discuss the Michigan rape-shield statute, the federal rape-shield rule, their purpose and their constitutional implications in Part XII.A.1 of this article.

j. Roadmap for Admissibility of Other Acts of Conduct

Is the other act of conduct admissible in a given circumstance? The chart on the following page may be of assistance in reaching a determination.

---

444. MICH. COMP. LAWS ANN. § 768.27b(1) (West 2012). Within the statute's meaning, domestic violence includes:

> (i) Causing or attempting to cause physical or mental harm to a family or household member.
>
> (ii) Placing a family or household member in fear of physical or mental harm.
>
> (iii) Causing or attempting to cause a family or household member to engage in involuntary sexual activity by force, threat of force, or duress.
>
> (iv) Engaging in activity toward a family or household member that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested.

MICH. COMP. LAWS ANN. § 768.27b(5)(a). Family or household members include spouses and former spouses, individuals who share or previously shared a dwelling, individuals who have a child in common and present and former dating partners. MICH. COMP. LAWS ANN. § 768.27b(5)(b).

445. People v. Meissner, 294 Mich. App. 438, 452; 812 N.W.2d 37 (2011), *leave denied*, 491 Mich. 938; 815 N.W.2d 126 (2012).

446. People v. Mack, 493 Mich. 1; 825 N.W.2d 541 (2012) ("We hold that the reasoning of *Watkins* fully controls in this case."), *aff'g*, No. 295929, 2011 WL 1519278 (Mich. Ct. App. Apr. 21, 2011).

1. Is the "other act" relevant to proving a fact at issue in the case? ▶	a. If not, **STOP**. Do **NOT** admit. b. If so, **CONTINUE** to No. 2.	
2. Do any of the special exceptions that allow for character evidence permit its introduction (*e.g.*, MCL sections 768.27a and 27b, or FRE 413-15)? ▶	a. If not, **CONTINUE** to No. 3. b. If so, **ADMIT** the evidence, subject to Rule 403 balancing. ▶	**Caveat:** Recall that, under section 27a, prior acts of sexual misconduct that establish an individual's predisposition bolster the evidence's probative value, and not its prejudicial effect, under Rule 403 balancing.
3. Assuming the evidence is relevant to prove the party's character, is it also relevant, to some degree, for a non-character purpose, such as to prove motive or intent? ▶	a. If not, **STOP**. Do **NOT** admit. b. If so, **CONTINUE** to No. 4.	
4. Subject the evidence to Rule 403 balancing: Does the unfair prejudicial	a. If not, **ADMIT**. b. If so, do **NOT**	

effect[447] (usually, the extent to which the evidence is relevant to an impermissible character purpose) *substantially* outweigh its probative value (its relevance to establish a permissible *non*-character purpose)? ▶ admit.

G. Evidence of Compromise, Settlement and/or to Pay Medical Expenses

The federal and state rules both disallow a party's use of an adverse party's offer of settlement, or statements the adverse party made during settlement negotiations, to prove the validity or invalidity of a claim, or to prove the amount for which the offeror is liable.[448] In plain English, this means party P cannot show that party D is liable for X amount because D offered to settle the case, nor may it use statements D made during settlement negotiations as substantive evidence of D's liability. Furthermore, a party may not prove or disprove liability with evidence that the opposing party settled with a non-party.[449] However, the federal and state rules diverge slightly in that the federal rules add that such evidence of compromise or statements in settlement negotiations is also inadmissible "to impeach by a prior inconsistent statement or a contradiction."[450]

First, such evidence "is not relevant to a defendant's liability since it may be 'motivated by a desire for peace rather than from a concession of the merits of the claim[.]'"[451] Second, it "promotes the public policy favoring the compromise and settlement of disputes," . . . "[b]y [facilitating] full and open disclosure" during settlement talks.[452]However, the rules do not bar such evidence for purposes "such as proving a witness's bias or prejudice, negating a contention of undue

447. In Michigan cases, for the purpose of Rule 403 balancing, the character and/or propensity value of the Section 27a evidence weighs in favor of the evidence's probative value, not its prejudicial effect. *Watkins*, 491 Mich. at 487.

448. FED. R. EVID. 408(a); MICH. R. EVID. 408.

449. Windemuller Elec. Co. v. Blodgett Mem'l Med. Ctr., 130 Mich. App. 17, 23; 343 N.W.2d 223 (1983).

450. FED. R. EVID. 408(a).

451. *Windemuller,* 130 Mich. App. at 21.

452. *Id.* (quoting United States v. Contra Costa Cnty. Water Dist., 678 F.2d 90, 92 (9th Cir. 1982)).

delay, or proving an effort to obstruct a criminal investigation or prosecution."[453]

Similarly, Michigan's Rule 409 provides that: "[e]vidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury."[454] The policy underlying this rule is that "'such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person.'"[455] However, unlike Rule 408, Rule 409 "does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay."[456]

1. Settlement Offers by State Actors in Malicious-Prosecution Actions

In *Arnold v. Wilder*, plaintiff Maria Arnold sued police officer James Wilder for false arrest, malicious prosecution, battery, and intentional infliction of emotional distress, as well as Wilder's municipal employer for negligent hiring, and vicarious liability for Wilder's alleged state law torts.[457]

The plaintiff testified that she was at her home in Kingsley, Kentucky, on October 25, 2003, when she encountered the defendant officer.[458]

> It appears that Arnold knew the purpose of Wilder's visit even before she spoke with him, as [Phyllis Ann Breuer, a neighbor and Kingsley's mayor] had called the police several times in the past to complain that neighborhood children, including Jacob[, one of her sons], were "running through the yards, jumping over fences, [and] running through flower beds." D.J. Reynolds (Reynolds), the [local police chief] had gone to Arnold's house twice prior to October 25, 2003, to explain Breuer's complaints to her "and [to] let her know that the boys were going to have to stop doing that." On October 25, Breuer again contacted the

453. FED. R. EVID. 408(b); *see also* MICH. R. EVID. 408.

454. MICH. R. EVID. 409; *see also* FED. R. EVID. 409.

455. FED. R. EVID. 409 advisory committee's notes on proposed rules (quoting Karl H. Larsen, *Admissibility of Evidence Showing Payment, or Offer or Promise of Payment, of Medical, Hospital, and Similar Expenses of Injured Party by Opposing Party*, 65 A.L.R. 3d 932 (1975)).

456. FED. R. EVID. 409 advisory committee's note.

457. Arnold v. Wilder, 657 F.3d 353, 362 (6th Cir. 2011).

458. *Id.* at 358.

> police—by calling Reynolds and leaving a message—and complained that [children] "were running through yards and flower beds and hopping over fences [and] needed to be brought under control." Reynolds was off-duty when he received the message, so he called Wilder—the on-duty officer—and told Wilder to "respond to the call and stop the boys from running through the yards."[459]

Wilder found the children, Arnold's son and two of his friends, and delivered them to the plaintiff's house, and told Arnold he wanted to "talk to you first."[460] Arnold told the children to go inside and instructed her son's friends to telephone their mothers, whereupon she noticed the officer growing "angrier and angrier" for no discernable reason.[461] At this juncture, Wilder came toward Arnold "and started to turn around and get between [Arnold] and the house, blocking her from getting inside the house. Arnold again told the boys to go inside and get a telephone, instructing Jacob to "call papa" because she wanted her father "to come and be with the kids and help [her]." Wilder then told her, "Your daddy can't help you now."[462]

The incident soon escalated. As the appellate panel observed:

> The next thing Arnold remembered was Wilder knocking her to the ground. Once she was on the ground, the children ran out of the house and, as Arnold attempted to tell them "to back off [and] . . . go back to the house," Wilder put Arnold into a chokehold and began to drag her across the street to his police car. Caroline followed Wilder and Arnold, shouting "I don't have a daddy. I don't have a daddy." The other children also followed Wilder and Arnold across the street. At no point did Wilder tell Arnold that she was under arrest or that he was going to arrest her.[463]

> Once they were at Wilder's police car, Arnold asked Wilder to "please wait until somebody gets here for the kids." Instead, Wilder shoved her in the back of the car and, when she was inside the car, sprayed her with pepper spray. Arnold had no memory of struggling with Wilder or kicking him during this

459. *Id.*
460. *Id.*
461. *Id.*
462. *Id.*
463. *Arnold*, 657 F.3d at 358-59.

> time. Wilder closed the car door, locking Arnold inside. As Wilder walked around to the front of the car, one of Jacob's friends ran up to the car and opened the door, letting Arnold out.[464]

Arnold ran inside the home and shut the door, while Wilder contacted his colleagues on the force, reporting that "a prisoner had escaped from his car and had gone into the house and locked the house and was not coming out."[465] Arnold's brother, John DeCamillis, testified that soon after he arrived on the scene, he "heard Wilder say 'I'm going to lock this fucking cunt up . . . . These people are going to learn to respect me.'"[466]

Arnold eventually exited her home peacefully, and Wilder transported her to the police department, where, Arnold testified, she "heard Wilder ask another officer; 'How can I make this a felony[?]'"[467]

Wilder, on the other hand, testified to a substantially different version of the events. The officer said he was attempting to investigate the complaint by talking to the children, but the plaintiff obstructed his attempts to do so, and "[s]he kept telling me that she wasn't going to let me talk to the children."[468] After Arnold grew "louder and more boisterous," and Wilder held out his handcuffs and warned her that her conduct could land her in jail.[469] Clearly, whatever warning had no effect, and the two fell to the ground as Arnold resisted arrest.[470]

Wilder testified that when he got Arnold and into the police car he was unable to shut the door because Arnold repeatedly kicked the door open, and eventually kicked him in the face, knocking his glasses sideways. As a result, Wilder sprayed Arnold with pepper spray while she was in the back of his police car to gain control of her and to stop her from kicking him.[471]

The local authorities charged Arnold with various misdemeanor and felony offenses, including disorderly conduct, assault of a police officer, resisting arrest and, finally, escape.[472] Almost four months later, they offered to dismiss all criminal charges if Arnold promised not to "initiate, pursue, or otherwise become involved in a civil or criminal

---

464. *Id.* at 358-59.
465. *Id.* at 359.
466. *Id.* at 360.
467. *Id.*
468. *Id.* at 361.
469. *Arnold*, 657 F.3d at 361.
470. *Id.*
471. *Id.*
472. *Id.* at 362.

action in any form against Strathmoor [the officer's employer] . . . or against Officer James Wilder."[473] The plaintiff refused the order and proceeded to trial on the misdemeanor counts (the state and/or city had dropped the felony charges), where Arnold prevailed.[474]

Arnold then instituted a civil suit against multiple defendants, which eventually proceeded to a jury trial against Wilder and his municipal employer.[475] A jury found the defendants liable for $57,400 in actual damages and $1 million in punitive damages, an award the defendants appealed.[476] Following the verdict, the trial court remitted the punitive-damages award from $1 million to $229,600.[477] Arnold appealed the reduction in damages, while the defendants cross-appealed.[478]

On appeal, the defendants contended, inter alia, that the trial court erred in admitting a draft settlement agreement, and in permitting the plaintiff to testify that her criminal defense attorney urged her to sign a "Covenant Not to Sue" and advised her that:

> [H]e could not guarantee that [she] would not spend some time in jail or have some fine . . . , [and] that [she] needed to seriously think about the fact that if [she] went through with the criminal case and did not consent not to sue . . . [she] could end up having to serve jail time.[479]

Addressing the defendants' objection in the trial court, Arnold's counsel responded that "the 'fact that she was looking at originally two felonies, subsequently the felonies were dismissed, and she then was facing misdemeanors, actually went to trial on these misdemeanor charges, all that evidence [went] to her damages [with respect to her] . . . emotional distress claims.'"[480]

The appellate panel of Judge Helene N. White, writing for herself and Judges Damon J. Keith and Julia Smith Gibbons,[481] agreed with the plaintiff's contention that the settlement offer was relevant to prove that the arresting officer, Wilder:

---

473. *Id.*
474. *Id.*
475. *Arnold*, 657 F.3d at 361.
476. *Id.*
477. *Id.* at 362.
478. *Id.* at 363.
479. *Id.* at 366-67.
480. *Id.* at 367.
481. *Arnold*, 657 F.3d at 356.

> [P]articipated in the process of settling Arnold's criminal charges *—he was present at the settlement discussions and his name was on the Covenant*—thereby potentially establishing an element of Arnold's malicious prosecution claim, and that Arnold suffered emotional distress in deciding to proceed to trial in light of the charges she was facing and the recommendations of her attorney regarding the Covenant.[482]

Importantly, the panel noted, the covenant "did not concern the settlement of civil claims, which 'the policy behind Rule 408 seeks to encourage.'"[483] With an apparent nod to the "exceptions," provision of Rule 408(b), the panel concluded the trial court did not admit the settlement for an impermissible purpose of evidencing the defendants' substantive liability, and affirmed the judgment, although it remanded the matter to the trial court to reconsider the amount of punitive damages.[484]

---

482. *Id.* at 367 (emphasis added).

483. *Id.* (quoting United States v. Logan, 250 F.3d 350, 367 (6th Cir. 2001)). I disagree on this point, as it appears the covenant was the authorities' proposal to settle both *criminal and civil claims*, which the officials certainly would have expected given the circumstances and allegations in this case. Importantly, Rule 410 specifically provides that:

> In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:
> . . . (4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

FED. R. EVID. 410(a); *see also* MICH. R. EVID. 410(a). Reading Rules 410 and 408 together, I cannot escape the conclusion that admitting the settlement agreement frustrated the policy underlying the rules: encouraging resolution of criminal and civil cases by "[b]y [facilitating] 'full and open disclosure' during settlement talks." *Windemuller*, 130 Mich. App. at 21 (quoting *Contra Costa*, 678 F.2d at 91). While the settlement offer may have been admissible for one purpose (to establish the plaintiff's emotional trauma), it was inadmissible for another purpose (to prove the defendant's liability), and here there appears to be a great danger that a jury would consider the defendant's offer as evidence that it knew it had done something wrong and sought to minimize its losses. Accordingly, with hindsight, the trial judge, should have excluded the settlement offer, if not on Rule 408 grounds, then on the grounds that "its probative value [wa]s substantially outweighed by a danger of . . . confusing the issues [and/or] misleading the jury[.]" FED. R. EVID. 403.

484. *Arnold*, 657 F.3d at 367-72.

2. Evidence of an Insurer's Initial Payments to the Insured to Establish Why the Plaintiff Sought, but Later Discontinued, Medical Care

Abir Chouman and her husband, Abdul Aziz Ajami, sued their no-fault automobile insurer, Home Owners Insurance Company, for personal-injury benefits stemming from injuries they sustained after another driver rear-ended them.[485] The defendant-insurer appealed after a judgment in Chouman's favor.[486]

Home Owners' first argument on appeal was that the trial court erred in admitting evidence that the insurer initially paid personal-injury-protection benefits to the plaintiffs, but later terminated the payments.[487]

The defendant's payment of benefits to the plaintiffs was not inadmissible, the appellate panel held, as Chouman:

> [R]eceived extensive medical treatment while defendant was paying her medical bills, but she mostly stopped receiving medical treatment thereafter. It was critical for plaintiffs to explain why Chouman discontinued much of her medical treatment, in light of a possible argument that Chouman had discontinued treatment because she no longer considered it necessary.[488]

Accordingly, such evidence was "highly and directly relevant to the underlying question of whether Chouman suffered a serious impairment of body function because of the accident."[489] Writing for the panel, Judge Christopher M. Murray,[490] held that the court did not admit the evidence of payments for the impermissible purpose of establishing the defendant's liability, but rather for the permissible purpose of establishing that Chouman suffered an injury.[491] On remand, the court held that the "plaintiffs are entitled to fully explain why Chouman discontinued medical treatments, but they may not introduce evidence *that it was defendant who had previously been paying*."[492]

---

485. Chouman v. Home Owners Ins. Co., 293 Mich. App. 434, 436; 810 N.W.2d 88 (2011).

486. *Id.* at 436.

487. *Id.* at 437.

488. *Id.* at 437-38.

489. *Id.* at 438.

490. *Id.* at 435.

491. *Chouman*, 293 Mich. App. at 438.

492. *Id.* (emphasis added). Bearing in mind the purpose behind this rule, it is hard to understand how a jury could *not* conclude that the insurer was liable after hearing

Second, the defendant insurer argued that the trial court erred in admitting evidence that the defendant, as was their right under the policy, consented to the plaintiffs' settlement with the at-fault driver.[493] Here, the court held, "it does not appear that defendant's consent to the settlement was, itself, a compromise of a dispute defendant had with any party or nonparty[,]" and thus concluded that Rule 408 did not bar the trial court's admission of defendant's consent to plaintiff's settlement with the driver.[494] However, the panel immediately considered the policy considerations underlying Rule 408, and observed that the defendant's:

> [C]onsent to the compromise may have been the result of the same wide range of possible motivations that might drive an actual settlement. Additionally, the contract standard related to defendant's approval of the Hamadi settlement differs completely from the substantial impairment standard that plaintiff was required to prove in the case before the jury.[495]

Accordingly, the panel held that the trial court should have excluded such evidence on the grounds that "its probative value is substantially outweighed by the danger of unfair prejudice, confusion, redundancy, or other related concerns."[496] Nevertheless, the court held that such error was harmless.[497] The panel then reversed the judgment in plaintiff's favor—holding that the trial judge had erroneously directed a partial directed verdict in plaintiff's favor—and remanded the case to the trial court for a retrial.[498]

---

testimony that the defendant initially paid for the plaintiff's medical care. That is, evidence that the insurer initially covered the plaintiff's medical care is *highly* prejudicial. The appellate opinion is silent as to whether the insurer's theory of the case was that the plaintiff discontinued medical care because it was no longer necessary. Given the prejudicial impact of the evidence of payments, a more reasonable approach would be for the trial court to exclude the evidence *unless the insurer opened the door* by insinuating that the plaintiff terminated the care because it was medically unnecessary, in which case it could admit the payments as rebuttal evidence, casting any limitations of Rule 409 aside.

493. *Id.* at 438.

494. *Id.* at 439.

495. *Id.* (footnote omitted).

496. *Id.* at 439-40 (citing MICH. R. EVID. 403).

497. *Chouman*, 293 Mich. App. at 440.

498. *Id.* at 444-45.

V. PRIVILEGES

Chief Justice Warren Burger wrote, at the height of the Watergate scandal, that privileges, as "'exceptions to the demand for every man's evidence[,] are not lightly created nor expansively construed, for they are in derogation of the search for truth.'"[499] Privileges generally exist to further public policy of encouraging certain relationships, as "public policy requires the encouragement of the communications without which these relationships cannot be effective."[500]

A party's proper invocation of a privilege, similar to a court's suppression order, has the enormous impact of rendering otherwise competent, relevant and admissible evidence inadmissible.[501]

In Michigan, courts look to the common law for the parameters of privileges, unless court rule or legislative statutes otherwise modify those privileges.[502] It is against this backdrop that the Michigan Court of Appeals and the U.S. Supreme Court considered two cases concerning the scope, application and meaning of two privileges—the privilege between religious ministers and their congregants, and between attorneys and their clients.

A. The Clerical, or Priest-Penitent, Privilege

Michigan law provides that communications between clergy members and their congregants "are hereby declared to be privileged and confidential when those communications were necessary to enable . . . members of the clergy . . . to serve as such[.]"[503] This provision, part of the Code of Criminal Procedure,[504] is substantially similar to Section

499. Howe v. Detroit Free Press, 440 Mich. 203, 228 n.1; 487 N.W.2d 374 (1992) (Boyle, J., concurring in part and dissenting in part) (quoting United States v. Nixon, 418 U.S. 683, 710 (1974)).

500. *Id.* at 211 (quoting CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 72, at 170-171 (3d ed. 1984)).

501. MICH. R. EVID. 402 (stating that "all relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court."); MICH. R. EVID. 501 (noting that "privilege is governed by the common law, except as modified by statute or court rule.").

502. MICH. R. EVID. 501. In federal cases, it is the federal courts' interpretation of the common law which sets the parameters of those privileges. FED. R. EVID. 501 (first sentence). Federal courts will only defer to state law of privileges—or state interpretation of common-law privileges—in civil cases, and only "regarding a claim or defense for which state law supplies the rule of decision." *Id.*

503. MICH. COMP. LAWS ANN. § 767.5a(2) (West 2012).

504. MICH. COMP. LAWS ANN. §§ 760.1–777.69 (West 2012).

2156 of the Michigan evidentiary statutes,[505] which provides that "[n]o minister . . . shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules or practice of such denomination."[506]

Interpreting the meaning of these two provisions, the Michigan Court of Appeals found them directly applicable in ruling that an accused child molester's purported confession to his minister was inadmissible under the clerical privilege.[507]

Two years after the incident, which occurred when the victim was nine, she told her mother that her cousin, twelve years old at the time of the incident, shared a bed with her, pulled down her pants, penetrated her rectum, and threatened to kill her if she disclosed the incident.[508]

When she alerted her mother, the mother contacted the local police department as well as the pastor of her church, John Vaprezsan, with whom the defendant's mother worked as a church secretary.[509] The pastor summoned the defendant and his mother to an 11 p.m. meeting after her work shift ended, and disclosed the events at a preliminary examination[510] in the district court:

> [Vapreszan] testified that he called defendant and K[, the defendant's mother,] into his office without forewarning them of the topic for discussion. Vaprezsan admitted that defendant and K likely believed that they were being summoned for counseling on some issue. In response to defense counsel's inquiry, the pastor explained that he requested K [the mother]'s presence during the meeting even though it was not required because defendant was a minor and it was "the right thing to do."

505. MICH. COMP. LAWS ANN. §§ 600.2101-600.2169 (West 2012).

506. MICH. COMP. LAWS ANN. § 600.2156 (West 2012).

507. People v. Bragg, 296 Mich. App. 433, 433; 824 N.W.2d 170 (2012).

508. *Id.* at 173.

509. *Id.* at 174.

510. *Id.* At a preliminary examination, the prosecutor bears the burden of presenting "'enough evidence on each element of the charged offense to lead a person of ordinary prudence and caution to conscientiously entertain a reasonable belief of [the defendant's] guilt.'" People v. Cohen, 294 Mich. App. 70, 74; 816 N.W.2d 474 (2011) (quoting People v. Perkins, 468 Mich. 448, 452; 662 N.W.2d 727 (2003)). A person facing a felony charge in Michigan has a right to a preliminary examination in the district court before a case can proceed to trial in the circuit court. MICH. COMP. LAWS ANN. § 766.1 (West 2012). *See also* People v. Reno, 85 Mich. App. 586, 588; 272 N.W.2d 144 (1978) (holding that defendants have no right to preliminary examinations in misdemeanor cases).

> Once inside his office, Vaprezsan shared the information he learned from the victim "to find out . . . from [defendant] . . . if this did occur" and, if so, "to deal with . . . the aftermath." During the conversation, Vaprezsan was "upset" and "very controlling" because he "was angry at the sin and what sin causes." Vaprezsan denied "screaming" at defendant, claiming that he approached the situation as "a loving broken hearted pastor." The first step "to get some help" was to uncover the truth. Vaprezsan testified that defendant initially denied the allegations. Vaprezsan "reasoned with" defendant, asking him why his cousin would fabricate such a story. Defendant allegedly broke down, began to weep and admitted to the accuracy of the details provided by the victim. Vaprezsan consoled defendant "with [his] spirit, with [his] attitude, with [his] love for [defendant]." During this interview, K remained in the room, "[q]uiet and weeping." When the interview was over, Vaprezsan prayed with defendant and K, "I asked God - - to help us through this and help [defendant]."[511]

The defendant's mother disputed the pastor's version of the events, explaining that "Vaprezsan called her and defendant into his office where he accused defendant of touching the victim inappropriately. K asserted that Vaprezsan stood close to defendant, yelling in his face and claiming to know his guilt. K stressed that defendant never confessed to any crime."[512]

The district court found probable cause to bind over the defendant for trial in the circuit court, having denied Bragg's motion to exclude Vaprezsan's testimony as to the alleged confession.[513]

The circuit judge hearing the case, however, made a pretrial ruling to suppress the confession on the ground of clerical privilege.[514] In doing so, the judge observed "the fact that his mother was present, or the fact that anybody else was present, the fact that the defendant did not go to the Pastor on his own initiative, none of those things I think are relevant."[515] The judge, Cynthia Gray Hathaway, added, "[w]hat's relevant is that the Pastor, I'm sure, called in—in fact he testified that he wanted to counsel and discuss this sin. And that's all very religious in

511. *Bragg*, 296 Mich. App. at 175.
512. *Id.* at 176.
513. *Id.*
514. *Id.*
515. *Id.* at 177.

nature."[516] The circuit court stayed the case pending the prosecutor's interlocutory application for leave to appeal.[517]

A unanimous panel of three judges—Elizabeth L. Gleicher, Patrick M. Meter and Pat M. Donofrio—affirmed the circuit court decision in an opinion by Judge Gleicher.[518] In commencing its analysis, the panel explained that "[u]nlike other evidentiary rules that exclude evidence because it is potentially unreliable, privilege statutes shield potentially reliable evidence in an attempt to foster relationships[.]"[519] In other words, "[w]hile the assurance of confidentiality may encourage relationships of trust, privileges inhibit rather than facilitate the search for truth."[520]

Judge Gleicher explained that the relevant statutes—MCL sections 600.2156 (the evidentiary statute pertaining to the clerical privilege) and 767.5a(2) (the criminal code provision pertaining to the clerical privilege) were closely connected: "[S]tatutes that relate to the same subject or that share a common purpose are *in para materia* [sic] and must be read together as one."[521] Having said that, the court noted that section 2156 precluded a priest from disclosing the subject of a certain statement "to anyone, not simply before a court of law."[522] On the other hand, Section 5a(2) covered "statements made by certain persons within a protected relationship such as . . . priest-penitent . . . which the law protects from forced disclosure *on the witness stand*[.]"[523] Thus, the panel concluded:

> Read together and harmonized, the more specific MCL 767.5a(2) creates an evidentiary privilege, precluding the incriminatory use of "any communication" made by a congregant to his or her cleric when such communication was "necessary to enable the" cleric "to serve as such" cleric. That statute governs the use of a defendant's statements against him or her in court. MCL 600.2156 more broadly precludes a cleric from disclosing certain

516. *Id.*

517. *Bragg*, 296 Mich. App. at 177.

518. *Id.* at 189.

519. *Id.* at 178 (quoting People v. Stanaway, 446 Mich. 643, 658; 521 N.W.2d 557 (1994)).

520. *Id.* at 445-46 (quoting *Stanaway*, 446 Mich. at 658).

521. *Id.* at 451 (quoting People v. Buehler, 477 Mich. 18, 26; 727 N.W.2d 127 (2007)).

522. *Id.* at 452.

523. *Bragg*, 296 Mich. App. at 452-53 (quoting BLACK'S LAW DICTIONARY 1198 (6th ed. 1990)) (emphasis added).

> covered communications in other situations, not limited to the courtroom. It does not qualify as an evidentiary privilege.[524]

Furthermore, Section 5a(2), unlike Section 2156, did not limit its scope to "confessions[,]" thus "it is irrelevant whether defendant's statements to [Pastor] Vaprezsan fall within the definition of a confession."[525] The court then considered whether Section 5a(2) applied to Bragg's statement to his pastor.[526] Under the statute, the privilege covers only those communications that are "necessary to enable" the minister to serve in his capacity.[527] Ruling on issue of first impression in Michigan courts, the court held that "a communication is necessary to enable a cleric to serve as a cleric if the communication serves a religious function such as providing guidance, counseling, forgiveness, or discipline."[528]

Applying this interpretation to the facts of the case, the panel explained that the defendant's statement to his pastor:

> [W]as necessary to enable Vaprezsan to serve as a pastor because defendant communicated with Vaprezsan in his professional character in the course of discipline enjoined by the Baptist Church.
>
> The communication between defendant and Vaprezsan served a religious function—it enabled Vaprezsan to provide guidance, counseling, forgiveness, and discipline to defendant. Vaprezsan testified that he wanted "to get [defendant] some help," and the first step necessitated that defendant admit his actions. Vaprezsan averred that he "consoled" defendant and counseled him as "a loving broken hearted minister."
>
> Vaprezsan also spoke with defendant in his "professional character" as a pastor. Vaprezsan explicitly stated that he "interrogate[d]" the defendant "[i]n [his] role as a pastor." Once Vaprezsan convinced defendant to speak about the sexual assault, the pastor prayed with defendant. This was not a secular conversation. If Vaprezsan had not been a pastor, the

524. *Id.* at 453.
525. *Id.* at 454.
526. *Id.*
527. *Id.* (quoting MICH. COMP. LAWS ANN. § 767.5a(2) (West 2012)).
528. *Id.* at 455. The court discussed various federal and state cases that guided this determination. *Id.* at 455-66.

> communication would not have occurred. Because of Vaprezsan's authority as the church pastor, he was able to summon defendant and his mother to the church office and expect their attendance. Inside the pastor's office, the trio did not discuss secular topics such as K.'s employment at the church. They spoke only of the victim's accusation that defendant had committed a sin and criminal act against her.
>
> The communication was also made in the course of discipline enjoined by the Baptist Church. Vaprezsan learned during his religious training that confidential communication is essential to create trust between congregants and their minister. The Baptist Church taught Vaprezsan that "[t]here's no need in others knowing personal matters, that are discussed with" their pastor. Vaprezsan testified that under Baptist doctrine, his communication with defendant would be considered confidential, and yet Vaprezsan claimed that sharing defendant's communication with the police and the victim's family did not violate that confidence. Vaprezsan denied that praying with his congregants was part of his "duties as a pastor" of the Baptist Church, instead characterizing his act of praying with defendant as being "part of what's right," and "very biblical." Vaprezsan also testified that providing counseling and guidance services are a part of his role as a Baptist minister.[529]

It mattered not, the panel explained, that the pastor initiated the conversation, as the statute "extends its privilege to covered 'communications,' not just confessions.[530] The term 'communication' in no way suggests that the congregant must initiate the conversation in order for the privilege to apply."[531] The identity of the person who initiated a clerical communication is irrelevant to a court's consideration of the clerical privilege's application.[532]

Finally, the court considered whether the presence of Bragg's mother at the meeting with Vaprezsan constituted a waiver of privilege.[533] The court noted the privilege's "holder may waive it 'through conduct that would make it unfair for the holder to insist on the privilege

529. *Bragg*, 296 Mich. App. at 455.
530. *Id.*
531. *Id.* at 466-67.
532. *Id.*
533. *Id.* at 467.

thereafter.'"[534] The panel relied upon precedent set in 1920 for the proposition that the holder "may waive the cleric-congregant privilege by 'giving evidence of what took place at the confessional,' . . . or sharing the content of the otherwise privileged communication with a third party."[535]

That said, "Michigan courts have similarly rejected blanket policies under which the presence of a third party automatically waives a privilege."[536] The panel thus concluded:

> K. [the mother]'s presence does not destroy the confidentiality of the conversation between defendant and Vaprezsan. Defendant was a minor when Vaprezsan summoned him and K. to the church office. If the claimed privilege related to the doctor-patient or attorney-client relationship, the presence of a minor patient or client's parent would certainly be deemed necessary and would not vitiate the privilege. So too with the cleric-congregant privilege. As defendant's parent, K. [the mother] could sustain defendant during this difficult conversation. Moreover, there is no record indicating that defendant, or even Vaprezsan, believed K.'s presence destroyed the confidentiality of their communication. K., defendant and Vaprezsan met in a closed door meeting late at night. These conditions support an understanding of confidentiality.[537]

Accordingly, having held the clerical privilege applicable to the circumstances of the defendant's confession to his pastor, the panel affirmed the circuit court's order excluding the pastor's testimony as to Bragg's statements.[538]

B. The Attorney-Client Privilege and Its Fiduciary Exception

The purpose of the attorney-client privilege, the U.S. Supreme Court has explained, "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[539] That purpose

534. *Id.* at 466 (quoting *Howe*, 440 Mich. at 214).

535. *Bragg*, 296 Mich. App. at 466 (quoting People v. Lipsczinska, 212 Mich. 484, 493-94; 180 N.W. 617 (1920)).

536. *Id.* at 468 (citing Basil v. Ford Motor Co., 278 Mich 173, 178; 270 N.W. 258 (1936); Grubbs v. K Mart Corp., 161 Mich. App. 584, 589; 411 N.W.2d 477 (1987)).

537. *Id.* at 469.

538. *Id.*

539. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

is two-fold: "[T]o protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[540]

As privileges, like other exclusionary rules, are exceptions to the general rule that "[a]ll relevant evidence is admissible,"[541] one must familiarize him or herself with the exceptions to the exceptions. Among those is the fiduciary exception, where "a trustee obtains legal advice related to the exercise of fiduciary duties."[542] Under such circumstances, the U.S. Supreme Court explained, "the trustee cannot withhold attorney-client communications from the beneficiary of the trust."[543] Just a few days into this *Survey* period, the high court considered whether the fiduciary exception applies to communications between the federal government and its legal counsel regarding the government's stewardship of Native American lands.[544]

The Jicarilla Apache Nation, a New Mexico tribe whose "lands contain timber, gravel, and oil and gas reserves," sued the federal government on a breach-of-trust theory, alleging the government mismanaged the natural resources on the land when purportedly acting on the tribe's behalf.[545] Following its in camera review of government documents, the U.S. Court of Federal Claims ordered the government to produce most of the documents that it had categorized as follows: "(1) requests for legal advice relating to trust administration sent by personnel at the Department of the Interior to the Office of the Solicitor, which directs legal affairs for the Department [and] (2) legal advice sent from the Solicitor's Office to personnel at the Interior and Treasury Departments[.]"[546] The U.S. Court of Federal Claims overruled the government's objections, explaining that the documents "'involve matters regarding the administration of tribal trusts, either directly or indirectly implicating the investments that benefit Jicarilla' and contain

---

540. *Id.* at 390. The State of Michigan has codified the attorney-client privilege in the same statute that covers the clerical and physician-patient privileges. MICH. COMP. LAWS. ANN. § 767.5a(2) (West 2012). Under the statute, communications between attorneys and their clients are "privileged and confidential when those communications were necessary to enable the attorneys . . . to serve as [an] attorney[.]" *Id.*

541. MICH. R. EVID. 402; *see also* FED. R. EVID. 402.

542. United States v. Jicarilla Apache Nation, 131 S. Ct. 2313, 2318 (2011). I could find no case in which a Michigan state court adopted the fiduciary exception to the attorney-client, although a federal judge in the Western District of Michigan appears to recognize it. *See Glidden Co. v. Jandernoa*, 173 F.R.D. 459, 478 (W.D. Mich. 1997).

543. *Jicarilla Apache Nation*, 131 S. Ct. at 2318.

544. *Id.* at 2318.

545. *Id.* at 2318-19.

546. *Id.* at 2319.

'legal advice relating to trust administration.'"[547] The Federal Circuit Court of Appeals denied the government's petition for a writ of mandamus to prevent the disclosure, concluding that the privilege did not apply "when th[]e communications concern management of an Indian trust and the United States[.]."[548] As the Supreme Court explained:

> [T]he [Federal Circuit] court recognized that sometimes the Government may have other statutory obligations that clash with its fiduciary duties to the Indian tribes. But because the Government had not alleged that the legal advice in this case related to such conflicting interests, the court reserved judgment on how the fiduciary exception might apply in that situation.[549]

The high court, without saying so explicitly, appeared to concur with the lower courts in finding the existence of a fiduciary exception to the attorney-client privilege.[550] In support of this position, it approvingly cited the Delaware case of *Riggs National Bank of Washington, D. C. v. Zimmer*.[551] In *Riggs*, the Delaware Court of Chancery established a two-prong analysis to determine whether the fiduciary exception applies: (1) identifying the attorney's "real client," and (2) determining whether the trustees' fiduciary duties to the beneficiaries outweighed their interests in the privilege.[552]

The *Riggs* court held that the trustees (empowered under a decedent's will) were not the attorneys' "real client" because the trustees were "'mere representative[s]' of the beneficiaries who had a fiduciary obligation to act in the beneficiaries' interest when administering the trust."[553] In determining that the beneficiaries were the attorneys' real clients, the Delaware chancellors found three factors which favored that result:

> [W]hen the advice was sought, no adversarial proceedings between the trustees and beneficiaries had been pending, and therefore there was no reason for the trustees to seek legal advice in a personal rather than a fiduciary capacity; (2) the court saw

547. *Id.* (quoting 88 Fed. Cl. 1, 14-15 (2009)).

548. *Id.* at 2320 (quoting *In re* United States, 590 F.3d 1305, 1313 (Fed. Cir. 2009)).

549. *Jicarilla Apache Nation*, 131 S. Ct. at 2320 (citing *In re United States*, 590 F.3d at 1313).

550. *Id.* at 2321-22.

551. *Id.* at 2321 (citing Riggs Nat'l Bank of Washington D.C. v. Zimmer, 355 A.2d 709 (Del. Ch. 1976)).

552. *Id.* (citing *Riggs*, 355 A.2d at 712-14).

553. *Id.* (citing *Riggs*, 355 A.2d at 712).

> no indication that the memorandum was intended for any purpose other than to benefit the trust; and (3) the law firm had been paid out of trust assets. That the advice was obtained at the beneficiaries' expense was not only a "significant factor" entitling the beneficiaries to see the document but also "a strong indication of precisely who the real clients were."[554]

The second prong pertained to policy considerations.[555] Where "more information helped the beneficiaries to police the trustees' management of the trust, disclosure was, in the [Delaware] court's judgment, 'a weightier public policy than the preservation of confidential attorney-client communications.'"[556]

But the Supreme Court found the fiduciary exception inapplicable to the Jicarilla case.[557] It explained that, in managing Native American lands, the government was no mere trustee and the Native Americans were not akin to the beneficiaries of a deceased settlor's trust: "[W]hile trust administration 'relat[es] to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest *of the United States*.'"[558]

In applying the *Riggs* factors, the Justices, in an opinion by Justice Samuel A. Alito, with the support of Chief Justice John G. Roberts Jr. and Justices Antonin G. Scalia, Anthony M. Kennedy and Clarence Thomas,[559] concluded "that the United States does not obtain legal advice as a 'mere representative' of the Tribe; nor is the Tribe the 'real client' for whom that advice is intended."[560] It noted that "[g]overnment attorneys are paid out of congressional appropriations at no cost to the Tribe[,]" which is a "'strong indicator of precisely who the real clients were' and a 'significant factor' in determining who ought to have access to the legal advice."[561] Justice Alito continued, "[t]he payment structure confirms our view that the Government seeks legal advice in its sovereign capacity rather than as a conventional fiduciary of the Tribe."[562] Thus, "when the Government seeks legal advice related to the administration of tribal trusts, it establishes an attorney-client

554. *Id.* at 2322 (quoting *Riggs*, 355 A.2d at 712).
555. *Jicarilla Apache Nation*, 131 S. Ct. at 2322.
556. *Id.* (quoting *Riggs*, 355 A.2d at 714).
557. *Id.* at 2324.
558. *Id.* at 2324 (quoting Heckman v. United States, 224 U.S. 413, 437 (1912)) (emphasis added).
559. *Id.* at 2318.
560. *Id.* at 2326.
561. *Jicarilla Apache Nation*, 131 S. Ct. at 2326 (quoting *Riggs*, 355 A.2d at 712).
562. *Id.*

relationship related to its sovereign interest in the execution of federal law. In other words, the Government seeks legal advice in a 'personal' rather than a fiduciary capacity."[563] Concluding, the justices explained, "that privilege belongs to the United States."[564]

Justice Sonia M. Sotomayor, however, in dissent, viewed the federal government as being a "conventional fiduciary in managing Indian trust fund accounts," and thus "would hold as a matter of federal common law that the fiduciary exception is applicable in the Indian trust context, and thus the Government may not rely on the attorney-client privilege to withhold communications related to trust management."[565] She explained, "[r]ather than fashioning a blanket rule against application of the fiduciary exception in the Indian trust context, I would, consistent with Rule 501 and principles of judicial restraint, decide the question solely on the facts before us."[566]

VI. WITNESSES

A. The Personal-Knowledge Requirement

A testifying witness generally must have "personal knowledge" of the matter to which he or she testifies.[567]

In *United States v. Kelsor*, a federal drug-distribution case,[568] the government played wiretap recordings of the defendant's telephone calls and presented witnesses who interpreted the meaning of the words the defendant expressed therein.[569] The defendant, citing the personal-knowledge requirement in Rule 602, argued the witnesses could not testify to the meaning of terms the defendant expressed in calls in which those witnesses were not participants.[570] The Sixth Circuit panel—Judge Ralph B. Guy Jr., writing for himself and Judges Helene N. White and Raymond M. Kethledge,[571] discussed the facts as follows:

---

563. *Id.* at 2327-28.

564. *Id.* at 2330.

565. *Id.* at 2336 (Sotomayor, J., dissenting).

566. *Id.* at 2328 (citing FED. R. EVID. 501). Justices Stephen G. Breyer and Ruth Bader Ginsburg concurred in the court's judgment. *Id.* at 2331 (Breyer, J., concurring).

567. MICH. R. EVID. 602; FED. R. EVID. 602. For the exceptions, see Part VII of this Article, which pertains to lay and expert-opinion testimony.

568. United States v. Kelsor, 665 F.3d 684, 688-90 (6th Cir. 2011).

569. *Id.* at 696-97.

570. *Id.*

571. *Id.* at 697.

> Eight recorded calls were published to the jury during Mitchell Wood's testimony, including five calls in which Wood was a participant. Defendant objected to testimony regarding the three calls between Wood's girlfriend Kristine Dixon and defendant. At issue is Wood's testimony that Dixon was referring to bundles of heroin when she is heard saying that she wanted "six," or that she wanted "twenty-two." Wood had already testified how he was familiar with Dixon's purchasing practices. When Wood was asked what defendant meant when he said it was "too hot," defense counsel's objection was sustained.[572]

Here, the panel held, the government laid the proper foundation—that Wood knew what Kelsor's use of the word "bundles" meant.[573]

Another witness, Mandell Cantrell, testified that he was a "runner" who delivered heroin to Kelsor and, in discussing the wiretap recordings, "references to 'he' or 'him' and checking to see if 'he had enough on him' were references to himself and heroin.[574] He also explained that certain numbers, as in '50' or 'the 21' that he mentioned having, were references to amounts of grams of heroin."[575] The appellate panel found no violation of the personal-knowledge requirement as the defendant failed to object to Cantrell's testimony and establish that the witness lacked personal knowledge.[576]

Finally, the panel considered whether the trial court erred in permitting a Drug Enforcement Administration agent, Bakr (whose first name is unknown), to explain the meaning of terms such as "'fronting,' 'dime,' and 'stack' in the context of narcotics trafficking."[577] Judge Guy and his colleagues noted that the trial court had permitted the defense to voir dire the agent extensively regarding his knowledge of these terms and found no abuse of discretion in permitting Agent Bakr's testimony regarding the words' meanings.[578] Accordingly, the panel affirmed the defendant's conviction for these and other reasons.[579]

---

572. *Id.* at 697-98.
573. *Id.* at 698.
574. *Kelsor*, 665 F.3d at 698.
575. *Id.*
576. *Id.*
577. *Id.*
578. *Id.*
579. *Id.* at 701.

B. Witness' Comments as to Another Witness' Credibility

In Michigan, the courts have long held that "it [is] improper for a witness to comment or provide an opinion on the credibility of another witness since matters of credibility are to be determined by the trier of fact."[580] At the federal level, the Sixth Circuit appears to be heading in the same direction.

In *Arnold*, the plaintiff's counsel asked the defendant police officer at trial "whether numerous witnesses were lying because their testimony had been inconsistent with that of [defendant] Wilder[.]"[581] With a nod to an unpublished opinion in a prior case, the court hedged slightly when it held that "'[a]lthough there may be exceptions, the general principle that credibility determinations are meant for the jury, not witnesses, applies here,' and the district court erred by permitting counsel to question Wilder in this manner."[582] Nevertheless, the panel held that the error was harmless and declined to reverse the judgment.[583]

C. Michigan Rule of Evidence 606: Competency of Juror as Witness

As of January 1, 2012, the Michigan Supreme Court amended Rule 606 of the Michigan Rules of Evidence,[584] to "make[] Michigan's rule more consistent with FRE 606, and [to] clarif[y] the types of information a juror may testify to if an inquiry is made into a verdict or indictment."[585]

The amendment produced the following rule:

> (a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.
>
> (b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may

---

580. People v. Buckey, 424 Mich. 1, 17; 378 N.W.2d 432 (1985) (quoting People v. Adams, 122 Mich. App. 759, 767; 333 N.W.2d 538 (1983)).

581. *Arnold*, 657 F.3d at 367. I also discuss *Arnold* in Part IV.G.1 of this Article.

582. *Id.* at 367-68 (quoting United States v. Dickens, 438 Fed. App'x 364, 370 (6th Cir. 2011) (footnote omitted)).

583. *Id.* at 368.

584. MICH. R. EVID. 606. *See* FED. R. EVID. 606.

585. MICH. SUP. CT., Amendment of Rule 606 of the Michigan Rules of Evidence, ADM File No. 2010-12 (Dec. 22, 2011), *available at* http://www.courts.michigan.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Adopted/2010-12_2011-12-22_formatted-order.pdf.

> not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.[586]

VII. OPINION TESTIMONY

A testifying witness generally must have "personal knowledge" of the facts to which he or she testifies, as the rules forbid speculation.[587] Thus, opinion testimony, where admissible, is an exception to the default rule of "personal knowledge."[588] There are two kinds of opinion testimony, "lay" testimony[589] and "expert" testimony,[590] although the vast majority of litigated issues in this arena concern expert testimony. The Michigan Court of Appeals and Supreme Court, along with the U.S. Sixth Circuit Court of Appeals, considered numerous cases regarding the foundational requirements, scope, and relevance of expert-witness testimony during the *Survey* period.

A. Foundational Requirements for Expert Testimony

Under the rules, an "expert witness" may render an opinion for the trier of fact "[i]f the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue" and the witness has the relevant "knowledge, skill, experience, [and] training[.]"[591] The testimony's proponent must establish "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and

586. MICH. R. EVID. 606.
587. MICH. R. EVID. 602. *See also* FED. R..EVID. 602.
588. MICH. R. EVID. 602.
589. *See* MICH. R. EVID. 701; *see also* FED. R. EVID.701.
590. *See* MICH. R. EVID. 702; *see also* FED. R. EVID.702.
591. MICH. R. EVID. 702. The corresponding federal rule is virtually identical. *See* FED. R. EVID. 702.

methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[592]

The Michigan rules and the federal rules differ in one important respect; whereas, under the Michigan rules, the bases or data for the expert's testimony must be in the form of admissible evidence,[593] the federal rules explicitly provide that such data need *not* be in evidence.[594] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the U.S. Supreme Court eased the standards for a trial court's admission of expert testimony.[595] Until *Daubert*, the prevailing *Frye* test provided that scientific testimony was inadmissible unless it was "'generally accepted' as reliable in the relevant scientific community."[596] Holding that Rule 702 supersedes *Frye* and does *not* incorporate a "generally accepted" requirement, the *Daubert* Court nevertheless required that trial courts "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[597]

The Court further explained that "[t]his entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[598] Factors the court could consider in determining whether to admit expert testimony are: "[W]hether [a scientific] theory or technique" can be (and has been) tested[,]"[599] second, "whether the theory or technique has been subjected to peer review and publication[,]"[600] third, "the known or potential rate of error"[601] and finally, whether the relevant scientific community generally accepts the theory or technique.[602] In short, *Daubert* converted the *Frye* "test," or "requirement," to a mere factor among five factors courts must

592. MICH. R. EVID. 702.

593. MICH. R. EVID. 703.

594. FED. R. EVID. 703 (emphasis added). "But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." *Id.*

595. Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993).

596. *Id.* at 584 (quoting Frye v. United States, 54 App. D.C. 46, 47 (1923)).

597. *Id.* at 589.

598. *Id.* at 592-93.

599. *Id.* at 593.

600. *Id.*

601. *Daubert,* 509 U.S. at 594.

602. *Id.* The court further explained that "[w]idespread acceptance can be an important factor in ruling particular evidence admissible, and 'a known technique which has been able to attract only minimal support within the community,' [*United States v.*] *Downing*, 753 F.2d [1224,] 1238 [(1985)], may properly be viewed with skepticism." *Id.*

consider in determining the reliability of expert testimony.[603] Michigan has followed the U.S. Supreme Court's lead in adopting the *Daubert* standards.[604]

1. Product Liability Actions

Newell Rubbermaid, Inc., a manufacturer, settled a worker's-compensation claim from an employee who sustained serious injuries after a forklift accident at a Newell warehouse in 2004.[605] Newell then filed a diversity action in 2008 against the forklift manufacturer, the Raymond Corp., alleging that under Ohio product-liability law, "the failure to include a rear guard door on the forklift—caused [an employee]'s injuries when her left foot slipped out of the operator compartment and was crushed between the forklift and a warehouse structure."[606] Newell premised Raymond's liability for negligence under two theories then available under Ohio product-liability law: consumer expectations and risk-benefit.[607] The federal district court "granted Raymond's motion for summary judgment," partially due to Newell's failure to proffer testimony from an expert who qualified under Rule 702.[608] Newell appealed from this dismissal order.[609]

Before applying the *Daubert* factors, the court noted that "[a]n expert who presents testimony must 'employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.'"[610] The Sixth Circuit panel avoided evidentiary issues it deemed non-dispositive before affirming the district court's decision to exclude the expert testimony on the grounds "that his methodology was not sufficiently reliable to allow his testimony."[611] The panel—Chief Judge Alice M. Batchelder and Judges Ronald Lee Gilman and Eric L. Clay—in an opinion by Judge Gilman, approvingly quoted the district court's analysis of the expert's qualifications:

> Railsback's report was comprehensively evaluated by the district court. The court concluded that Railsback's methods are clearly not scientifically sound. He merely counts accidents from

603. *Id.*
604. Gilbert v. DaimlerChrysler Corp., 470 Mich. 749, 781; 685 N.W.2d 391 (2004).
605. Newell Rubbermaid, Inc. v. Raymond Corp., 676 F.3d 521, 525 (6th Cir. 2012).
606. *Id.*
607. *Id.* at 525-26 (citing OHIO REV. CODE ANN. § 2307.75(A) (West 2005)).
608. *Id.* at 526.
609. *Id* at 526-27.
610. *Id.* at 527 (quoting Kumho Tire Co. v. Carmichael, 526 U.S. 137, 152 (1999)).
611. *Newell,* 676 F.3d at 528.

> accident reports relating to non-Raymond forklifts. Without questioning or verifying the data and without conducting any tests of his own . . . , he reaches conclusions about the forklift involved in this case. Furthermore, although . . . he opines that a latching or spring-loaded rear door is necessary to make this forklift safe and that such a modification would be technically and economically feasible, he never actually tested either of these alternative designs.[612]

Concluding, the Sixth Circuit noted "four red flags" in the proferred expert's testimony: "anecdotal evidence, improper extrapolation, failure to consider other possible causes, and, significantly, a lack of testing."[613] The appellate panel affirmed the district court's summary judgment order, in part due to Newell's failure to proffer an expert who could properly testify to the risk-benefit theory of its negligence claim.[614]

2. Medical Malpractice Actions

In addition to the foundational requirements for expert witnesses in Rule 702, the Michigan Legislature has enacted statutory foundational requirements for experts testifying as to the relevant standard of care in medical malpractice cases.[615]

Michigan law requires that, in cases alleging medical malpractice, the plaintiff alleging a breach of the duty of care must obtain an affidavit from an expert in the relevant field of medical care alleging the duty of care along with an explanation as to how the defendant breached his or her duty of care.[616] In *Gay v. Select Specialty Hospital*,[617] the plaintiff's

---

612. *Id.* (quoting Newell Rubbermaid, Inc. v. Raymond Corp., No. 5:08CV2632, 2010 WL 2643417, at *20-21 (N.D. Ohio July 1, 2010)).

613. *Id.* The district court explained that:

> [The expert] merely counts accidents from accident reports relating to non-Raymond forklifts. Without questioning or verifying the data and without conducting any tests of his own (except irrelevant acceleration tests), he reaches conclusions about the forklift involved in this case. Furthermore, although, in Sections D and E of the Report, he opines that a latching or spring-loaded rear door is necessary to make this forklift safe and that such a modification would be technically and economically feasible, he never actually tested either of these alternative designs.

Newell, 2010 WL 2643417, at *20-21.

614. *Id.* at 532-34.

615. MICH. COMP. LAWS ANN. § 600.2169 (West 2012).

616. MICH. COMP. LAWS. ANN § 600.2912d. The affiant must qualify as an expert witness within the meaning of section 2169. MICH. COMP. LAWS ANN § 600.2912(d)(1).

617. Gay v. Select Specialty Hosp., 295 Mich. App. 284; 813 N.W.2d 354 (2012).

expert alleged that the defendant hospital breached its duty of care when its nurse left the decedent unattended while he was out of bed.[618] The nurse had assisted the decedent in getting out of bed and had helped her to a commode, but was not present soon thereafter when the patient reached for a ringing telephone, fell, injured her shoulder and head, and subsequently died two days later.[619] The expert's affidavit of merit said that "the nursing staff should have assessed Wright for fall-risk on each shift and, given Wright's frailty, should not have left her unattended while she used the commode."[620]

Because the law requires an affidavit of merit accompanying a complaint in each such lawsuit,[621] the viability of Gay's suit turned on whether her affiant qualified as a expert witness on the nurse's duty of care under Section 2169.[622] The Calhoun County Circuit Court held that the affiant nurse was unqualified and dismissed Gay's suit with prejudice.[623] Among Section 2169's requirements are that:

> The person must have "during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time" to either the "active clinical practice" or the instruction of "students in an accredited health professional school or accredited residency or clinical research program" or both, where the active clinical practice or instruction is "in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed . . . ."[624]

The affiant, Kathleen Boggs, a nurse, testified at deposition that she was the education director at a hospital, and in that capacity supervised the education of all nursing staff.[625] She testified, "'I did all the orientation, I did all the CPR classes, I did continuing education, sat on a lot of committees, oriented nurses, new nurses to their units.'"[626] "Further, when asked whether she took an 'active role in patient care' she stated that she did, but only 'as far as I was working with the new

618. *Id.* at 289.
619. *Id.*
620. *Id.*
621. MICH. COMP. LAWS ANN. § 600.2912d.
622. MICH. COMP. LAWS ANN.§ 600.2169.
623. *Gay*, 295 Mich. App. at 290.
624. *Id.* at 292-93 (quoting MICH. COMP. LAWS ANN. § 600.2169(1)(b)(i)-(ii)).
625. *Id.* at 294-95.
626. *Id.* at 295.

nurses on their nursing unit.'"[627] On the basis of this testimony, the trial court concluded the affiant "was not directly involved in the care of patients."[628]

A two-to-one majority of the appellate panel, however, concluded otherwise.[629] The majority, Judges Michael J. Kelly and E. Thomas Fitzgerald, explained that Section 2169's requirement that the expert be in "active clinical practice"[630] "is not the equivalent of stating that the professional must *directly interact* with patients, which is what the trial court apparently understood when it disregarded Boggs's work overseeing the orientation of new nurses for the hospital."[631] The majority continued:

> A medical professional can be involved in the treatment of patients in a variety of ways in a clinical setting without directly interacting with the patients. And the fact that many—if not most—nurses will physically interact with patients in the practice of their professions does not mean that a nurse who is indirectly involved in the care of patients is not engaged in the "active clinical practice" of nursing. Giving the phrase "active clinical practice" its ordinary meaning, the key question is whether Boggs was actively engaged in the profession of nursing in a clinical setting.
>
> We also cannot agree with the dissent's conclusion that the word "active"—as used in the phrase "active clinical practice"—must be understood to impose a requirement that a nurse directly treat patients in order to be engaged in the "active clinical practice" of nursing. Although it has the sense of being "marked by or disposed to direct involvement or practical action," the adjective "active" can also mean "engaged in action or activity," or "characterized by current activity, participation, or use." *Random House Webster's College Dictionary* (2d ed, 1997). In imposing professional-time requirements on expert witnesses, the Legislature intended to address a perceived problem with full-

627. *Id.*
628. *Id.*
629. *Gay*, 295 Mich. App. at 295.
630. MICH. COMP. LAWS ANN. § 2169(1)(b)(i).
631. *Gay*, 295 Mich. App. at 296 (emphasis added).

> time professional witnesses who would ostensibly testify to whatever someone paid them to testify about.[632]

It further explained, "the act of orienting nurses within a hospital involves some degree of explaining, coordinating, and instructing nurses regarding the proper care of their patients. And explaining, coordinating and instructing nurses about the proper care of patients in a clinical setting necessarily involves—albeit indirectly—the treatment of patients."[633]

The appellate panel further held that Boggs, the affiant nurse, met the qualifications to testify as an expert on the appropriate standard of nursing care in light of her teaching duties.[634] It rejected the trial court's conclusion that "the professional may meet the time requirement by devoting the majority of his or her time to the instruction of students is [] the same as stating that the professional must actually spend a *majority* of his or her time instructing students."[635] The court explained:

> It is commonly understood that a person who teaches—and especially with regard to persons who teach a profession—must spend significant time preparing for class, maintaining familiarity with new and evolving professional techniques, and participating in meetings designed to further the educational process. Such activities are no less "devoted" to the "instruction of students" than the time actually spent in front of the students demonstrating a procedure or lecturing about the proper standards of care.[636]

Accordingly, having concluded the affiant was qualified as an expert witness as to the appropriate duty of care, the court of appeals reversed the trial court's order dismissing Gay's suit.[637]

In *Estate of Jilek v. Stockson*, the relevant issue (for this article's purpose) was whether the defendant's expert witnesses were qualified as experts within the meaning of Section 2169.[638] Reversing the court of appeals, the supreme court held the witnesses were qualified to testify as

---

632. *Id.*

633. *Id.* at 297.

634. *Id.* at 299.

635. *Id.* (citing MICH. COMP. LAWS ANN.§ 2169(1)(b)(ii)) (emphasis added).

636. *Id.* at 300.

637. *Gay,* 295 Mich. App. at 301-02. Judge William C. Whitbeck would have affirmed the trial court's decision, holding the affiant was unqualified to testify as to the duty of care. *Id.* at 302-11 (Whitbeck, J., dissenting).

638. Estate of Jilek v. Stockson, 490 Mich. 961; 805 N.W.2d 852 (2011).

experts.[639] The court of appeals had held, inter alia, that "expert witnesses must 'match the one most relevant standard of practice or care—the specialty engaged in by the defendant physician during the course of the alleged malpractice[.]'"[640]

In *Jilek*, the plaintiff estate brought a wrongful-death action against a physician and her employer, an urgent-care center, alleging the physician was "negligent in her evaluation, diagnosis, and treatment of Daniel Jilek[.]"[641] Plaintiff's decedent had visited defendant physician Carla Stockton's urgent-care center complaining of "continued sinus/respiratory congestion."[642] Plaintiff died while exercising five days later, due to coronary-artery disease, which defendant Stockson had failed to uncover.[643] Plaintiff alleged that the proper standard of care was that of emergency-room medicine, and had Stockson not breached that duty of care, "Jilek's cardiac disease would have been discovered and timely treated or she would not have prescribed what plaintiff asserted was a contraindicated medication that precipitated the heart attack."[644] Defendants, however, contended the appropriate standard was that of "a family-practice physician in an urgent-care setting."[645]

At the conclusion of trial, the jury issued a verdict of no cause of action.[646] On appeal, plaintiff argued, inter alia,[647] that the court erred insofar "[a]s there is no board certification titled 'family practice in an urgent-care center,' this cannot be considered a specialty defining the most relevant standard of care, let alone the 'one most relevant' standard."[648] In short, the supreme court ruled that the proper standard of care was that of "an urgent-care center, not an emergency-medical facility."[649] Accordingly, the justices held that the trial court did not abuse its discretion in allowing the defendants' witnesses to testify as to the proper standard of care for an urgent-care center.[650]

---

639. *Id.* at 961 (citing Estate of Jilek v. Stockson, 289 Mich. App. 291; 796 N.W.2d 267 (2010)).

640. *Jilek*, 289 Mich. App. at 301 (citing Woodward v. Custer, 476 Mich. 545, 560; 719 N.W.2d 842 (2006)).

641. *Id.* at 293.

642. *Id.* at 294.

643. *Id.*

644. *Id.* at 294-95.

645. *Id.* at 304-05.

646. *Jilek,* 289 Mich. App. at 304-05.

647. Brief for Plaintiff-Appellant at 37-40, Jilek v. Stockson, 289 Mich. App. 291; 790 N.W.2d 207 (2010) (No. 05-268-NH).

648. *Jilek*, 289 Mich. App at 301.

649. *Jilek*, 490 Mich. at 961.

650. *Id.*

3. Expert Testimony in Criminal Cases as to Lawyer-Defendants' Legal Obligations

A recent Sixth Circuit case, *United States v. Cunningham*,[651] is instructive in that it provides a framework for determining whether a party has laid the proper foundation for expert testimony as to a lawyer-defendant's legal duties to clients when the lawyer himself is on trial for criminal fraud and his or her intent is at issue.[652]

The federal government charged and obtained convictions of two Kentucky lawyers, Shirley Cunningham Jr. and William Gallion, for the offense of conspiracy to commit wire fraud during their representation of several hundred users of the "fen-phen" diet drug in mass-tort litigation against the drug's manufacturer, American Home Products.[653] The defendants' clients, 431 in total, had earlier opted out of a class-action settlement in Pennsylvania federal court.[654] The defendant lawyers pursued their clients' claims in Kentucky state court in a separate class action.[655] The lawyers settled the action for $200 million, but without disclosing the settlement to their clients (and without their clients' consent), and successfully petitioned the judge presiding over the Kentucky state case to dismiss the matter with prejudice.[656] As the Sixth Circuit panel summarized:

> [Kentucky's rules pertaining to attorney conduct] imposed upon Cunningham, Gallion, and [an earlier co-defendant attorney] the obligation to inform their clients of the total amount of the settlement, the number of individuals sharing in it, the method used to calculate each individual's share, and the 95-percent acceptance requirement.
>
> But the evidence at trial revealed that they did none of this. Instead, according to the testimony of numerous clients, a representative of the lawyers went to each client individually, told him or her that a tentative settlement agreement had been reached as to that individual's claim (without mentioning that the claim had already been dismissed with prejudice by Judge Bamberger), devalued the amount of the individual's recovery as

651. United States v. Cunningham, 679 F.3d 355 (6th Cir. 2012).
652. *Id.*
653. *Id.* at 363.
654. *Id.* at 363-64.
655. *Id.*
656. *Id.* at 364-65.

> compared to the number listed on Gallion's spreadsheet, and instructed the client to sign a confidential release.
>
> If a client complained about the recovery amount or refused to settle, the lawyers' representative would return at a later date with a larger offer, falsely explaining that the lawyers had successfully renegotiated the client's claims with AHP. Every client ultimately accepted his or her settlement offer.
>
> After each client had accepted the offer, he or she was informed of the agreement's confidentiality provision. But the lawyers misrepresented to at least some of their clients the effect of noncompliance with that provision, telling these clients that they could go to jail if they told anyone about the details of the settlement. In this way, the lawyers used the provision as both a sword and a shield, bullying their clients into keeping their mouths shut and protecting the lawyers' actions from discovery by others.[657]

Although their retainer agreements permitted the attorneys only about $22 million of the recovery,[658] "the lawyers paid their clients—in checks marked 'final settlement'—just a bit more than $45 million altogether, or less than twenty-three percent of the total settlement amount [...] [and] kept the remainder for themselves and associated counsel[.]"[659] After various machinations and payments to the clients:

> [T]he $200,450,000 in total settlement proceeds broke down as follows: Cunningham received over $21 million; Gallion, nearly $31 million; Mills, almost $24 million; Chesley, more than $20 million; [an ostensibly charitable fund which the co-defendants managed], $20 million. Several other lawyers divided up approximately $10.5 million. And the clients? Even with the second distribution, they received a total of approximately $73.5 million—somewhat less than 37 percent of the total value of the settlement.[660]

Following a Kentucky Bar Association investigation into their conduct, the co-defendants voluntarily withdrew as practicing attorneys

---

657. *Cunningham*, 679 F.3d at 365-66.
658. *Id.* at 363.
659. *Id.* at 366.
660. *Id.* at 369.

in that state.[661] Although their first trial resulted in a hung jury, a second trial resulted in Cunningham and Gallion's convictions, with sentences of 240 and 300 months in prison, respectively, and $127 million in restitution.[662]

At a retrial, the defendants attempted, with expert testimony, to disprove the third element of the offense of wire fraud, "that [t]he[y] intended to deprive a victim of money or property."[663] The expert, Richard L. Robbins, an attorney, would have testified as to the co-defendant attorneys'

> [R]esponsibility to provide notice to the putative class members; whether the class action was properly decertified; whether Mr. Gallion could properly hold back settlement funds for future contingencies pursuant to a settlement agreement; the propriety of attorney fees in awards in class actions or mass plaintiff actions; and whether a "*cy pres*" distribution of settlement funds is an appropriate practice in class action [sic].[664]

In short, the expert would have testified, "although the defendants' actions 'were clearly innovative,' they 'do not show a violation of law, and certainly [are] not indicative of any intent to defraud or other wrongful motive.'"[665]

The panel considered two questions relating to this expert testimony: was the expert qualified within the meaning of Rule 702, and if so, was his testimony sufficiently reliable?[666] The district court had answered no to both questions.[667]

While:

> The defendants sought to qualify Robbins based on his record of participation in numerous class actions and multi-plaintiff cases[,] [b]ut the district court refused to qualify him as an expert, citing "concerns about qualifying Robbins, or any

661. *Id.* at 369.
662. *Id.* at 370.
663. *Cunningham,* 679 F.3d at 370 (quoting United States v. Faulkenberry, 614 F.3d 573, 581 (6th Cir. 2010)).
664. *Id.* at 377.
665. *Id.*
666. *Id.* at 378-80.
667. *Id.*

> witness, as an expert on an area of the law solely on the basis of work experience in a particular area."[668]

But the panel strongly suggested that it disagreed, as "'the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience.'"[669] The proper question, the appellate judges held, was whether the expert's "experience litigating complex business matters was sufficiently 'extensive and specialized' to qualify him as an expert on complex litigation, class actions, and mass-tort cases."[670] The panel explained:

> We agree that not every lawyer with experience as an advocate in a particular area of law necessarily qualifies as an expert in his or her practice area. But Robbins's experience, which consisted of nearly 30 years in business litigation and included involvement in numerous class actions and multi-plaintiff cases, is far more substantial than the typical attorney's.[671]

Finally, the court said, "any deficiencies in his professional background or credentials" went to the weight but not the admissibility of the expert's testimony, and "could have been probed on cross-examination—'the traditional and appropriate means of attacking shaky but admissible evidence.'"[672] That said, although the court had "grave doubt" as to the district court's holding the expert unqualified, its ruling as to the expert's *reliability* was correct, and negated any need to find error in the trial court's exclusion of the expert testimony.[673] Even if the expert was qualified, the defendants failed to make a showing that his testimony was "(1) relevant, meaning that the testimony 'will help the trier of fact to understand the evidence or to determine a fact in issue,' and (2) reliable."[674] The Sixth Circuit's observed that:

> To begin with, Robbins's proposed testimony was rooted in the belief that the state-court lawsuit was settled as a 'quasi-class action.' That belief was in direct conflict with the district court's legal conclusion that the case was settled as an aggregate

668. *Id.* (quoting United States v. Gallion, 257 F.R.D. 141, 148 (E.D. Ky. 2009)).

669. *Cunningham,* 679 F.3d at 378-79 (quoting FED. R. EVID. 702 advisory committee's notes (2000 amends.)).

670. *Id.* at 379 (quoting *Kumho*, 526 U.S. at 156).

671. *Id.*

672. *Id.* (quoting *Daubert*, 509 U.S. at 596).

673. *Id.* at 379.

674. *Id.* at 379-80 (quoting FED. R. EVID. 702).

> settlement, and thus Robbins's opinions relating to class actions—including how they are usually settled, the frequency of *cy pres* distributions in class-action settlements, and the rights of class members—would have been both irrelevant and confusing to the jury.
>
> Moreover, Robbins's testimony from the first trial contained numerous misstatements of the law. He took the position, for example, that even if Kentucky's aggregate-settlement rule applied to the settlement, the defendants did not have to comply with the rule because, "[i]n my opinion, it would have been extremely risky for these lawyers to disclose the entire settlement amount to these claimants. And in my opinion, I think it has little, if no relevance to the claimants." Robbins also explained that the defendants did not need to provide notice to the class prior to the dismissal of the class action. Both of these statements are in conflict with Kentucky law. *See* Ky. Sup. Ct. R. 3.130(1.8)(g) (the aggregate-settlement rule); Ky. R. Civ. P. 23.05 (requiring notice prior to the dismissal of a class action).[675]

Accordingly, the panel found that the district court did not abuse its discretion in excluding the expert's testimony, as to do so would have "allow[ed] into evidence irrelevant, unreliable, and potentially confusing testimony for the sole purpose of leveling the playing field [against a properly qualified government witness]. The judge had the authority to agree with one side and not the other on a particular interpretation of the law."[676]

As a final point regarding this case, the federal rules specifically exclude expert testimony "about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone."[677] Accordingly, the panel said the district court was absolutely on point in barring the expert's testimony that the defendants "lacked the requisite criminal intent to defraud."[678] The panel thus affirmed the defendants' convictions and sentences.[679]

---

675. *Cunningham*, 679 F.3d at 380.
676. *Id.* at 382.
677. FED. R. EVID. 704(b).
678. *Cunningham*, 679 F.3d at 380.
679. *Id.* at 386.

4. Lost Earning Capacity in Personal Injury Cases

The *Daubert* principles and Rule 702 found applicability in a recent sixth circuit personal-injury case in which the district court excluded the plaintiff's expert testimony as to her future lost earning power.[680] In that case, plaintiff Brandy Andler was visiting friends at an Ohio campground when she "stepped off the path on which she was walking and fell into a six-to-eight-inch grass-covered hole, breaking several bones in both of her feet."[681] As part of her claim for damages in this diversity action, plaintiff proffered an expert, accountant Daniel Selby, who would have testified to her future lost earning power as a result of the injury.[682] The district court, however, granted the defendant's motion in limine to exclude Selby's testimony, concluding that it was unduly speculative.[683] A jury awarded the plaintiff $10,000 after hearing no testimony as to the plaintiff's future lost earning potential.[684]

Both sides appealed the judgment on various grounds.[685] Applying Rule 702, the panel—consisting of the opinion author, Judge Karen Nelson Moore, and Judges Deborah L. Cook and Boyce F. Martin Jr.—held that an expert witness cannot premise his or her testimony as to future earning capacity on "unsupported speculation."[686] The testimony "should be excluded if it is based on 'unrealistic assumptions regarding the plaintiff's future employment prospects,'[687] [citation omitted] or 'facts that [a]re clearly contradicted by the evidence[.]'"[688] Before rendering his or her opinion, the expert should consider "factors such as plaintiff's age, employment record, training, education, ability to work, and opportunities for advancement."[689]

"Andler's historical earnings are relevant," the court explained, "but the fact that she did not meet her earning capacity in the two years prior to her injury does not necessarily render Selby's projections inaccurate or even unreasonable."[690]

---

680. Andler v. Clear Channel Broad., Inc., 670 F.3d 717, 721 (6th Cir. 2012).
681. *Id.*
682. *Id.* at 722.
683. *Id.*
684. *Id.* The $10,000 award reflected a fifty percent reduction from $20,000 due to the comparative negligence the fact trier attributed to the plaintiff. *Id.* n.3.
685. *Id.* at 721.
686. *Andler,* 670 F.3d at 727 (quoting *Daubert,* 509 U.S. at 589-90).
687. *Id.* (quoting Boucher v. U.S. Suzuki Motor Corp., 73 F.3d 18, 21 (2d Cir. 1996)).
688. *Id.* (quoting Boyar v. Korean Air Lines Co., 954 F. Supp. 4, 8-9 (D.D.C. 1996)).
689. *Id.*
690. *Id.* at 728.

The expert premised the plaintiff's earnings potential, at least in part, on the intent Andler expressed to shift from part-time to full-time work as her children grew older.[691] After noting the permissibility of the expert's consulting actuarial tables or figures from the U.S. Bureau of Labor Statistics,[692] the court held that "[t]he factual basis for using full-time averages in Selby's pre-injury earning capacity calculation may not be particularly strong, but 'it is not proper for the Court to exclude expert testimony 'merely because the factual bases for an expert's opinion are weak.'"[693] Concluding that doubts about the reasonableness of the expert's methods went to the testimony's weight and not its admissibility, the panel vacated the judgment and ordered the district court to "grant a partial new trial on the issue of damages."[694]

B. The Scope of Expert Testimony: Speculation vs. Reasonable Inferences

Both the Michigan and federal rules permit a testifying witness, who is otherwise qualified, to testify as to an "ultimate issue" for the fact trier to decide.[695] The rules diverge, however, as to whether the basis for an expert's testimony—the underlying facts or data—must be in evidence: the Michigan rules say "yes," whereas the federal rules say "no."[696] I note this distinction before discussing *V&M Star Steel v. Centimark Corp.*,[697] as this case's holding likely might have differed had it been a Michigan state court, and not a federal court, considering the admissibility of expert testimony in the case.[698]

V & M contracted "with Centimark to replace part of the corrugated steel roof" at its Youngstown, Ohio, plant.[699] The contract required that Centimark observe V & M's safety standards, that it hold V & M harmless for any damage to life, property or operations at the plant resulting from Centimark's work, and that Centimark's "[m]aterials [] be

691. *Id.* at 729.

692. *Andler*, 670 F.3d at 728.

693. *Id.* at 729 (quoting *Boyar*, 954 F. Supp. at 7).

694. *Id.*

695. MICH. R. EVID. 704; FED. R. EVID. 704(a). This rule, however, is subject to the limitation that, in criminal cases, however, an expert may not testify as to whether a defendant "did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense." FED. R. EVID. 704(b).

696. *Compare* MICH. R. EVID. 703, *with* FED. R. EVID. 703.

697. V & M Star Steel v. Centimark Corp., 678 F.3d 459 (6th Cir. 2012), *reh'g denied*, No. 10-3584, 2012 U.S. App. LEXIS 13714 (6th Cir. July 2, 2012).

698. *Compare* MICH. R. EVID. 704, *with* FED. R. EVID. 704.

699. *Id.* at 461.

stored and stacked in a manner that prevents sliding, falling, or collapsing."[700]

There would be no case, of course, had some roofing panels not slid, fallen and collapsed one rainy day in July 2006.[701] The panels crashed onto a V & M electrical substation on the ground level, knocking out power for over 30 hours and stalling operations for that period of time.[702] V&M claimed damages for repairs and lost profits of "around $3 million."[703]

V & M's expert, Daniel C. Mester, was an ironworker with "forty years of pertinent experience installing metal roof sheeting."[704]

In his opinion, Centimark should have used kickers or some type of restraining device to secure the bundles staged on A-Bay because the use of kickers is a "normal and common procedure" any time material is placed on a sloped surface [e.g., a roof]. Mester explained that [] metal bands could not be relied upon to prevent panels from sliding out of bundles because the bands can stretch or weaken during transit from the manufacturer and when the bundles are lifted by crane to the roof. He noted that vibration from V & M's overhead crane in A-Bay, wind, and precipitation all added to the constant force of gravity so that the "natural tendency is for the sheeting to want to move downhill." Mester stated that, "[f]rom the photos I was shown, this is exactly what happened." He opined that the absence of kickers on A Bay "is what allowed the sheeting to slide off the roof." Like Centimark's expert, Bajek, Mester also stated that the panels would slide downward as soon as the bands were cut. In Mester's opinion, Centimark did not set up the job properly because kickers should have been used on all roof levels.[705]

In other words, Mester would have testified at trial that the defendant was guilty of (contractual and/or tortious) negligence in not using kickers to secure the metal sheeting.

The Northern District of Ohio granted summary judgment for defendant Centimark on various grounds.[706] Among those grounds was its ruling that Mester's opinion on V & M's behalf was inadmissible.[707] The Sixth Circuit reversed on all grounds in a unanimous opinion by

---

700. *Id.*
701. *Id.* at 462.
702. *Id.*
703. *Id.*
704. *V & M Star Steel*, 478 F.3d at 464.
705. *Id.*
706. *Id.* at 465 (citing V & M Star Steel v. Centimark Corp., No. 4:07CV3573, 2009 WL 5943241 (N.D. Ohio Feb. 4, 2009)).
707. *V & M Star Steel*, 2009 WL 5943241, at *17-19.

Judge Jane B. Stranch on behalf of herself and Judges Martha Craig Daughtrey and Karen Nelson Moore.[708]

First, the panel easily concluded that "Mester was qualified by knowledge, skill, experience, and training to give reliable opinion testimony about the frequency and necessity of kicker use in the metal roofing industry."[709] The testimony would "assist the jury in deciding the parties' dispute regarding the existence and application of industry standards."[710]

Second, the panel concluded that the district court erred in excluding—as mere speculation—Mester's testimony[711] that the metal sheets, laying on a sloped surface, "are going to want to slide down[]" when workers cut the metal bands encompassing the sheets on the grounds that "V & M had not produced any evidence that the metal bands around the bundle in question had been cut[.]"[712] The panel responded:

> Mester did not state or imply that the metal bands on the bundle at issue had been cut; rather, he simply described what ordinarily occurs if metal bands are cut while the bundle sits unsecured on a sloped surface. V & M was not required to present proof that the bands had been cut on the bundle in question as a condition for the admission of Mester's expert testimony. Mester's explanation, based on his extensive knowledge and experience in the industry, would have assisted the jury in understanding the force of gravity on the roofing panels.[713]

The panel also disagreed with the district court's conclusion that the expert's opinion "has no factual basis for causation[.]"[714] Responding, the panel explained that "[e]xperts are permitted a wide latitude in their opinions, including those not based on firsthand knowledge[,]"[715] and the rules permit an expert to base his opinion on an inference and reach an "ultimate issue."[716]

---

708. *V & M Star Steel*, 478 F.3d at 466, 468-69.
709. *Id.* at 467 (citing FED. R. EVID. 702(a)).
710. *Id.*
711. *Id.* at 468.
712. *Id.* at 467.
713. *Id.*
714. *V & M Star Steel*, 678 F.3d at 467 (quoting *V & M Star Steel*, 2009 WL 5943241, at *18).
715. *Id.* at 468 (quoting Jahn v. Equine Servs., PSC, 233 F.3d 382, 388 (6th Cir. 2000)).
716. *Id.* (citing FED. R. EVID. 704(a)).

Mester "was not required to develop scientific measurements to support his opinion that gravity caused the panels to slide."[717] The panel explained that "Mester's opinion helps V & M establish that, had Centimark installed kickers on A-Bay, it is more probable that the panels would not have fallen into the substation when gravity pulled them downward. Therefore, his opinion is relevant, admissible evidence."[718] The lower court's concerns about Mester's testimony went to the testimony's weight and not its admissibility, and thus the district court abused its discretion in excluding his testimony.[719] For this and other reasons, the Sixth Circuit reversed the district court's dismissal of the case and remanded the matter for trial.[720]

C. Expert Testimony at Suppression Hearings

Trial courts hold suppression hearings when a criminal defendant makes a prima facie claim that police officials seized evidence of a crime in contravention of his constitutional rights against unreasonable searches and seizures.[721] The "exclusionary rule" bars a court's admission of the "fruit of the poisonous tree"[722]—the "physical, tangible materials obtained either during or as a direct result of an unlawful invasion."[723]

Simply put, the trial court takes evidence and determines whether a *constitutional violation occurred*, and if so, it suppresses the "fruits" of that illegal search or seizure. Thus, in considering a "preliminary" question of whether a violation occurred (and thus whether to admit the evidence), the rules of evidence specifically provide that they themselves are inapplicable.[724]

In *United States v. Stepp*, the Sixth Circuit provided a framework for a trial court's admission of expert testimony at suppression hearings, bearing in mind that Federal Rule of Evidence 702 does not apply.[725]

In *Stepp*, a Tennessee sheriff's deputy stopped a vehicle in which the defendant was riding.[726] This led to police questioning, a call for backup,

---

717. *Id.*
718. *Id.*
719. *Id.*
720. *V & M Star Steel*, 678 F.3d at 470.
721. *See, e.g.*, People v. Kaufman, 457 Mich. 266; 577 N.W.2d 466 (1998); U.S. CONST. amend. IV; MICH. CONST. art. I, § 11.
722. Wong Sun v. United States, 371 U.S. 471, 488 (1963).
723. *Id.* at 485.
724. FED. R. EVID. 104(a); MICH. R. EVID. 104(a); FED. R. EVID. 1101(d)(1); MICH. R. EVID. 1101(b)(1). *See also* United States v. Matlock, 415 U.S. 164, 172-75 (1974).
725. United States v. Stepp, 680 F.3d 651 (6th Cir. 2012).

and the arrival of a canine unit.[727] The dog, the deputy testified, "alerted to the presence of" illegal drugs in the car, which led to a search of the vehicle's interior, the discovery of two kilograms of cocaine, and the defendant's arrest.[728] After a suppression hearing, the district court denied the defendant's suppression motion, resulting in a conditional plea of guilty to the offense of conspiracy to possess cocaine with intent to distribute the same.[729] This conditional plea permitted the defendant to appeal the adverse result of the suppression hearing to the Sixth Circuit.[730]

Stepp's counsel challenged the deputy's testimony of the dog's "alert" as to the presence of cocaine in the vehicle and the defense:

> [T]hen sought to call Samuel Kenneth Jones, Sr., ("Jones"), as "an expert in training dogs." The government objected to Jones testifying and was permitted to cross-examine (voir dire) Jones on his qualifications. Jones testified that he had trained dogs for approximately fifty years, thirty of which were spent training dogs for various forms of police, military, and civilian work. He admitted that he had trained only two or three dogs for drug work during his tenure as a trainer, the last of which was ten years before he was called to testify. He had no certifications in training drug dogs, and he had never been a police dog handler. The government then submitted that Jones was "not qualified to testify on drug dogs," and following brief re-direct, the district court sustained the government's objection. The district judge then had a brief conversation with Jones regarding his background, during which Jones indicated that based on his experience, "from what I saw . . . that dog did not hit." Counsel for the defendant was permitted to make an offer of proof that Jones would have testified that based on the behavior of the dog handler immediately prior to the alert and the dog immediately following the alert, "this dog *was given a signal" by the officer*, which led to the alert.[731]

---

726. *Id.* at 657-59.

727. *Id.*

728. *Id.* at 659.

729. *Id.* at 657.

730. *Id.*

731. *Stepp*, 680 F.3d at 659-60 (emphasis added) (footnote omitted) (citations omitted). Notably, the Sixth Circuit has held that a "'positive indication by a properly-trained dog is sufficient to establish probable cause for the presence of a controlled

Stepp's counsel alleged the trial court erred in excluding the expert's testimony.[732] A two-member majority of a Sixth Circuit panel—Judge Karen Nelson Moore writing on behalf of herself and Judge Damon J. Keith—however, found no error and affirmed.[733]

First, the judges noted, the expert's testimony would have been evidence concerning the admissibility of other evidence—the drugs—at trial.[734] Accordingly, whether the dog, in fact, alerted to the presence of drugs, and whether such alert was reliable was a "preliminary question of fact" and thus the rules of evidence did not control admission of such expert testimony as to the dog.[735]

Having said that, the panel explained that the decisions on such preliminary question nevertheless "must be 'supported by competent and credible evidence.'"[736] Explaining that a district court has "discretion to place limits" on such testimony to facilitate its consideration of the ultimate issue of whether to admit the overlaying evidence (the drugs),[737] it must consider if the expert's conclusion "is sufficiently credible to serve as a basis for the district court's conclusions. At a suppression hearing, we would expect the district court to err on the side of considering more, not less, information, particularly on an issue for which the other party has offered competing expert testimony."[738]

Continuing, the panel held that Rule 702 and *Daubert* do not apply to the court's admissibility in suppression hearings.[739] Following the seventh circuit's lead, the panel explained that "nothing in *Daubert*'s stated rationale would be furthered by requiring a judge to apply *Daubert* before hearing expert testimony at a suppression hearing."[740] "[T]he district court must always consider any proffered expert's qualifications and determine, in its discretion, what weight to afford that expert's testimony."[741] A *Daubert* hearing prior to its suppression hearing, the panel suggested, would be impractical for a trial court, as determining

---

substance[.]'" *Id.* at 670 (quoting United States v. Howard, 621 F.3d 433, 447 (6th Cir. 2010, *cert. denied*, 131 S.Ct. 1623 (2011)).

732. *Id.* at 668.

733. *Id.* at 657. Judge Danny J. Boggs "concurred in the result only." *Id.*

734. *Id.* at 668.

735. *Id.* (citing FED. R. EVID. 104(a) and 1101(d)(1)). The judges further explained that "[t]he Rules of Evidence are inapplicable as well to the admission of evidence presented at suppression hearings." *Stepp*, 680 F.3d at 668 (citing United States v. Matlock, 415 U.S. 164, 172-73 (1974)).

736. *Id.* (quoting Fields v. Bagley, 275 F.3d 478, 485 n.5 (6th Cir. 2001)).

737. *Stepp*, 680 F.3d at 668.

738. *Id.* at 669.

739. *Id.*

740. *Id.* (citing United States v. Ozuna, 561 F.3d 728, 736-37 (7th Cir. 2009)).

741. *Id.* (citing United States v. Diaz, 25 F.3d 392, 394 (6th Cir. 1994)).

the weight to afford that expert's testimony "will typically *follow* the presentation of an expert's testimony, rather than precede it."[742]

Applying this somewhat relaxed standard, the panel affirmed the district court's decision, but not before concluding it had reached the right result for the wrong reason:

> [T]he district court stated: "I listened carefully to the material submitted, and it does not appear that the witness is qualified to testify regarding drug dogs. . . . [B]ased on the information I have got . . . *I could not receive any testimony* in this area." The district court added that "it is up to the party presenting the witness to show that they're qualified and that their testimony can be helpful to the decider of fact in an issue that is before the court, and that was not demonstrated in this matter." Thus, on this record, we must hold that the district court abused its discretion in excluding Jones, not because he was qualified to render opinions in this area, but because the district court improperly held itself to an erroneous standard when deciding whether it could hear his testimony in the first place.[743]

The panel did not dispute the relevance of the expert's testimony,[744] but opined that "Jones's opinion would not have constituted the 'competent and credible evidence' on which we expect district courts to rely."[745] Judge Moore wrote in her opinion:

> Jones was questioned at length about his background, demonstrating that he lacked the necessary qualifications to offer even minimally credible or reliable testimony on the subject of dogs sniffing for narcotics. Jones admitted to having trained only two or three drug dogs in the course of a fifty-year career, the last of which was ten years before the hearing. He was not, nor had he ever been, a police-dog handler. He had no certification on narcotics-dog training. Furthermore, any prejudice in erroneously preventing him from testifying was minimized by the fact that his ultimate conclusions and an abbreviated explanation were offered both by Jones and counsel for the defendant in an offer of proof. The dog handler, Officer Young,

742. *Id.* (emphasis added).

743. *Stepp*, 680 F.3d at 699 (internal citations omitted).

744. *Id.* at 670 (citing United States v. Howard, 621 F.3d 433, 448 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 1623 (2011)).

745. *Id.* (quoting Fields v. Bagley, 275 F.3d 478, 485 n.5 (6th Cir. 2001)).

> had already credibly testified at length regarding the training of the dog involved in this case and how the dog had alerted (sitting down near the driver's door). Had the district court applied the correct standard, we believe that the district court in its discretion would have permissibly taken the same actions of rejecting the content of Jones's proffered testimony in favor of the highly credible evidence offered by the government's expert in this area.[746]

Accordingly, the panel held that the district court's error in applying an incorrect legal standard, while constituting an abuse of discretion,[747] was harmless.[748] For this and other reasons, the panel affirmed Stepp's conviction.[749]

D. Non-testifying Expert Opinion in Criminal Cases

As I noted above, under Michigan law, but not under federal law, "[t]he facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence."[750] Whether one expert can testify as to a non-testifying expert's report in a criminal case is a difficult issue with which both the Michigan and U.S. Supreme Courts struggled during the *Survey* period, because such circumstances raise concerns not only in regard to the Confrontation Clause of the Constitution—which I discuss in Part VIII.C of this article—but also in regard to courts' interpretation of Rules 702 and 703.

1. Williams v. Illinois

In *Williams v. Illinois*, the State charged Sandy Williams with rape.[751] Before identifying Williams as a potential culprit, a vaginal swab of a female rape victim produced a semen sample.[752] Using a sample of this biological material, an outside firm, Cellmark, produced a DNA profile of the culprit.[753] No witness from Cellmark testified, but a

---

746. *Id.* (citation omitted).
747. *Id.* at 669-670.
748. *Id.* at 670.
749. *Stepp*, 680 F.3d. at 672. The panel remanded the matter for resentencing on unrelated grounds. *Id.*
750. MICH. R. EVID. 703. *See also* FED. R. EVID. 703.
751. Williams v. Illinois, 132 S. Ct. 2221, 2227 (2012).
752. *Id.*
753. *Id.*

prosecution expert testified that Cellmark's DNA profile of the culprit matched a subsequent blood sample of the defendant.[754] The U.S. Supreme Court observed:

> The expert made no other statement that was offered for the purpose of identifying the sample of biological material used in deriving the profile or for the purpose of establishing how Cellmark handled or tested the sample. Nor did the expert vouch for the accuracy of the profile that Cellmark produced.[755]

However, [Sandra] Lambatos [an Illinois forensic scientist] confirmed that:

> [H]er testimony relied on the DNA profile produced by Cellmark . . . . She stated that she trusted Cellmark to do reliable work because it was an accredited lab, but she admitted she had not seen any of the calibrations or work that Cellmark had done in deducing a male DNA profile from the vaginal swabs.[756]

The plurality—Justice Samuel A. Alito, writing for himself, Chief Justice John G. Roberts Jr., Justices Stephen G. Breyer, and Anthony M. Kennedy—concluded that the expert's "reliance [on the non-expert's report] does not constitute admissible evidence of this underlying information."[757] Specifically, in trials not by jury but by judge, as was the Williams trial, "it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose."[758] The plurality opined that it had faith in the trial judge to understand that the expert "was not competent to testify to the chain of custody of the sample taken from the victim[.]"[759] The plurality explained:

> This match also provided strong circumstantial evidence regarding the reliability of Cellmark's work. Assuming (for the reasons discussed above) that the Cellmark profile was based on the semen on the vaginal swabs, how could shoddy or dishonest work in the Cellmark lab have resulted in the production of a

754. *Id.*
755. *Id.*
756. *Id.* at 2230 (citations omitted).
757. *Williams*, 132 S. Ct. at 2234 (citing FED. R. EVID. 703; ILL. R. EVID. 703).
758. *Id.* at 2235 (citing Harris v. Rivera, 454 U.S. 339, 346 (1981)).
759. *Id.* at 2237.

> DNA profile that just so happened to match petitioner's? If the semen found on the vaginal swabs was not petitioner's and thus had an entirely different DNA profile, how could sloppy work in the Cellmark lab have transformed that entirely different profile into one that matched petitioner's? And without access to any other sample of petitioner's DNA (and recall that petitioner was not even under suspicion at this time), how could a dishonest lab technician have substituted petitioner's DNA profile?[760]

In cases involving juries:

> The purpose of disclosing the facts on which the expert relied [when not in evidence] is to . . . show that the expert's reasoning was not illogical, and that the weight of the expert's opinion does not depend on factual premises unsupported by other evidence in the record—not to prove the truth of the underlying facts.[761]

The plurality expressed no agreement with the dissent's concern that the fact-finder—judge or jury—would consider the underlying facts or data for their truth, and not merely for the purpose of legitimizing the expert's conclusions.[762] It offered the following explanation:

> First, trial courts can screen out experts who would act as mere conduits for hearsay by strictly enforcing the requirement that experts display some genuine "scientific, technical, or other specialized knowledge [that] will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. Rule Evid. 702(a). Second, experts are generally precluded from disclosing inadmissible evidence to a jury. Third, if such evidence is disclosed, the trial judges may and, under most circumstances, must, instruct the jury that out-of-court statements cannot be accepted for their truth, and that an expert's opinion is only as good as the independent evidence that establishes its underlying premises. And fourth, if the prosecution cannot muster any independent admissible evidence to prove the foundational facts that are essential to the relevance

760. *Id.* at 2239 (footnote omitted).
761. *Id.* at 2240.
762. *Id.* at 2241.

> of the expert's testimony, then the expert's testimony cannot be given any weight by the trier of fact.[763]

Having found no violation of the evidentiary rules pertaining to expert testimony, the court affirmed the defendant's conviction for this and other reasons.[764]

2. People v. Fackelman

People v. Fackelman[765] presented the Michigan Supreme Court with a similar question but produced a different result—the court's reversal of the defendant's conviction.[766] In *Fackelman*, a jury found the defendant "guilty but mentally ill of home invasion, felonious assault, and felony-firearm, charges that resulted from an altercation he had with Randy Krell, the man who defendant believed had caused the death of his teenage son, Charlie[.]"[767] Soon after his arrest for this offense in the Monroe area, the defendant was in a Toledo, Ohio, hospital where psychiatrist Agha Shahid interviewed him and "prepared a three-page report on defendant's psychiatric condition" two days after the incident.[768] Shahid did not testify at trial, but both the prosecution and defense presented expert witnesses who reviewed the report and testified as to their opinions about the defendant's mental state.[769]

> The prosecutor presented the expert testimony of Dr. Jennifer Balay, a psychologist who examined defendant at the Michigan Center for Forensic Psychiatry in May 2007. Dr. Balay said that defendant was mentally ill, but she did not think that he was legally insane at the time of the offense. Specifically, she concluded that defendant "was not psychotic at anytime during this depression." Defendant presented the expert testimony of Dr. Zubin Mistry, a clinical psychologist who interviewed defendant on September 4, 2007. Dr. Mistry disagreed with Dr. Balay's assessment. He testified that defendant was legally insane at the time of the offense, concluding that defendant had experienced a "major depressive episode with psychotic features" or a "brief reactive psychosis."

---

763. *Williams*, 132 S. Ct. at 2241.
764. *Id.* at 2244.
765. People v. Fackelman, 489 Mich. 515; 802 N.W.2d 552 (2011).
766. *Id.* at 564.
767. *Id.* at 518.
768. *Id.* at 520.
769. *Id.* at 521.

Both Dr. Mistry and Dr. Balay reviewed Dr. Shahid's report in making their determinations regarding defendant's mental state. As the first witness presented by defendant, Dr. Mistry provided the requisite testimony needed for defendant to raise his insanity defense. Dr. Mistry testified that Dr. Shahid's report was one of many sources he had reviewed in reaching his opinion that defendant was legally insane at the time of the incident. In his direct testimony, he never referenced Dr. Shahid's diagnosis, never discussed any other doctor's diagnosis, and testified only as to his own diagnosis. On cross-examination, the prosecutor's questioning of Dr. Mistry was largely focused on Dr. Shahid, bringing out details about Dr. Shahid's professional credentials ("He's an M.D., psychiatrist, correct?") and Dr. Shahid's prior relationship to Dr. Mistry ("Do you know Dr. Shahid?" "You respect his opinion, correct?"). At the end of this cross-examination, the prosecutor squarely placed Dr. Shahid's diagnosis before the jury:

Q. At the end of that report did you read Dr. Shahid's diagnosis?
A. Yeah.

Q. You read where it says major depression, single episode,—
A. Yes.

Q. — severe, without psychosis?
A. Yes.

Q. But you don't agree that the Defendant did not have a psychosis, do you?
A. No. My opinion is different as to the diagnosis.

The prosecutor later referred to Dr. Shahid's report in his examination of his own expert, Dr. Balay, again referring to Dr. Shahid's diagnosis, and asking if Balay agreed with Dr. Shahid's diagnosis. She answered yes. He also repeatedly mentioned Dr. Shahid and his diagnosis in closing arguments, telling the jury that "it's real important to look at what Dr. Shahid had to say, even though he did not testify here before you." Defense counsel did not object to the questioning of the witnesses on the basis of

> Dr. Shahid's report and diagnosis or to the prosecutor's arguments.[770]

The supreme court, reversing the court of appeals,[771] held that testimony concerning the Shadid report was inadmissible under Rule 703 as the underlying report was not in evidence.[772] As the court—Justice Stephen J. Markman writing for a majority of himself, Justices Michael F. Cavanagh, Marilyn Kelly, Diane M. Hathaway and Mary Beth Kelly—explained:

> It is undisputed that both Dr. Mistry and Dr. Balay reviewed Dr. Shahid's report in making their determinations regarding defendant's mental state. Indeed, Dr. Balay specifically testified that Dr. Shahid's report constituted a "big part" of her opinion. It is understandable why the testifying doctors would rely heavily on Dr. Shahid's report, given that he was the only doctor to evaluate defendant shortly after the offense. Thus, the facts and data documented in his report provided distinctive insight into defendant's state of mind at the time of the offense.[773]

The five-member majority held that "the diagnosis itself was inadmissible under MRE 703 because it constituted an 'opinion,' and thus did not fall within the ambit of MRE 703, which renders admissible only the '*facts or regular data* . . . upon which an expert bases an opinion or inference[.]"[774] Accordingly, the supreme court reversed the conviction on this ground and because it also held that such testimony violated the defendant's rights under the Confrontation Clause,[775] a second aspect of this case I discuss in Part VIII.C.1.c of this article.

Chief Justice Robert Young Jr., dissenting on behalf of himself and Justice Brian K. Zahra, found no Rule 703 violation.[776] He explained that "an expert may form his opinion 'on historical data, *including* information and *opinions* contained in prior competency evaluations, when forming an opinion regarding a defendant's criminal

---

770. *Id.* at 521-23.

771. People v. Fackelman, No. 284512, 2009 WL 2635147 (Mich. Ct. App. Aug. 27, 2009).

772. *Fackelman*, 489 Mich. at 534.

773. *Id.*

774. *Id.* at 535.

775. *Id.* at 564.

776. *Id.* at 595 (Young, C.J., dissenting).

responsibility.'"[777] Because the Shadid report "was one of several pieces of data contained within his evaluation and would not have to be redacted under MRE 703, . . . [t]he rule of completeness, MRE 106, would have required that the entire evaluation be introduced into evidence because it 'ought in fairness . . . be considered contemporaneously with' the rest of the evaluation."[778]

VIII. HEARSAY, HEARSAY EXCEPTIONS AND THE ADMISSIBILITY OF OUT-OF-COURT STATEMENTS UNDER THE CONFRONTATION CLAUSE

Hearsay, most trial practitioners know, is an out-of-court statement "offered in evidence to prove the truth of the matter asserted."[779] In plainer English, the hearsay rule bars testimony that something is a fact because some person made an out-of-court statement that it *is* a fact. The hearsay rule does not bar a party from offering an out-of-court statement for a purpose other than establishing the truth of the statement, as "[w]here a witness testifies that a statement was made, rather than about the truth of the statement itself, the testimony is not hearsay."[780]

The rules of evidence and various legislative enactments have complicated the already difficult-to-understand rule, with numerous exclusions and exceptions. Furthermore, much of the recent federal and state jurisprudence relating to the Confrontation Clause ties closely to the definition of hearsay. The *Survey* period saw no shortage of cases in the hearsay realm.

A. Exclusions/Exemptions from the Definition of Hearsay

1. Prior Inconsistent Statements

A prior inconsistent statement does not constitute hearsay because it is not "offered in evidence to prove the truth of the matter asserted[,]"[781]

---

777. *Id.* at 594 n.80 (quoting People v. Dobben, 440 Mich. 679, 698; 488 N.W.2d 726 (1992)).

778. *Fackelman*, 489 Mich. at 595 n.80 (quoting MICH. R. EVID. 106) (Young, C.J., dissenting).

779. MICH. R. EVID. 801(c). The federal rules more specifically provide that hearsay is an out-of-court statement "a party offers in evidence to prove the truth of the matter asserted *in the statement*." FED. R. EVID. 801(c) (emphasis added).

780. People v. Harris, 201 Mich. App. 147, 151; 505 N.W.2d 889 (1993) (citing People v. Sanford, 402 Mich. 460, 491; 265 N.W.2d 1 (1978)).

781. MICH. R. EVID. 801(c).

"but is only offered to test the credibility of the witness's testimony in court."[782]

A party generally does not proffer a prior inconsistent statement to prove its contents as true, but merely seeks to discredit the witness by proving as fact that the witness has *told different stories*.[783] Again, recall that "[w]here a witness testifies that a statement was *made*, rather than about the *truth* of the statement itself, the testimony is not hearsay."[784]

What makes a statement "inconsistent" was the critical question a panel of the court of appeals sought to explain in the 2012 medical-malpractice case of *Howard v. Kowalski*.[785] The panel held that "any material variance between the testimony and the previous statement suffices" to establish inconsistency.[786]

Mercy Hospital Cadillac admitted the now-deceased Barbara Johnson after one of her horses bit her face, causing heavy bleeding.[787] The *per curiam* opinion for a unanimous panel of Judges Jane E. Markey, Deborah A. Servitto and Amy Ronayne Krause further summarized the facts as follows:

> [Defendant Dr. Robert F.] Kowalski testified that between 2:50 and 2:52 p.m., he requested the assistance of an ENT and an anesthesiologist "STAT" to help manage Mrs. Johnson's airway and that a medical helicopter be summoned to transport her to a larger hospital with better trauma treatment capability. Anesthesiologist Dr. Charles Urse responded and shortly thereafter, ENT specialist Dr. Lisa Jacobson also responded to the "STAT" call for assistance. Both Drs. Kowalski and Urse testified in their pretrial depositions and at trial that Mrs.

---

782. Howard v. Kowalski, 296 Mich. App. 664, 677; 823 N.W.2d 302 (2012) (citing Merrow v. Bofferding, 458 Mich 617, 631; 581 N.W.2d 696 (1998); People v. Steele, 283 Mich. App. 472, 487; 769 N.W.2d 256 (2009). A party may make inquiry of a witness about the prior statement, but may not introduce the statement into evidence unless and until "the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon[.]" MICH. R. EVID. 613(b). The federal rules contain a similar requirement. *See* FED. R. EVID. 613(b).

783. Both the federal and state rules further provide that, if the witness made the prior statement "under oath subject to the penalty of perjury at a trial" or hearing, the prior statement's proponent *may* offer the statement to prove its truth. FED. R. EVID. 801(d)(1)(A); MICH. R. EVID. 801(d)(1)(A).

784. *Harris*, 201 Mich. App. at 151 (emphasis added).

785. *Howard*, 296 Mich. App. at 676.

786. *Id.* at 677 (quoting JOHN W. STRONG ET AL., MCCORMICK, EVIDENCE ON EVIDENCE § 34, ¶¶ 151-152 (6th ed 2007)).

787. *Id.* at 667.

> Johnson had been relatively stable when they were at her bedside discussing the best medical procedure to maintain the patency of her airway. About 3:00 p.m., Dr. Kowalski was called away to another emergency room patient who had gone into cardiac arrest. Thereafter, at about 3:05 p.m., Mrs. Johnson began having more serious difficulty breathing, crying out that she could not breathe. Dr. Urse administered medications and attempted to orally intubate Mrs. Johnson, but the amount of blood in her mouth and throat made it impossible. Dr. Urse, with Dr. Jacobson's assistance, performed a cricothyroidotomy to ventilate the patient's lungs by inserting breathing tubes directly through her throat. The procedure was only partially successful, and Mrs. Johnson suffered cardiac arrest. She was resuscitated and placed on life support, but she had sustained permanent brain damage. Five days later, she was removed from life support and died.[788]

The plaintiff's theory at trial was that Kowalski neglected his duty of care by "failing to immediately intubate Mrs. Johnson before being called away to the other patient and leaving Mrs. Johnson unattended."[789] He further theorized that Urse did not arrive to render care to Johnson "until after the patient's fatal deterioration began at about 3:05 p.m."[790] The decedent's estate alleged that by the time defendant's colleague Urse began trying to intubate the patient, it was too late to undo the damage.[791] Plaintiff's counsel exchanged communications with Urse's insurer, which facilitated the physician's providing an affidavit to plaintiff's counsel,[792] which stated as follows:

> 4. I was contacted, by beeper or through the operating room front desk staff (I can't recall completely which one) in regards to a STAT ER page on patient Barbara Johnson on the afternoon of April 4, 2005. Then I immediately proceeded to the PACU to obtain the anesthesia department airway box, and then immediately proceeded to the Emergency Room, arriving within approximately two to three minutes after I was notified.

---

788. *Id.* at 667-68.
789. *Id.* at 668.
790. *Id.* at 668-69.
791. *Howard*, 296 Mich. App. at 669.
792. *Id.* at 669.

> 5. That my findings and treatment are summarized in my hand-written progress note contained in the medical record.[793]

Urse testified at trial and at deposition that plaintiff's theory was incorrect — he was at the patient's "bedside discussing treatment options with Dr. Kowalski while the patient was stable and before Dr. Kowalski was called away."[794] In other words, Urse testified, his first encounter with the patient was *not* when things went haywire, but earlier. He further testified that his progress note "did not include the events preceding the patient's acute deterioration . . . ."[795]

The trial court excluded the affidavit as hearsay in a pretrial ruling, but permitted plaintiff's counsel to refer to it in his opening statement "without showing it, by saying 'that Dr. Urse signed something which I believe is contrary to his testimony.'"[796] In his opening statement, the plaintiff's counsel argued that:

> The affidavit signed by Dr. Urse indicates nothing about him being in the room with Dr. Kowalski. Nothing. And we specifically inquired that question, that's what we wanted to know, who was in the room between 2:45 and 3:00. And we felt with that affidavit, that he had verified he was not initially in the room, but he testified in deposition contrary to that[.][797]

When Urse testified at trial that his first encounter with the decedent was when she was stable (contrary to plaintiff's theory), plaintiff's counsel sought to impeach the physician with the affidavit, but:

> The trial court suggested that counsel needed to lay a better foundation. When plaintiff's counsel asked Dr. Urse if his one-page progress note reflected the treatment he provided, Urse answered, "Yeah, it's a summary of events that occurred starting when she started to have respiratory distress" and "a summary of what had occurred that I thought was important." Dr. Urse identified a copy of the affidavit, identified his signature, and agreed the affidavit was a notarized statement given under oath. Dr. Urse was asked to and read aloud ¶ 4 of the affidavit. At this point, the trial court suggested that the affidavit be marked, and

793. *Id.* at 670.
794. *Id.*
795. *Id.* at 670.
796. *Id.* at 671.
797. *Howard*, 296 Mich. App. at 672.

> was, as Exhibit 17. In an effort to establish the affidavit as a prior inconsistent statement, plaintiff's counsel asked Dr. Urse about ¶ 5 of the affidavit and about the content of his progress note. Counsel moved for the admission of Exhibit 17, but the trial court ruled that it had not heard any testimony from Dr. Urse that was inconsistent with his affidavit.
>
> On further cross-examination, Dr. Urse acknowledged that his progress note did not state all that he had done or all that occurred and that he had not thought it important to note that he had conferred with Dr. Kowalski regarding treatment options. He also admitted that he reviewed plaintiff's notice of intent and that he talked to a "legal representative" before signing the affidavit. But Dr. Urse denied ever seeing the correspondence at issue [between plaintiff's counsel and his insurer] and explained that "I thought that when I filled out the affidavit, that you were asking me about when I got contacted and how long it took me to get down to the ER, that was my understanding, and that's what I wrote." Plaintiff's Counsel noted that he did not ask that the affidavit be prepared, to which Dr. Urse replied "that's what my legal representative said and I read it and I said that is what happened and I signed it."[798]

The trial court ruled that it would not admit the affidavit into evidence, although it would have the witness read its content into the record and would not preclude plaintiff's counsel from cross-examining Urse about its contents.[799] Shortly before closing statements, the judge denied the plaintiff's motion to admit the affidavit as rebuttal evidence, concluding it was not contrary to Urse's testimony at trial or deposition.[800] Plaintiff's counsel argued during closing statements, as the panel characterized counsel's words, "that the defense in this case was fabricated, that Dr. Urse's affidavit indicated that there was no meeting between Dr. Urse and Dr. Kowalski, that Dr. Urse did not come to Mrs. Johnson's room between 2:53 and 3:00 p.m. as the two doctors testified."[801] The jury delivered a verdict in defendant's favor, finding no cause of action.[802]

---

798. *Id.* at 672-73.
799. *Id.* at 673.
800. *Id.* at 674.
801. *Id.* at 675.
802. *Id*

Was Urse's affidavit contrary to—"inconsistent"—with his sworn testimony? Yes, held the Michigan Court of Appeals in finding error in the trial court's decision to the contrary.[803]

Noting that "[t]he Michigan Rules of Evidence do not expressly prescribe a test for inconsistency[,]"[804] the panel approvingly quoted the McCormick treatise on evidence and adopted (or, at least, appeared to adopt) its definition:

> [A]ny material variance between the testimony and the previous statement suffices. The pretrial statement need "only bend in a different direction" than the trial testimony. For instance, *if a prior statement omits a material fact presently testified to, which it would have been natural to mention in the prior statement, the statement is sufficiently inconsistent.* The test ought to be: Could the jury reasonably find that a witness who believed the truth of the facts testified to would be unlikely to make a prior statement of this tenor?[805]

The court of appeals characterized the trial court's contradictory rulings as nonsensical: it had ruled that Urse's affidavit was *not* inconsistent with Urse's testimony but nevertheless permitted plaintiff's counsel to ask Urse to *read* the affidavit into the record.[806] It explained, "[t]he contents of the affidavit were clearly not about a collateral issue. As the trial court itself acknowledged, plaintiff's entire theory of the case was premised on the fact that the affidavit and medical records told the 'true story,' and that Dr. Urse 'changed his position regarding what happened.'"[807] Any error, however, was harmless because "the trial court allowed the contents of the affidavit into evidence, allowed plaintiff's counsel to discuss its contents during closing argument, and instructed the jury to consider whether the affidavit contradicted Dr. Urse's testimony."[808] The court of appeals reversed the judgment, however, on grounds that the trial court's error in excluding e-mail communications between plaintiff's counsel and defendant's insurer was error and not harmless.[809] I discuss that aspect of the case in Part IV.C of this article.

---

803. *Howard*, 296 Mich. App. at 676.

804. *Id.* at 677.

805. *Id.* at 677-78 (quoting JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 34, ¶¶ 151-152 (6th ed. 1999)) (emphasis added).

806. *Id.* at 678.

807. *Id.* at 679.

808. *Id.* at 680.

809. *Howard*, 296 Mich. App. at 684.

2. Prior Consistent Statements

Under the Michigan rules, when a party seeks to discredit a witness' testimony by "an express or implied charge against the declarant of recent fabrication or improper influence or motive[,]" the proponent of that witness' testimony may seek to admit a prior statement of that witness "consistent with the declarant's testimony" (a prior consistent statement) if doing so would rehabilitate that witness and rebut the assertion that some recent factor caused the witness to fabricate his or her testimony.[810] In other words, when the adverse party insinuates that the witness' testimony is the result of a motive to fabricate, the proponent may introduce the fact that a witness made the same statement *before he had any motive to fabricate.*

The foundation for the court's admission of such a prior consistent is as follows:

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose.[811]

The court of appeals had occasion to explain the applicability of this rule to a declarant victim's statements where the victim's testimony eventually resulted in the defendant-appellant's conviction on two counts of first-degree criminal sexual conduct and one count of unarmed robbery in *People v. Mahone.*[812]

Judge Amy Ronayne Krause summarized the facts in a unanimous opinion on behalf of herself and Judges Mark J. Cavanagh and Kathleen Jansen:[813]

> The victim was working as a prostitute at the time of the offense, a fact that was fully explored before the jury by both the

---

810. MICH. R. EVID. 801(d)(1)(B). The corresponding federal rule is virtually identical. *See* FED. R. EVID. 801(d)(1)(B).

811. People v. Mahone, 294 Mich. App. 208, 213-14; 816 N.W.2d 436 (2011) (quoting People v. Jones, 240 Mich. App. 704, 707; 613 N.W.2d 411 (2000)).

812. *Id.* at 211.

813. *Id.*

> prosecution and the defense. The codefendants initially sought to procure her services after finding an online advertisement that had been placed by the victim's working partner. The victim testified that she refused to see two customers at once, whereupon the codefendants initially left. They then returned, tricked her into opening the door, robbed her of her cell phone and computer, and sexually assaulted her; they were interrupted by the arrival of another customer. Defendant testified that the interaction had been completely consensual until interrupted by the other customer's arrival. However he and [co-defendant Evan Jerome] Burney took their money back after the acts in question and, unbeknownst to defendant until they returned to their car, Burney also took the victim's cell phone and computer. The defense theory was essentially that the victim invented the claimed sexual assault as vengeance for the theft and the refusal to pay.[814]

The first purported prior consistent statement was an investigating "officer's testimony that the victim said she had been threatened with a large vodka bottle."[815] The appellate panel concluded that, under the circumstances, the officer's testimony did not fall within the ambit of a prior consistent statement because it did not meet the fourth foundational requirement for the court's admission of such a statement—that it "be made prior to the time that the supposed motive to falsify arose."[816] Here, the panel explained, the defense's theory was that the victim was angry about the co-defendants having stolen from her and inflated her claim to include rape allegations in order to exact revenge.[817] "Consequently, the alleged motive to falsify would have arisen before the victim talked to the officer."[818]

The second purported prior consistent statement, the panel concluded, however, *did* meet the foundational requirements for such a statement.[819] The victim's co-worker testified that, shortly after she directed the defendants to the victim's room, the victim telephoned the coworker to say *she was not expecting two clients simultaneously*.[820] The appellate court explained that defendant had implicitly charged the

814. *Id.* at 211-12.
815. *Id.* at 213.
816. *Id.* at 214 (quoting *Jones*, 240 Mich. App. at 707).
817. *Mahone*, 294 Mich. App at 214.
818. *Id.*
819. *Id.*
820. *Id.*

victim fabricated her testimony to include a rape allegation *after* the theft and that "the victim admitted [the defendant] and Burney without any complication[.]"[821] Thus, the panel explained, "Critically, this telephone call would have occurred *before* the victim would have had any motive to falsify, no matter which version of events is correct."[822] For this and other reasons (one of which I discuss in Part VII.B.1 of this article), the court affirmed Mahone's conviction on all charges.[823]

3. Party-Opponent's Statements

The rules specifically exclude from their definition of hearsay a party's own statement when an adverse party offers the statement against the party-opponent declarant.[824] This doctrine, however, meets its limits when it collides with the principle that a witness may generally not testify to his or her own legal conclusions, as a Sixth Circuit panel explained in the bankruptcy case *In re Dickson.*[825]

Debtor Nancy E. Dickson executed a promissory note and mortgage of certain property in favor of Countrywide Home Loans in consideration for Countrywide's $79,000 loan to her in 1998.[826] Later, once bankruptcy proceedings commenced, Dickson sought to avoid the lien on the ground that "Countrywide did not properly perfect its lien on her manufactured home."[827] To determine whether Countrywide held a valid lien, the bankrupty court explained that it would look to "the intent of the parties at the time of contract formation[.]"[828] The Sixth Circuit Bankruptcy Appellate Panel (BAP) described the debtor's deposition testimony as

---

821. *Id.*

822. *Id.*

823. *Mahone*, 294 Mich. App at 218.

824. FED. R. EVID. 801(d)(2). The corresponding Michigan rule is substantially similar. *See* MICH. R. EVID. 801(d)(2). Many attorneys are under the misimpression that Rule 801(d) permits a party to offer *its own* hearsay statement into evidence, ignoring the words of the rule specifying that "[t]he statement is offered *against* a party[.]" MICH. R. EVID. 801(d)(2) (emphasis added). The Michigan Supreme Court emphasized in a 1941 case that a party's own self-serving statement *is* hearsay:

> Admissions are statements made by or on behalf of a party to the suit in which they are offered which contradict some position assumed by that party in that suit. They are substantive evidence for the adverse party, but never for the party by whom or on whose behalf they are supposed to have been made.

Elliotte v. Lavier, 299 Mich. 353, 357; 300 N.W. 116 (1941).

825. Dickson v. Countrywide Home Loans (*In re* Dickinson), 655 F.3d 585, 592 n.4 (6th Cir. 2011).

826. *Id.* at 587 (quoting Countrywide Home Loans v. Dickinson (*In re* Dickson), 427 B.R. 399, 401 (B.A.P. 6th Cir. 2010), *aff'd*, 655 F.3d 565 (6th Cir. 2011)).

827. *Id.* at 402.

828. *Id.* at 403.

"equivocal regarding her intention to grant a lien to Countrywide on the manufactured home," but noted that "she ultimately agreed that she was granting a lien on the manufactured home in favor of Countrywide."[829]

After reviewing the evidence, the bankruptcy court found "that Countrywide had failed to perfect its lien, and that even if Countrywide had perfected its lien, such lien was avoidable as a preference."[830] The Sixth Circuit BAP affirmed, and Countrywide took a regular appeal to the sixth circuit.[831]

On appeal, Countrywide emphasized the debtor's alleged concession during her deposition that she had granted a lien to Countrywide over the property at issue.[832] The unanimous panel—Judge Richard Allen Griffin writing for himself and Judges Alan E. Norris and Julia Smith Gibbons—held that the debtor was not qualified to make this statement, even if it was a statement against her own interest.[833] Citing the rule pertaining to expert testimony, the panel explained that, "lay persons, such as Dickson, are not qualified to make legal conclusions."[834] Countrywide misplaced its reliance on the debtor's admission that her creditor had a lien on the manufactured home.[835] For this and other reasons, the panel affirmed the bankruptcy court's judgment in Dickson's favor.[836]

4. Statements in Furtherance of a Conspiracy

Both the Michigan and federal rules carve out an exclusion from the definition of hearsay for statements of an adverse party's co-conspirator "during the course and in furtherance of the conspiracy[.]"[837] As foundation, the statement's proponent "must establish by a preponderance of the evidence that a conspiracy existed, that the defendant was a member of the conspiracy, and that the coconspirator's

829. *Id.*
830. *Id.*
831. In re *Dickson*, 655 F.3d at 587.
832. *Id.* at 592 n.4.
833. *Id.*
834. *Id.* (citing FED. R. EVID. 701(c); Mitroff v. Xomox Corp., 797 F.2d 271, 276-77 (6th Cir. 1986)).
835. *Id.*
836. *Id.* at 594.
837. Both the Michigan and federal rules require some foundational evidence for the existence of the conspiracy in addition to the statements' contents (the statement itself cannot be the sole foundation that a conspiracy existed). FED. R. EVID. 801(d)(2)(E); MICH. R. EVID. 801(d)(2)(E).

statement was made during the course and in furtherance of the conspiracy."[838]

In *United States v. Kelsor*, the government successfully prosecuted the defendant on various counts relating to his involvement in a conspiracy to traffic heroin in the Columbus, Ohio, area, resulting in a life sentence for Ronald Kelsor.[839] From that case comes the holding that "[s]tatements in furtherance of a conspiracy take many forms, including statements that keep a coconspirator apprised of another's activities, induce continued participation, or allay his fears."[840] The statement "need not actually further the conspiracy."[841]

One of the defendant's associates, Mitchell Wood:

> [T]estified that on one occasion when he and [colleague Paul] Coon drove to Columbus to obtain heroin from defendant, Coon had a silver and black .380 caliber handgun with him. When they got there, Coon got out of the car with money and the handgun and returned to the car with the heroin and without the handgun.[842]

Wood explained that Coon told him he carried a gun to the meeting with defendant because "[h]e was short on his money, his part of the money, and he had asked Ron Kelsor if he would take the gun in exchange for the rest of the money that he owed for the heroin."[843] A unanimous panel of the sixth circuit—Judge Ralph B. Guy Jr. writing for himself, Judges Raymond M. Kethledge and Helene N. White[844]—overruled Kelsor's contention that the statement was not in furtherance of the conspiracy and thus did not meet the foundational requirements for the district court to admit it under Rule 801(d)(2)(E).[845] The evidence, the panel said, "established that the statement was made in the course and furtherance of the conspiracy[]"—that "Wood and Coon pooled their money to conduct a single transaction with the defendant. But, short on his portion of the money on this occasion, Coon explained to Wood that he had asked the defendant to accept the handgun in partial payment of

838. United States v. Kelsor, 665 F.3d 684, 693 (6th Cir. 2011) (citing United States v. Wilson, 168 F.3d 916, 920 (6th Cir. 1999); United States v. Clark, 18 F.3d 1337, 1341 (6th Cir. 1994)).

839. *Id.* at 688-90.

840. *Id.* at 694 (citing United States v. Salgado, 250 F.3d 438, 450 (6th Cir. 2001)).

841. *Id.* (quoting *Salgado*, 250 F.3d at 449).

842. *Id.* at 693.

843. *Id.* at 694.

844. *Kelsor*, 665 F.3d at 689-90.

845. *Id.* at 694-95.

their joint purchase."[846] Accordingly, the district court's admission of the statement did not constitute error, and for this and other reasons, the Sixth Circuit panel affirmed the defendant's convictions.[847]

B. Hearsay Exceptions

"Exceptions to the hearsay rule are justified by the belief that the hearsay statements are both necessary and inherently trustworthy."[848] In determining whether a statement is "inherently trustworthy," a court looks at "the totality of the circumstances surrounding the actual making of the statement, *not evidence corroborating the statement*[.]"[849]

1. Statements for the Purpose of Medical Diagnosis or Treatment

A common exception to the hearsay rule exists in MRE 803(4), which covers a statement "made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment."[850] The theory behind the statement's "trustworthiness" is that "the declarant ha[s] a self-interested motivation to be truthful in order to receive proper medical care."[851]

In *People v. Mahone*, whose facts I described in Part VIII.A.2 of this article, the defendant objected on hearsay grounds to the court's admission of statements the victim made to a nurse during the victim's rape examination.[852] The court held that, to qualify under this exception, the statements must have been "reasonably necessary for diagnosis and treatment and . . . the declarant [must have] had a self-interested

846. *Id.* at 695.

847. *Id.* at 695, 701.

848. People v. Meeboer, 439 Mich. 310, 322; 484 N.W.2d 621 (1992) (citing Solomon v. Shuell, 435 Mich. 104, 119; 457 N.W.2d 669 (1990)).

849. *Id.* at 323 n.17 (emphasis added) (citing State v. Larson, 472 N.W.2d 120, 125 (Minn. 1991)).

850. MICH. R. EVID. 803(4). The corresponding federal rule, worded more narrowly, states the foundational requirements as follows: The statement "(A) is made for—and is reasonably pertinent to—medical diagnosis or treatment; and (B) describes medical history; past or present symptoms or sensations; their inception; or their general cause." FED. R. EVID. 803(4).

851. People v. Mahone, 294 Mich. App. 208, 215; 816 N.W.2d 436 (2011).

852. *Id.* at 214.

motivation to be truthful in order to receive proper medical care."[853] The court explained the importance and trustworthiness of such statements:

> Particularly in cases of sexual assault in which the injuries might be latent, such as contracting sexually transmitted diseases or psychological in nature, and thus not necessarily physically manifested at all, a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment.[854]

Without extensive explanation, the panel held that the trial court properly admitted the statements under the medical-diagnosis-and-treatment exception to the hearsay rule.[855]

2. Recorded Recollection and Records of Regularly Conducted Activity

At times during his or her testimony, a witness may be unable to remember some or all aspects of the circumstances to which he or she testifies.[856] "It not infrequently happens that a witness, under the embarrassment of an examination, forgets, or omits to state, facts within his knowledge, or is disinclined to disclose fully and definitely what he knows."[857] Accordingly, courts allow a party to attempt to refresh the witness' memory with a document or some other item, even if the witness was not the author or creator of the document or item.[858]

---

853. *Id.* at 215.

854. *Id.* (citing People v. Garland, 286 Mich. App. 1, 9-10; 777 N.W.2d 732 (2009); People v. McElhany, 215 Mich. App. 269, 282-83; 545 N.W.2d 18 (1996)).

855. *Id.*

856. Hileman v. Indreica, 385 Mich. 1, 7-8; 187 N.W.2d 411 (1971).

857. *Id.*

858. People v. Hill, 282 Mich. App. 538, 547; 766 N.W.2d 17 (2009), *aff'd in part, vacated in part*, 485 Mich. 912; 733 N.W.2d 257 (2009). *See also* United States v. Marrero, 651 F.3d 453, 471-72 (6th Cir. 2011) (quoting Rush v. Ill. Cent. R.R. Co., 399 F.3d 705, 716 (6th Cir. 2005) ("The propriety of permitting a witness to refresh his memory from a writing prepared by another largely lies within the sound discretion of the trial court."). *But see* MICH. R. EVID. 612(b) ("[When] the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying."). The corresponding federal rule provides that:

> Unless 18 U.S.C. § 3500 provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in

If this document fails to refresh the witness' memory, the proponent of his testimony, through the hearsay exception in MRE 803(5), may then have the witness read the contents of a document he or she authored as evidence of his prior recollection ("past recollection recorded").[859] To do so, the proponent must establish that the record was "made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly."[860]

Regardless of a witness' memory—or lack thereof—a separate hearsay exception permits the court to admit documents and records if they come within the meaning of a "business record."[861] The proponent must establish, through a custodian of records or a person with access to the records, that the entries or recordings of facts or events on the document were "made at or near the time [of the events or occurrences the recording documents] by - or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that activity to make the memorandum, report, record, or data compilation."[862]

It was the applicability and limits of the business-records and past-recollection-recorded exceptions that the Sixth Circuit considered in the recent criminal case of *United States v. Fisher*.[863] In this case, federal prosecutors in Detroit charged, and convicted, Edward Fisher of conspiracy to defraud the United States[864] by falsifying a payroll-administration company's tax liability while he served as its legal counsel.[865] One of the witnesses at trial was an attorney Fisher's employer had hired "to help resolve the company's outstanding tax obligations."[866] The company's chief executive "testified that he and Fisher, among others, agreed that they would not inform [attorney McGee] Grigsby that SES [the employer] had filed false tax returns.[867]

---

camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

FED. R. EVID. 612(b).

859. MICH. R. EVID. 803(5).

860. *Id.*

861. MICH. R. EVID. 803(6).

862. *Id. See also* FED. R. EVID. 803(6) (the corresponding federal rule is substantially similar).

863. 648 F.3d 442 (6th Cir. 2011).

864. 18 U.S.C.A. § 371 (West 1994).

865. *Fisher*, 648 F.3d at 444-45.

866. *Id.* at 445.

867. *Id.*

They decided instead to blame the systems and software people within SES's accounting department for the tax deficiencies."[868]

Although the district court permitted Grigsby to orally read most of his notes into the record as a past recollection recorded,[869] the defendant contended on appeal that the judge erred in denying his motion to admit the notes themselves into evidence under the business-records exception.[870] A unanimous three-judge panel of the Sixth Circuit—Judge Ronald Lee Gilman writing for himself and Judges R. Guy Cole Jr. and Eric L. Clay[871]— however, disagreed and affirmed the defendant's conviction.[872]

The district court ruled, first, that the notes were not admissible as they contained several layers of hearsay[873] and the federal rules only permit a court to admit "hearsay within hearsay" when "each part of the combined statements, [each level of hearsay] conforms with an exception to the rule."[874] The circuit judges did not consider this question, as they agreed with the district court's second rationale—that the court's admission of the notes would prejudice the jury substantially more than the notes would be probative, in violation of FRE 403.[875]

The notes, the district judge explained, were "'voluminous, cryptic, and idiosyncratic,' and 'admitting them all with or without attempts at limiting instructions would have a high likelihood of misleading and confusing the jury.'"[876] The panel deferred to the district court's judgment, noting that, in applying Rule 403, "a district court is granted 'very broad discretion in determining whether the danger of undue prejudice outweighs the probative value of the evidence.'"[877]

In any event, the panel concluded, "[b]ecause the vast majority of Grigsby's notes were in fact admitted as his past recollection recorded, Fisher has failed to show that the district court's exclusion of the written copies of the same notes was prejudicial."[878] Accordingly, the panel held that the district judge did not abuse his discretion in denying the

868. *Id.*
869. *See* FED. R. EVID. 803(5).
870. *Fisher*, 648 F.3d at 449 (citing FED. R. EVID. 803(6)).
871. *Id.* at 451.
872. *Id.* at 445.
873. *Id.* at 449.
874. FED. R. EVID. 805. The corresponding Michigan rule is substantially similar. *See* MICH. R. EVID. 805.
875. *Fisher*, 648 F.3d at 449.
876. *Id.* (citations omitted).
877. *Id.* (quoting United States v. Vance, 871 F.2d 572, 576 (6th Cir. 1989)).
878. *Id.* at 450.

defendant's motion to admit the records into evidence.[879] For this and other reasons, the Sixth Circuit affirmed the defendant's conviction.[880]

3. Statements by Vulnerable Victims

Rule 803A of the Michigan rules[881] is one of a number of rules or statutes that come into play in trials for offenses involving "vulnerable victims"—victims of violence and/or sexual abuse who, due to their relationship to their abuser (e.g., parent-child, husband-wife or boyfriend-girlfriend) sometimes hesitate to cooperate in the prosecution.[882] Both the Michigan courts and the legislature have established hearsay exceptions for out-of-court statements where the declarant is a vulnerable victim.[883] I discuss these hearsay exceptions below.

a. The Tender Years Exception

Under the Michigan rules, a child's statement concerning a sexual act against him or her:

> [I]s admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;

879. *Id.*

880. *Id.* at 451.

881. MICH. R. EVID. 803A.

882. For example, whereas the *general* rule is that an individual's alleged propensity to commit certain acts is inadmissible to prove he or she acted in conformity therewith, MICH. R. EVID. 404(b)(1), FED. R. EVID. 404(b)(1), Michigan law provides that other acts of sexual abuse or domestic violence *are* admissible to show the defendant acted in conformity with his or her character to commit such acts. MICH. COMP. LAWS ANN. § 768.27a (West 2012) (pertaining to other acts of sexual abuse of children); MICH. COMP. LAWS ANN. § 768.27b (West 2012) (pertaining to other acts of domestic violence). For a discussion of the policy considerations underlying Section 768.27a, see *People v. Pattison*, 276 Mich. App. 613, 618-21; 741 N.W. 2d 558 (2007). The federal rules—rather than statutes—contain similar provisions. *See* FED. R. EVID. 412-15.

883. *See* MICH. R. EVID. 803(A), MICH. COMP. LAWS ANN. § 768.27c (West 2012).

(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

(4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.[884]

The court of appeals recently had occasion to discuss the second and third requirements of this rule in the case of *People v. Douglas*.[885] A Lenawee County jury convicted Jeffrey Alan Douglas of first-degree criminal sexual conduct (CSC) (victim under thirteen years of age)[886] and second-degree CSC (victim under thirteen years of age)[887] in a case that originally commenced in 2009.[888] "KD," the victim in this case, first alerted her mother about the victim's performing sexual acts on her father about one year after the incident took place, while she was riding in a vehicle with her mother at the age of about three-and-a-half years.[889] She subsequently described the incident to Jennifer Wheeler in an interview at the nonprofit organization Care House.[890]

In that interview, Wheeler told KD:

This place here is called Care House, and we call it Care House not because anyone lives here—

[*KD*]: Um-hum.

Ms. Wheeler:—just because everyone who works here really cares about kids. You know what my job is here at Care House?

[*KD*]: M-mm.

Ms. Wheeler: It's to listen and talk with kids. That's what I do every single day all day long. I talk to little kids. I talk to older kids like you. Sometimes even teenagers.

---

884. MICH. R. EVID. 803A.

885. 296 Mich. App. 186, 193-95; 817 N.W.2d 640 (2012), *appeal granted*, 493 Mich. 876; 821 N.W.2d 574 (2012), *held in abeyance*, 828 N.W.2d 381 (Mich. 2013).

886. MICH. COMP. LAWS ANN. § 750.520b(1)(a) (West 2008).

887. MICH. COMP. LAWS ANN. § 750.520c(1)(a) (West (2008).

888. *Douglas*, 296 Mich. App. at 191.

889. *Id.* at 194.

890. *Id.* at 191.

[*KD*]: Teenagers?

Ms. Wheeler: Yeah, teenagers. And when I talk to kids, they tell me everything. They tell me about their friends and their families. They tell me about their moms and their dads. They tell me about things that happen to them. Things that they saw. Things that they heard. They tell me about worries and problems. They tell me about secrets. They even tell me about things that people tell them not to tell, and that's okay because as long as you talk to me today, you get to tell me anything and everything that you want. Okay?

[*KD*]: Know what, my daddy makes me suck his peepee.[891]

Under the circumstances, the court of appeals held that KD's statements to Wheeler were "arguably not spontaneous[,]" thus potentially failing the second requirement under Rule 803A.[892] A per curiam opinion from two of the panel's three members, Judges Pat M. Donofrio and Cynthia D. Stephens,[893] explained that:

> [Q]uestioning by an adult is not incompatible with a ruling that the child produced a spontaneous statement . . . for such statements to be admissible, the child must broach the subject of sexual abuse, and any questioning or prompts from adults must be nonleading or open-ended in order for the statement to be considered the creation of the child.[894]

Here, the panel emphasized, it was Wheeler's statements that prompted the declarant's utterance, and "KD had already talked to her therapist about the alleged sexual abuse, and . . . KD's mother had told her during the 45 to 60-minute drive that she was going to be interviewed . . . ."[895] Accordingly, without ruling definitively on the issue, the panel concluded the statements "were arguably not spontaneous."[896]

Having hedged on the first issue, the panel then unequivocally held that the statements failed the third requirement of Rule 803A—that "either the declarant made the statement immediately after the incident or

---

891. *Id.* at 193-94.

892. *Id.* at 194.

893. *Id.* at 210.

894. *Douglas*, 296 Mich. App. at 193 (quoting People v. Gursky, 486 Mich. 596, 614; 786 N.W.2d 579 (2010)) (internal quotation marks omitted).

895. *Id.* at 194.

896. *Id.*

any delay is excusable as having been caused by fear or other equally effective circumstance."[897] Given the one-year delay between the incident and her reporting, the appellate court noted, "KD's youth, without more, is not an equally effective circumstance that sufficiently explains why she did not disclose the abuse for such a long time."[898] Here the prosecution made no showing of "any explanation regarding the cause of the delay, let alone an indication that fear or a similar circumstance was the reason for the delay," and thus statements failed the third requirement of Rule 803A.[899] Finally, the judges explained that the first statement KD made corroborating her testimony was to her mother and not to Wheeler, thus failing Rule 803A's requirement that the 803A testimony concern only the "first corroborative statement about that incident."[900] Thus, the panel concluded, the trial court erred in admitting the statements contrary to the requirements of Rule 803A.[901]

Importantly, the panel noted that although Douglas' trial counsel failed to object to the testimony, this neglect constituted ineffective assistance of counsel, precluding application of the forfeiture principle for unpreserved claims of error.[902] Defense trial "counsel's failure to object to the hearsay testimony and the testimony that improperly bolstered KD's credibility fell below an objective standard of reasonableness because the witness testimony was, on the whole, consistent and did not demonstrate that KD had given different versions of events."[903] For these and other reasons, the appellate court vacated defendant's conviction and sentence and remanded the matter to the trial court.[904]

---

897. *Id.* at 194-95 (citing MICH. R. EVID. 803A(3)).

898. *Id.* at 194.

899. *Id.* at 194-95. Similarly, the panel noted that the "first" statement KD made to her mother while initially disclosing the incident in her mother's vehicle also failed this requirement as it "was not made immediately after the incident and there is no indication that fear or another equally effective circumstance caused the delay." *Id.* at 196.

900. *Douglas*, 296 Mich. App. at 195 (citing MICH. R. EVID. 803A).

901. *Id.*

902. *Id.* at 199-205 (citing People v. LeBlanc, 465 Mich. 575, 579; 640 N.W.2d 246 (2002); People v. Swain, 288 Mich. App. 609, 643; 794 N.W.2d 92 (2010); People v. Toma, 462 Mich. 281, 302; 613 N.W.2d 694 (2000)). *See also* People v. Carines, 460 Mich. 750, 763-64; 597 N.W.2d 130 (1999) (pertaining to appellate review of unpreserved errors).

903. *Douglas*, 296 Mich. App. at 200.

904. *Id.* at 210.

b. Statements of Domestic-Assault Victims to Police Officers

The Michigan Code of Criminal Procedure carves out a statutory hearsay exception in Section 27c for a statement of domestic-assault victims to law-enforcement officers, in domestic-violence cases, where the statement "purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant," where the statement "was made at or near the time of the infliction or threat of physical injury," and where "[t]he statement was made under circumstances that would indicate the statement's trustworthiness."[905] In a recent case, the court of appeals clarified that a trial court can admit a declarant's statement about a recent assault even when it also discusses the circumstances of prior assaults.[906]

In considering whether the circumstances indicate the statement's trustworthiness, the statute provides that a court may consider:

> (a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.
>
> (b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.
>
> (c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section.[907]

An Oakland County jury convicted Christopher Michael Meissner of second-offense domestic violence,[908] first-degree home invasion,[909] and obstruction of justice[910] in May 2010.[911] His girlfriend, Candace Worthington, had:

> [A]ppeared at the Waterford police station, visibly shaken and upset. She reported that defendant, with whom she had a relationship, had broken her door and had sent her threatening text messages. She showed a police officer the text messages, which included "You trying to die?" and "now you will reap the repercussions," as well as defendant's pointed message in

905. MICH. COMP. LAWS ANN. § 768.27c(1)(a), (c), (d) (West 2008).
906. People v. Meissner, 294 Mich. App. 438, 446-47; 812 N.W.2d 37 (2011).
907. MICH. COMP. LAWS ANN. § 768.27c(2).
908. MICH. COMP. LAWS ANN. § 750.81(3) (West 2008).
909. MICH. COMP. LAWS ANN. § 750.110a(2) (West 2008).
910. MICH. COMP. LAWS ANN. § 750.505 (West 2008).
911. *Meissner*, 294 Mich. App. at 442.

> response to Worthington's telling him that she had gone to the police: ". . . I am going to beat the shit out of you." Worthington described to the police *several experiences she had with defendant over the prior months*, including one in which defendant had destroyed her phone, another in which he pushed her down the stairs, and another in which he put her in a chokehold. Worthington wrote a statement recounting the threatening text messages, the prior physical injuries, and the other information she had given to the police.
>
> Worthington's statement also described an incident that had occurred just that morning, when Worthington had been awakened by a crashing noise and saw defendant in her bedroom. Defendant pushed her shoulder, asked for a cigarette, tossed coins at her, and then left.[912]

By the time of trial, Worthington was still dating the defendant and was pregnant with his child.[913] She recanted on the witness stand, testifying "that defendant had never beaten her and had never threatened her."[914]

Pursuant to Section 27c,[915] the prosecutor filed a notice of intent to admit Worthington's statements to the police at trial.[916] The trial court subsequently denied the defendant's motion to suppress the statements.[917] On appeal, the defendant argued that the delay between the alleged incident and Worthington's reports to the police suggested they were untrustworthy within the meaning of 27c(1)(c) ("The statement was made at or near the time of the infliction or threat of physical injury.") and (1)(d) ("The statement was made under circumstances that would indicate the statement's trustworthiness[]").[918]

The court of appeals, in a unanimous opinion by Judge Donald S. Owens on behalf of himself, Judges Kathleen Jansen and Peter D.

---

912. *Id.* at 442-43 (emphasis added).

913. *Id.* at 444.

914. *Id.*

915. The statute requires that:

> [T]he prosecuting attorney [] disclose the evidence, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered, to the defendant not less than 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown.

MICH. COMP. LAWS ANN. § 768.27c(3).

916. *Meissner*, 294 Mich. App. at 443.

917. *Id.*

918. *Id.* at 446-47 (citing MICH. COMP. LAWS ANN. § 768.27c(1)(d)).

O'Connell,[919] however, discovered no error in the trial court's admission of Worthington's statements to the police concerning the events that day or the defendant's prior acts[920] of assault over the preceding several months.[921] The panel explained why it had no concern with the statements' temporal requirement:

> In this case, Worthington made her November statements at or near the time defendant threatened her with injury. The record demonstrates that Worthington sought police assistance in the late afternoon or early evening. Shortly before she arrived at the police station, or perhaps while she was at the station, she received extremely threatening text messages from defendant. She described these messages in her written statement. Even at trial, Worthington acknowledged that after she informed defendant she had contacted the police, he sent a message stating that he would beat her. Accordingly, the trial court was not required to calculate or consider the number of hours that elapsed between the time of the charged offense and the time Worthington gave the statements to the police. The court could instead determine that Worthington's statements met the requirements of subsections (1)(a) because the statements described text messages that threatened physical injury, and met the requirements of subsection (1)(c) because she made the statements at or very near the time she received one or more of the threatening text messages.[922]

The panel then considered the defendant's argument that the court should have excluded the defendant's statements on the day of the charged incident because the statements concerned domestic-violence acts that occurred months prior.[923] It explained that, "[t]aken together, Subsections (1)(a) and (c) indicate that a hearsay statement can be

---

919. *Id.* at 460.

920. As I discuss above, Michigan law provides that other acts of domestic violence *are* admissible to show the defendant acted in conformity with his or her character to commit such acts. MICH. COMP. LAWS § 768.27b(1) (emphasis added) ("[I]n a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible *for any purpose for which it is relevant,* if it is not otherwise excluded under Michigan rule of evidence 403.") (emphasis added).

921. *Meissner*, 294 Mich. App. at 446-48.

922. *Id.* at 447.

923. *Id.* at 446.

admissible if the declarant made the statement at or near the time the declarant suffered an injury or was threatened with injury."[924]

In other words, the court appeared to hold, a hearsay statement a domestic-violence victim makes concerning a recent assault can also incorporate her account of a long-ago assault.[925] As the court explained, "[n]either subsection [(1)(a) or (1)(c)] requires that the statements at issue describe the *charged* domestic violence offense."[926] Accordingly, the appellate court found no error in the trial court's admission of Worthington's statements under section 27c.[927] For this and other reasons, the court affirmed defendant's convictions.[928]

*C. The Admissibility of Out-of-Court Statements in the Post-*Crawford *Era*

Courts are struggling anew with the meaning of the Confrontation Clause of the Sixth Amendment, no less than 221 years after the Bill of Rights first carried the force of law.[929] In the 2004 case of *Crawford v.*

---

924. *Id.* at 446-47.

925. *Id.* at 446-48.

926. *Id.* at 446 (emphasis added).

927. *Mesinner*, 294 Mich. App. at 447-48.

928. *Id.* at 460. The supreme court subsequently denied leave to appeal over the dissent of the three Democratic justices, Michael F. Cavanagh, Marilyn J. Kelly and Diane M. Hathaway. 491 Mich. 938; 815 N.W.2d 126 (2012).

929. ROGER A. BRUNS, NAT'L ARCHIVES & RECORDS ADMIN., *A More Perfect Union: The Creation of the U.S. Constitution*, *available at* http://www.archives.gov/exhibits/charters/constitution_history.html (last visited Apr. 29, 2013).

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; *to be confronted with the witnesses against him*; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI (emphasis added). Similarly, the Michigan Constitution provides:

> In every criminal prosecution, the accused shall have the right to a speedy and public trial by an impartial jury, which may consist of less than 12 jurors in prosecutions for misdemeanors punishable by imprisonment for not more than 1 year; to be informed of the nature of the accusation; *to be confronted with the witnesses against him or her;* to have compulsory process for obtaining witnesses in his or her favor; to have the assistance of counsel for his or her defense; to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court; and as provided by law, when the trial court so orders, to have such reasonable assistance as may be necessary to perfect and prosecute an appeal.

Washington, Justice Antonin G. Scalia led six of his colleagues to overrule the prevailing interpretation of the Confrontation Clause.[930] Until *Crawford*, under the doctrine of *Ohio v. Roberts*,[931] the Sixth Amendment would not bar the court's admission of a statement from a nontestifying witness in a criminal case if a court was satisfied that "the statement bears 'adequate indicia of reliability.'"[932] The old *Roberts* interpretation provided that to meet the test of reliability, "evidence must either fall within a 'firmly rooted hearsay exception' or bear 'particularized guarantees of trustworthiness.'"[933]

The less-flexible rule of *Crawford* accords trial judges much less discretion.[934] The court held that, "*[T]estimonial* statements of witnesses absent from trial [shall be] admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine."[935] Justice Scalia explained that the court discarded the Roberts doctrine because:

> Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.[936]

However, as Justice Scalia noted two years later, "[a] critical portion of this holding . . . is the phrase 'testimonial statements,'" because "[o]nly statements of this sort cause the declarant to be a 'witness' within

---

MICH. CONST. art. I, § 20 (emphasis added). The legislature has also codified a statutory confrontation right in the Code of Criminal Procedure, which provides:

> On the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself, and he shall have a right to produce witnesses and proofs in his favor, and *meet the witnesses who are produced against him face to face.*

MICH. COMP. LAWS ANN. § 763.1 (West 2012) (emphasis added).

930. Crawford v. Washington, 541 U.S. 36 (2004). Chief Justice William H. Rehnquist, now deceased, and Justice Sandra Day O'Connor, now retired, concurred in the result only. *Id.* at 69.

931. 448 U.S. 56 (1980).

932. *Crawford*, 541 U.S. at 40 (quoting *Roberts*, 448 U.S. at 66).

933. *Id.* (quoting *Roberts*, 448 U.S. at 66).

934. *See id.*

935. *Id.* at 59 (emphasis added).

936. *Id.* at 61.

the meaning of the Confrontation Clause."[937] Justice Scalia then explained the court's definition of "testimonial statements":

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.[938]

The advisory committee for the federal rules has explained that "[i]f the significance of an offered statement lies solely *in the fact that it was made*, no issue is raised as to the truth of anything asserted, and the statement is not hearsay."[939] Likewise, the *Crawford* Court explained that the Confrontation Clause "does not bar the use of testimonial statements for purposes *other than establishing the truth of the matter asserted.*"[940] In other words, a proponent of certain testimony only has a confrontation problem if his witness' testimony constitutes hearsay, because testimonial *non*-hearsay does not trigger a confrontation problem.[941]

The U.S. Supreme Court, the U.S. Sixth Circuit Court of Appeals and Michigan courts continue to develop the post-*Crawford* Confrontation Clause jurisprudence,[942] and there was no shortage of relevant cases during the *Survey* period. In this section, I discuss the extent to which the clause, post-*Crawford*, *shields* criminal defendants from testimonial hearsay when the declarant is not on the stand, subject to cross examination.

---

937. Davis v. Washington, 547 U.S. 813, 821 (2006) (quoting *Crawford*, 541 U.S. at 51).

938. *Id.* at 822.

939. FED. R. EVID. 801(c) cmt. (emphasis added).

940. *Crawford*, 541 U.S. at 59 n.9 (emphasis added) (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)).

941. *Id.* As Justice Thomas explained in *Williams v. Illinois*, a Confrontation Clause case, "[t]he threshold question in this case is whether [the] statements were hearsay at all." Williams v. Illinois 132 S. Ct. 2221, 2256 (2012) (Thomas, J., concurring in the judgment).

942. *See, e.g.*, *Williams*, 132 S. Ct. at 2221.

1. Testimony Pertaining to Expert Reports Whose Authors Do Not Testify

Five years after *Crawford* came *Melendez-Diaz v. Massachusetts*,[943] in which a newly divided[944] court ruled in 2009 that forensic laboratory reports (*e.g.*, those pertaining to the presence of alcohol or drugs in a person's blood) were testimonial in nature and thus triggered a defendant's right to confront the forensic scientist who prepared the report.[945] The Court noted that the business and public-records exceptions[946] to the hearsay rule often will pave the way for a court's admission of various documents, but only in cases where they have "been created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial. . . ."[947]

In other words, the Court explained that for the very reason such documents should not come within a hearsay exception, they are testimonial for purposes of the Confrontation Clause.[948] As if to underscore the *forensic* aspect of forensic science, the Court noted "[d]ocuments kept in the regular course of business may ordinarily be admitted at trial despite their hearsay status. But that is not the case if the regularly conducted business activity is the production of evidence for use at trial."[949]

a. Bullcoming v. New Mexico

In *Bullcoming v. New Mexico*,[950] the U.S. Supreme Court considered whether the trial court's admission of a forensic laboratory instrument's output—divulging the amount of alcohol in a subject's blood—required the testimony of the specific person who operated the device at the time of the test, or merely someone who reviewed the operator's records and would testify that the operator followed proper testing procedures.[951] The operator, the state argued, is not a testimonial witness because he "'was a

943. 557 U.S. 305 (2009).

944. The majority opinion's author again was Justice Scalia, who wrote on behalf of himself, Justices Clarence Thomas, Ruth Bader Ginsburg and now-retired Justices John Paul Stevens and David H. Souter. *Id.* at 306. Justice Anthony M. Kennedy wrote for the dissenters, which included Chief Justice John G. Roberts Jr., Justices Stephen G. Breyer, and Samuel A. Alito Jr. *Id.*

945. *Id.* at 324.

946. *See* FED. R. EVID. 803(6)-(10); MICH. R. EVID. 803(6)-(10).

947. *Melendez-Diaz*, 557 U.S. at 324.

948. *Id.*

949. *Id.* at 321 (citation omitted).

950. 131 S. Ct. 2705 (2011).

951. *Id.* at 2709-10, 13.

mere scrivener,' who 'simply transcribed the results generated by the gas chromatograph machine.'"[952] The State sought to introduce the non-testifying scientist's report, which included a:

> "[C]ertificate of analyst," completed and signed by Curtis Caylor, the SLD forensic analyst assigned to test Bullcoming's blood sample . . . . Caylor recorded that the BAC in Bullcoming's sample was 0.21 grams per hundred milliliters, an inordinately high level . . . . Caylor also affirmed that "the seal of the sample was received intact and broken in the laboratory," that "the statements in [the analyst's block of the report] are correct," and that he had "followed the procedures set out on the reverse of the report." Those 'procedures' instructed analysts, inter alia, to "retain the sample container and the raw data from the analysis," and to "note any circumstance or condition which might affect the integrity of the sample or otherwise affect the validity of the analysis." Finally, in a block headed "certificate of reviewer," the SLD examiner who reviewed Caylor's analysis certified that Caylor was qualified to conduct the BAC test, and that the "established procedure" for handling and analyzing Bullcoming's sample "had been followed."[953]

The Supreme Court framed the question as follows:

> Does the Confrontation Clause permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made in order to prove a fact at a criminal trial, through the in-court testimony of an analyst who did not sign the certification or personally perform or observe the performance of the test reported in the certification.[954]

---

952. *Id.* at 2713 (quoting State v. Bullcoming, 226 P.3d 1, 8-9 (N.M. 2010)). The New Mexico Supreme Court took this particular position, which the U.S. Supreme Court rejected. *Bullcoming*, 226 P.3d at 9.

953. *Bullcoming*, 131 S. Ct. at 2710-11 (citations omitted). New Mexico had charged Donald Bullcoming with the offense of aggravated driving under the influence of intoxicating liquor or drugs, an offense for which the state bears the burden of proving a driver's blood-alcohol concentration (BAC) equaled or exceeded .16 percent during the driving. *Id.* at 2711 (citing N.M. STAT. ANN. § 66-8-102(D)(1) (West 2012)). Michigan has a similar "super-drunk" driving statute, although the threshold BAC is slightly higher—.17 percent. MICH. COMP. LAWS ANN. § 257.625(1)(c) (West 2012).

954. *Bullcoming*, 131 S. Ct. at 2713.

The high court held that *Crawford* and *Melendez-Diaz* applied, rendering the report testimonial, thus requiring the state to put the forensic scientist on the witness stand.[955] The Justices explained that:

> [S]urrogate testimony of the kind Razatos was equipped to give could not convey what Caylor knew or observed about the events his certification concerned, *i.e.*, the particular test and testing process he employed. Nor could such surrogate testimony expose any lapses or lies on the certifying analyst's part. Significant here, Razatos had no knowledge of the reason why Caylor had been placed on unpaid leave. With Caylor on the stand, Bullcoming's counsel could have asked questions designed to reveal whether incompetence, evasiveness, or dishonesty accounted for Caylor's removal from his work station.[956]

The Court—Justice Ruth Bader Ginsburg writing on behalf of herself as well as Justices Antonin G. Scalia, Clarence Thomas, Sonia M. Sotomayor and Elena Kagan[957]—saw little, if any, distinction between *Bullcoming* and *Melendez-Diaz*:

> Here, as in *Melendez-Diaz*, a law-enforcement officer provided seized evidence to a state laboratory required by law to assist in police investigations. Like the analysts in *Melendez-Diaz*, analyst Caylor tested the evidence and prepared a certificate concerning the result of his analysis. Like the *Melendez-Diaz* certificates, Caylor's report here is "formalized" in a signed document headed a "report." Noteworthy as well, the SLD report form contains a legend referring to municipal and magistrate courts' rules that provide for the admission of certified blood-alcohol analyses.[958]

Accordingly, the Court reversed the defendant's conviction, holding that the trial court's admission of the laboratory report, in the absence of the forensic scientist who produced it, violated Bullcoming's rights under the Confrontation Clause.[959]

---

955. *Id.*
956. *Id.* at 2715 (footnotes omitted).
957. *Id.* at 2709.
958. *Id.* at 2717 (citations omitted).
959. *Id.* at 2718 - 19.

Justice Kennedy, dissenting on behalf of himself, Chief Justice Roberts and Justices Breyer and Alito,[960] agreed with Illinois' position that the forensic scientist's role in the investigation was only one of many actors "who laid hands on the evidence."[961] He explained:

> The record reveals that the certifying analyst's role here was no greater than that of anyone else in the chain of custody. The information contained in the report was the result of a scientific process comprising multiple participants' acts, each with its own evidentiary significance. These acts included receipt of the sample at the laboratory; recording its receipt; storing it; placing the sample into the testing device; transposing the printout of the results of the test onto the report; and review of the results.
>
> In the New Mexico scientific laboratory where the blood sample was processed, analyses are run in batches involving 40-60 samples. Each sample is identified by a computer-generated number that is not linked back to the file containing the name of the person from whom the sample came until after all testing is completed. The analysis is mechanically performed by the gas chromatograph, which may operate—as in this case—after all the laboratory employees leave for the day. And whatever the result, it is reported to both law enforcement and the defense.[962]

b. Williams v. Illinois

I now return to *Williams v. Illinois*,[963] which I also discuss in Part VII.D.1 of this article. To refresh readers as to the facts: Illinois charged the defendant with rape.[964] During the course of the police investigation, a vaginal swab of the victim found semen.[965] Using a sample of this biological material, an outside firm, Cellmark, produced a DNA profile of the culprit.[966] No witness from Cellmark testified, but a prosecution expert testified that Cellmark's DNA profile of the culprit matched a blood sample of the defendant.[967]

---

960. *Bullcoming*, 131 S. Ct. at 2723.
961. *Id.* at 2724 (Kennedy, J., dissenting) (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 312 n.1 (2009)).
962. *Id.* at 2724 (citations omitted).
963. 132 S. Ct. at 2221.
964. *Id.* at 2227.
965. *Id.*
966. *Id.*
967. *Id.*

Justice Alito, writing the plurality opinion for himself, Chief Justice Roberts, and Justices Kennedy and Breyer,[968] explained that the *Williams* court was addressing an issue Justice Sotomayor raised in her *Bullcoming* concurrence: "the constitutionality of allowing an expert witness to *discuss others' testimonial statements* if the testimonial statements were not themselves admitted as evidence."[969]

Justice Alito emphasized footnote 9 of *Crawford*, in which Justice Scalia wrote that the Confrontation Clause does not bar testimonial statements the prosecutor does not offer for their truth.[970] The State's expert, Justice Alito noted, testified that:

> Cellmark was an accredited lab; the ISP [Illinois State Police] occasionally sent forensic samples to Cellmark for DNA testing; according to shipping manifests admitted into evidence, the ISP lab sent vaginal swabs taken from the victim to Cellmark and later received those swabs back from Cellmark, and, finally, the Cellmark DNA profile matched a profile produced by the ISP lab from a sample of petitioner's blood. Lambatos had personal knowledge of all of these matters, and therefore none of this testimony infringed petitioner's confrontation right.
>
> Lambatos did not testify to the truth of any other matter concerning Cellmark. She made no other reference to the Cellmark report, which was not admitted into evidence and was not seen by the trier of fact. Nor did she testify to anything that was done at the Cellmark lab, and she did not vouch for the quality of Cellmark's work.[971]

Accordingly, the plurality concluded, Lambatos' testimony was *in response* to the premise of the prosecutor's question—"that the matching DNA profile was 'found in semen from the vaginal swabs[,]' . . . and [thus] Lambatos simply assumed that premise to be true when she gave her answer indicating that there was a match between the two DNA profiles."[972] Thus, her testimony as to the match was not hearsay, and the Confrontation Clause did not bar the court's admission of same.[973]

---

968. *Id.*

969. *Williams*, 132 S. Ct. at 2233 (emphasis added) (quoting *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring)).

970. *Id.* at 2235 (citing *Crawford*, 541 U.S. at 59-60 n. 9).

971. *Id.* (citations omitted).

972. *Id.* at 2236.

973. *Id.* at 2236-37.

Justice Alito noted that, in this case, the trial was by bench, and suggested, had it been by jury, the testimony could have been problematic given a danger that the jury would consider the testimony as to Cellmark's match for its truth.[974] The plurality said it rejected the notion "that the wording of Lambatos' testimony confused the trial judge."[975]

There was merely an infinitesimal probability that "Cellmark could have produced a DNA profile that matched Williams' if Cellmark had tested any sample other than the one taken from the victim."[976] The Court distinguished concerns about the admissibility of Lambatos' opinion (and whether the Confrontation Clause barred it) from concerns that Lambatos' opinion incorporated inadmissible testimonial hearsay that the relevant investigators and scientists in the case followed proper chain-of-custody procedures: "[T]he question before us is whether petitioner's Sixth Amendment confrontation right was violated, not whether the State offered sufficient foundational evidence to support the admission of Lambatos' opinion about the DNA match."[977]

Unlike *Bullcoming* and *Melendez-Diaz*, the plurality in *Williams* emphasized, "[a]n expert witness referred to the report *not to prove the truth of the matter asserted in the report*, i.e., that the report contained an accurate profile of the perpetrator's DNA, but only to establish that the report contained a DNA profile that matched the DNA profile deduced from petitioner's blood."[978]

Second, the plurality held that, even if Lambatos' testimony about the Cellmark match did constitute hearsay, it was nontestimonial hearsay, not unlike a recording of a 911 call, as "a statement does not fall within the ambit of the Clause when it is made 'under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.'"[979] Here, "[w]hen the ISP lab sent the sample to Cellmark, its primary purpose was to catch a dangerous rapist who was still at large, not to obtain evidence

974. *Id.* In other words, if the testimony had an admissible non-hearsay purpose, but a jury might consider it for an inadmissible hearsay purpose, a court would have to consider excluding it under Rule 403 balancing. *See* FED. R. EVID. 403; MICH. R. EVID. 403.

975. *Williams*, 132 S. Ct. at 2237.

976. *Id.* at 2238. The plurality emphasized that "because there was substantial (albeit circumstantial) evidence on this matter, there is no reason to infer that the trier of fact must have taken Lambatos' statement as providing 'the missing link.'" *Id.* at 2237 n.7.

977. *Id.* at 2238.

978. *Id.* at 2240 (emphasis added).

979. *Id.* at 2243 (quoting *Davis*, 547 U.S. at 822).

for use against petitioner, who was neither in custody nor under suspicion at that time."[980]

Justice Breyer, a dissenter in *Melendez-Diaz* and *Bullcoming*, lamented in his *Williams* concurrence that the plurality and dissenters failed to clearly define how the Confrontation Clause applies "to the panoply of crime laboratory reports and underlying technical statements written by (or otherwise made by) laboratory technicians" and the "outer limits of the testimonial statements rule set forth in *Crawford*."[981]

Justice Breyer explained that "[t]he Confrontation Clause problem lies in the fact that Lambatos did not have personal knowledge that the male DNA profile that Cellmark said derived from the crime victim's vaginal swab sample was in fact correctly derived from that sample."[982] If the courts are to permit testifying experts to rely on the reports of other experts who do not testify at trial, he said, "[t]he reality of the matter is that the introduction of a laboratory report involves layer upon layer of technical statements (express or implied) made by one expert and relied upon by another."[983] He asked:

> [To satisfy the Confrontation Clause], [w]ho should the prosecution have had to call to testify? Only the analyst who signed the report noting the match? What if the analyst who made the match knew nothing about either the laboratory's underlying procedures or the specific tests run in the particular case? Should the prosecution then have had to call all potentially involved laboratory technicians to testify? Six to twelve or more technicians could have been involved. . . . . Some or all of the words spoken or written by each technician out of court might well have constituted relevant statements offered for their truth and reasonably relied on by a supervisor or analyst writing the laboratory report.[984]

Justice Breyer then noted various proposals that would answer these questions in whole or in part,[985] before remarking that "judges, prosecutors, and defense lawyers have to know, in as definitive a form as possible, what the Constitution requires so that they can try their cases

980. *Id.* at 2243.
981. *Williams*, 132 S. Ct. at 2244-45 (Breyer, J., concurring).
982. *Id.* at 2245.
983. *Id.* at 2246.
984. *Id.* at 2247.
985. *Id.*

accordingly."[986] The Justice had urged the Court to order reargument, but explained that, absent reargument, he concluded the Cellmark report was nontestimonial, consistent with the *Melendez-Diaz* and *Bullcoming* dissents.[987] Justice Breyer favored a presumption of reliability—and thus admission of laboratory reports—although "the defendant would remain free to show the absence or inadequacy of the alternative reliability/honesty safeguards, thereby rebutting the presumption and making the Confrontation Clause applicable."[988]

In Justice Thomas' concurring view, "[t]here is no meaningful distinction between disclosing an out-of-court statement so that the factfinder may evaluate the expert's opinion and disclosing that statement for its truth."[989] Furthermore:

> To use the inadmissible information in evaluating the expert's testimony, the jury must make a preliminary judgment about whether this information is true . . . . If the jury believes that the basis evidence is true, it will likely also believe that the expert's reliance is justified; inversely, if the jury doubts the accuracy or validity of the basis evidence, it will be skeptical of the expert's conclusions.[990]

Justice Thomas cut to the heart of the matter in a footnote, in which he wrote, "the purportedly 'limited reason' for such testimony—to aid the factfinder in evaluating the expert's opinion—necessarily entails an evaluation of whether the basis testimony is true."[991] In *Williams*, the state's expert "relied on Cellmark's out-of-court statements that the profile it reported was in fact derived from L. J.'s swabs, rather than from some other source. Thus, the validity of Lambatos' opinion ultimately turned on the truth of Cellmark's statements."[992] Accordingly, in Justice Thomas' view, the Cellmark statements were hearsay because they "were introduced for their truth."[993]

---

986. *Id.* at 2448.
987. *Williams*, 132 S. Ct. at 2448.
988. *Id.* at 2252.
989. *Id.* at 2257 (Thomas, J., concurring).
990. *Id.* (quoting D. KAYE, D. BERNSTEIN, & J. MNOOKIN, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EXPERT EVIDENCE § 4.10.1, at 196 (2d ed. 2011)) (citations omitted) (internal quotation marks omitted).
991. *Id.* at 2257 n.1.
992. *Id.* at 2258.
993. *Williams*, 132 S. Ct. at 2258-59.

However, the statements were nontestimonial, in Justice Thomas' formalistic view of the Confrontation Clause,[994] because "[t]he Cellmark report lacks the solemnity of an affidavit or deposition, for it is neither a sworn nor a certified declaration of fact. Nowhere does the report attest that its statements accurately reflect the DNA testing processes used or the results obtained."[995] Solemnized statements "are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination."[996]

Justice Kagan, writing for the four dissenters—herself and Justices Scalia, Ginsburg and Sotomayor[997]—sought to stress, in stark terms, the importance of the accused's constitutional rights to confront adverse witnesses:

> Some years ago, the State of California prosecuted a man named John Kocak for rape. At a preliminary hearing, the State presented testimony from an analyst at the Cellmark Diagnostics Laboratory—the same facility used to generate DNA evidence in this case. The analyst had extracted DNA from a bloody sweatshirt found at the crime scene and then compared it to two control samples—one from Kocak and one from the victim. The analyst's report identified a single match: As she explained on direct examination, the DNA found on the sweatshirt belonged to Kocak. But after undergoing cross-examination, the analyst realized she had made a mortifying error. She took the stand again, but this time to admit that the report listed the victim's control sample as coming from Kocak, and Kocak's as coming from the victim. So the DNA on the sweatshirt matched not Kocak, but the victim herself. In trying Kocak, the State would have to look elsewhere for its evidence.[998]

In the dissenters' view, the state "used Sandra Lambatos—a state-employed scientist who had not participated in the testing—as the conduit" for evidence the Confrontation Clause should have barred as testimonial hearsay—Cellmark's DNA profile of the victim's attacker.[999] "Lambatos's testimony[,]" Justice Kagan complained, "is functionally

994. *See, e.g., Davis*, 547 U.S. at 834-42 (Thomas, J., concurring in the judgment in part, dissenting in part).

995. *Williams*, 132 S. Ct. at 2260.

996. *Id.* at 2261 (quoting *Melendez-Diaz*, 557 U.S. at 310-11).

997. *Id.* at 2264 (Kagan, J., dissenting).

998. *Id.* (citation omitted).

999. *Id.* at 2267.

identical to the 'surrogate testimony' that New Mexico proffered in *Bullcoming*[.]"[1000] The dissent continued, "Lambatos 'could not convey what the actual analyst knew or observed about the events . . . , *i.e.*, the particular test and testing process he employed.'"[1001]

Justice Kagan further suggested that the plurality stretched the meaning of *Crawford*'s ninth footnote, where the then-unanimous Court held that when a prosecutor offers a testimonial statement for purposes other than its truth (in other words, for a non-hearsay purpose), it posed no Confrontation Clause problem.[1002] She explained that, when an expert renders an opinion premised on inadmissible evidence:

> [T]o determine the validity of the witness's conclusion, the factfinder must assess the truth of the out-of-court statement on which it relies. That is why the principal modern treatise on evidence variously calls the idea that such "basis evidence" comes in not for its truth, but only to help the factfinder evaluate an expert's opinion "very weak," "factually implausible," "nonsense," and "sheer fiction."[1003]

The practice of having an expert offer an opinion premised on hearsay was the functional equivalent of a police officer telling jurors that "I concluded that Starr was the assailant because a reliable eyewitness told me that the assailant had a star-shaped birthmark and, look, Starr has one just like that."[1004] Only in this case, the testimony, as Justice Kagan characterized it, was, "I concluded that Williams was the rapist because Cellmark, an accredited and trustworthy laboratory, says that the rapist has a particular DNA profile and, look, Williams has an identical one."[1005] The *Williams* plurality's holding would allow prosecutors to get around the Confrontation Clause, she wrote, by "substitut[ing] experts for all kinds of people making out-of-court statements."[1006]

1000. *Id.*

1001. *Williams*, 132 S.Ct. at 2267 (quoting *Bullcoming*, 131 S. Ct. at 2715).

1002. *Id.* at 2268 (quoting *Crawford*, 541 U.S. at 59 n.9 ("The Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.")).

1003. *Id.* at 2268-69 (quoting D. KAYE, D. BERNSTEIN, & J. MNOOKIN, THE NEW WIGMORE: EXPERT EVIDENCE, § 4.10.1, at 196-97 (2d ed. 2011)).

1004. *Id.* at 2269.

1005. *Id.* at 2270.

1006. *Id.* at 2272.

c. People v. Fackelman

If any Michigan case closely approximates *Williams*, it is *People v. Fackelman*,[1007] to which I now return after discussing it in Part VII.D.2 of this article. In *Fackelman*, a jury found the defendant "guilty but mentally ill" of various felonies.[1008] Psychiatrist Agha Shahid interviewed the defendant shortly after his arrest in Ohio and "prepared a three-page report on [his] psychiatric condition."[1009] Shahid did not testify at trial, but both the prosecution and defense presented expert witnesses who reviewed the report and testified as to their opinions about the defendant's mental state.[1010] The court stated that:

> Dr. Mistry testified that Dr. Shahid's report was one of many sources he had reviewed in reaching his opinion that defendant was legally insane at the time of the incident. In his direct testimony, he never referenced Dr. Shahid's diagnosis, never discussed any other doctor's diagnosis, and testified only as to his own diagnosis.
>
> On cross-examination, the prosecutor's questioning of Dr. Mistry was largely focused on Dr. Shahid, bringing out details about Dr. Shahid's professional credentials ("He's an M.D., psychiatrist, correct?") and Dr. Shahid's prior relationship to Dr. Mistry ("Do you know Dr. Shahid?" "You respect his opinion, correct?"). At the end of this cross-examination, the prosecutor squarely placed Dr. Shahid's diagnosis before the jury:
>
> *Q*. At the end of that report did you read Dr. Shahid's diagnosis?
> *A*. Yeah.
>
> *Q*. You read where it says major depression, single episode,—
> *A*. Yes.
>
> *Q*. — severe, without psychosis?
> *A*. Yes.
>
> *Q*. But you don't agree that the Defendant did not have a psychosis, do you?

1007. 489 Mich. 515; 802 N.W.2d 552 (2011).
1008. *Id.* at 518.
1009. *Id.* at 520.
1010. *Id.* at 521.

A. No. My opinion is different as to the diagnosis.

> The prosecutor later referred to Dr. Shahid's report in his examination of his own expert, Dr. Balay, again referring to Dr. Shahid's diagnosis, and asking if Balay agreed with Dr. Shahid's diagnosis. She answered yes. He also repeatedly mentioned Dr. Shahid and his diagnosis in closing arguments, telling the jury that "it's real important to look at what Dr. Shahid had to say, even though he did not testify here before you." Defense counsel did not object to the questioning of the witnesses on the basis of Dr. Shahid's report and diagnosis or to the prosecutor's arguments.[1011]

The Michigan Supreme Court, reversing the court of appeals,[1012] concluded the prosecution testimony as to the Shadid report violated the defendant's rights under the Confrontation Clause as the "[d]efendant was not given a prior opportunity to cross-examine Dr. Shahid, nor was it shown that the doctor was unavailable to testify at trial so that his absence could be excused for purposes of the right of confrontation."[1013] The court explained, "Dr. Shahid's diagnosis of 'major depression, single episode, severe without psychosis' was used as substantive evidence for 'the truth of the matter asserted' [that Defendant was not insane.]."[1014] The court further noted:

> Dr. Shahid's diagnosis of no psychosis could only impeach or support the other experts' opinions if it was taken as true, something the prosecutor made clear in his closing arguments when he told the jury that "it's real important to look at what Dr. Shahid had to say, even though he did not testify here before you" and then proceeded to rely on Dr. Shahid's opinion as a third expert's vote on defendant's sanity[.][1015]

Thus, the testimony as to Dr. Shahid's report was hearsay for purposes of Confrontation Clause analysis.[1016] Finally, the court held, the following factors established Dr. Shadid was a *testimonial* witness:

1011. *Id.* at 521-23 (footnotes omitted).
1012. People v. Fackelman, No. 284512, 2009 WL 2635147 (Mich. Ct. App. Aug. 27, 2009).
1013. *Fackelman*, 484 Mich. at 528.
1014. *Id.* at 530 (quoting MICH. R. EVID. 801(c)) (footnote omitted).
1015. *Id.* at 531.
1016. *Id.*

> (1) defendant's admittance to the hospital was arranged by lawyers, (2) defendant was arrested en route to the hospital, (3) the report noted that the Monroe County Sheriff requested notification before defendant's discharge, (4) defendant referred to a trial and to a gun in his responses related in the report, and, perhaps most significantly, (5) at its very beginning and ending, in which its overall context is most clearly identified, the report expressly focused on defendant's alleged crime and the charges pending against him.[1017]

The court further observed that the Shadid report noted that "[p]atient also has legal charges against him through the State of Michigan 38th Judicial Circuit, and count one is home invasion, first degree, and count two is assault with a dangerous weapon (felonious assault)."[1018] Accordingly, the justices concluded, the report was testimonial because an "objective psychiatrist would reasonably be led to believe that his statements would be available for use at a later trial.'"[1019] Thus, because the report was hearsay (the prosecutor offered the report to support its assertion that defendant was sane) and because it was testimonial, the court's admission of Dr. Shahid's opinion without his presence violated the defendant's rights under the Confrontation Clause.[1020] Because the defendant did not object at trial, the court had to consider the constitutional issue under the very deferential plain-error standard of review, and nevertheless concluded the circumstances warranted reversal."[1021]

Chief Justice Young and Justice Zahra, on the other hand, concluded that the Shahid report was non-testimonial, and thus did not trigger a Confrontation Clause issue.[1022] As he explained, "the statement at issue in this case was not testimonial because it was neither formal nor created for the primary purpose of investigating or prosecuting crimes."[1023] Shahid treated a hospitalized patient "who had already attempted suicide once before and who continued to exhibit severe depression, Dr. Shahid created a detailed evaluation that outlined defendant's medical condition

---

1017. *Id.* at 532-33.

1018. *Id.* at 533.

1019. *Fackelman,* 489 Mich. at 533 (quoting *Crawford,* 541 U.S. at 52, and *Melendez-Diaz,* 557 U.S. at 310).

1020. *Id.* at 534.

1021. *Id.* at 537-42 (citing People v. Carines, 460 Mich. 750, 763; 597 N.W.2d 130 (1999)).

1022. *Id.* at 582 (Young, C.J., dissenting).

1023. *Id.*

and determined the most appropriate course of emergency treatment."[1024] The Chief Justice emphasized that the report included, not only a diagnosis, but a "*plan of treatment*[,]" and thus "Dr. Shahid's primary purpose in undertaking and documenting defendant's psychiatric evaluation was to provide medical care and treatment, not to serve as 'an active participant in the formal criminal investigation" or prosecution.'"[1025] Thus, he concluded, even if the report was hearsay, it was *nontestimonial* hearsay, thus avoiding a confrontation problem.[1026]

As an alternative ground, the Chief Justice also concluded that the prosecutor's purpose in presenting testimony as to the report was to impeach a defense witness, not to prove the report's assertions as truth, and thus even if the report was testimonial, it was testimonial non-hearsay.[1027]

2. Autopsy Reports

Do *Melendez-Diaz* and *Bullcoming* extend to autopsy reports? In Michigan, at least, the answer is yes.[1028]

In an earlier opinion in *People v. Lewis*, the court of appeals, after a post-*Melendez-Diaz* remand from the Michigan Supreme Court, had concluded that a court's admission of an autopsy report through the testimony of two individuals who did not perform the medical examination did not violate Reginald Lewis' confrontation rights at his trial for first-degree murder.[1029] The appellate panel concluded that the autopsy report was nontestimonial because it "was prepared pursuant to a duty imposed by statute."[1030] Thus, "[w]hile it was conceivable that the autopsy report would become part of [a] criminal prosecution, investigations by medical examiners are required by Michigan statute under certain circumstances regardless of whether criminal prosecution is contemplated."[1031]

In a one-page order, however, the Michigan Supreme Court, citing *Bullcoming*, held that the autopsy report *was* testimonial because it was

---

1024. *Id.* at 583.

1025. *Fackelman*, 489 Mich. at 584-85 (quoting Hartsfield v. Commonwealth, 277 S.W.3d 239, 244 (Ky. 2009)).

1026. *Id.* at 588.

1027. *Id.* at 588-89.

1028. *See* People v. Lewis, 287 Mich. App. 356; 788 N.W.2d 461 (2010), *aff'd in parts vacated in part*, 490 Mich. 921; 806 N.W.2d 295 (2010).

1029. *Lewis*, 287 Mich. App. at 362-63.

1030. *Id.* at 363.

1031. *Id.* (quoting People v. Lewis, No. 274508, 2008 WL 1733718, at *10 (Mich. Ct. App. Apr. 15, 2008)).

prepared with an eye toward criminal prosecution and thus the trial court's admission of same violated the defendant's confrontation rights.[1032] Here, however, where trial counsel raised no objections, and the defendant presented his claim in the context of ineffective assistance of counsel in failing to make the objection, the justices affirmed Lewis' conviction because the admission of the autopsy report was not determinative of the outcome.[1033]

In *People v. Childs*, Michael Childs' defense counsel stipulated to the trial court's admission of the autopsy report in his murder trial.[1034] As was the case in Lewis, when the defendant appealed his murder conviction on the ground that his counsel was ineffective for failing to raise a confrontation objection—in fact, here, *stipulating* to the report in this case—the court of appeals concluded the report was non-testimonial for Sixth Amendment purposes.[1035] In a similar one-page order, the justices disagreed and held the autopsy report was testimonial, but affirmed the conviction because the error was not outcome determinative.[1036]

3. Public Records—Driving Reports

Under Michigan law, when the Department of State[1037] suspends or revokes an individual's driving record, a state official sends a notice of suspension to the driver and state computers generate a document certifying that the state sent the driver such notice.[1038] If an individual then drives in contravention of this suspension or revocation, he commits

1032. *Lewis*, 490 Mich. at 921.

1033. *Id. See* Strickland v. Washington, 466 U.S. 668, 694 (1984) (holding that defendants who allege ineffective assistance of counsel on appeal "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."). Justice Marilyn Kelly, noted "a jurisprudentially significant question that has divided courts across the country[,]" had unsuccessfully urged her colleagues to grant oral argument to "allow the Court to determine to what extent the Court of Appeals erred and to explicitly decide the constitutional question presented." *Lewis*, 490 Mich. at 921-22 (Marilyn Kelly, J., concurring).

1034. 491 Mich. 906; 810 N.W.2d 563 (2012).

1035. People v. Childs, No. 297692, 2011 WL 4862442, at *9-10 (Mich. Ct. App. Oct. 13, 2011), *appeal denied*, 491 Mich. 906; 810 N.W.2d 562 (2012).

1036. 491 Mich. at 906.

1037. I use the terms "Department of State," "secretary of state" and "secretary of state's office" interchangeably.

1038. People v. Nunley, 491 Mich. 686, 690-91; 821 N.W.2d 642 (2012), *cert. denied*, 133 S. Ct. 667 (2012).

the offense of driving with a suspended license.[1039] To prove the charge, the prosecutor must establish that a defendant drove while his license was in suspension, and that the state notified him of his new (unfortunate) status.[1040]

Bearing in mind the *Davis'* Court's holding that a statement is testimonial for Confrontation Clause purposes if its "primary purpose . . . is to establish or prove past events potentially relevant to later criminal prosecution[,]"[1041] is the state's "certificate of mailing" a testimonial document such that its author must testify in court?

In *People v. Nunley*, a unanimous Michigan Supreme Court answered in the negative, finding no confrontation problem[1042] in a case that rose through all four levels of judicial tribunals in Michigan—beginning in the district court, with appeals to the circuit court, the court of appeals, and the Michigan Supreme Court. It finally ended just after Thanksgiving 2012 when the U.S. Supreme Court denied the defendant's petition for a writ of certiorari.[1043]

A two-member majority—Judges Pat M. Donofrio and Kathleen Jansen—of the court of appeals had reached the opposite conclusion of the Michigan Supreme Court, observing that "in light of the fact that notification is an element of the offense, certainly the certificate of mailing was made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[1044] Judges Donofrio and Jansen emphasized not only that the affiant "is providing more than mere authentication of documents; he is actually attesting to a required element of the charge" but that "the [prosecution] concede[d] that one purpose of the certificate of mailing is 'the production of evidence for use at trial[.]"[1045]

All of Michigan's justices—with the exception of Justice Hathaway, who concurred in the result only—joined Justice Zahra's opinion holding to the contrary.[1046] The court did not dispute that the affidavit "certifies a

---

1039. MICH. COMP. LAWS ANN. § 257.904(1) (West 2012). "DWLS" is a ninety-three-day misdemeanor for first-time offenders, § 257.904(3)(a), and a one-year misdemeanor for second and subsequent offenders, § 257.904(3)(b).

1040. *Nunley*, 491 Mich. at 691.

1041. *Davis*, 547 U.S. at 822.

1042. *Nunley*, 491 Mich. at 707. Although it issued after the end of this *Survey* period, I discuss the supreme court's opinion because the court of appeals' opinion issued within the *Survey* period.

1043. Nunley v. Michigan, 133 S. Ct. 667 (2012).

1044. People v. Nunley, 294 Mich. App. 274, 285; 819 N.W.2d 8 (2011) (citations omitted).

1045. *Id.* (citations omitted).

1046. *Nunley*, 491 Mich. at 715-16.

fact in question," but held that "this fact alone does not render the certificate a formal affidavit that is necessarily testimonial for purposes of the Confrontation Clause."[1047] Instead, Justice Zahra explained,

> [T]he circumstances under which the certificate was generated show that it is a nontestimonial business record created primarily for an administrative reason rather than a testimonial affidavit or other record created for a prosecutorial or investigative reason. As set forth earlier in this opinion, under *Crawford* and its progeny, courts must consider the circumstances under which the evidence in question came about to determine whether it is testimonial. The certificate here is a routine, objective cataloging of an unambiguous factual matter, documenting that the [department] has undertaken its statutorily authorized bureaucratic responsibilities. Thus, the certificate is created for an administrative business reason and kept in the regular course of the [department]'s operations in a way that is properly within the bureaucratic purview of a governmental agency. Our analysis of the nature and purpose of the certificate, as informed by the circumstances under which it was created, leads us to the conclusion that it is nontestimonial for the purposes of the Confrontation Clause.[1048]

The justices identified as the "most significant" factor in their analysis was "the fact that the . . . certificates of mailing are necessarily created *before* the commission of any crime that they may later be used to help prove."[1049]

1047. *Id.* at 706.

1048. *Id.* at 706-07.

1049. *Id.* at 707. Justice Zahra's ultimate conclusion may well have been sound, but, perhaps adding one argument too many, he opined that "[a]t the time the certificate was created, there was no expectation that defendant would violate the law by driving with a revoked driver's license and therefore no indication that a later trial would even occur." *Id.* at 709. Were that true, of course, the state would have no purpose in generating an attested certificate of mailing, as where—other than in court—would a sworn statement have any use? More persuasive was his observation that "the certificates of mailing are created under circumstances objectively indicating a purpose to *ensure the maintenance of records* indicating that the DOS has carried out its authorized function of notifying persons convicted of certain driving offenses that their driver's licenses have been suspended." *Id.* at 715 (emphasis added). Perhaps the supreme court should redefine a "testimonial statement," to mean one whose "primary purpose . . . is to establish or prove past ~~events~~ *criminal acts, or circumstances that resulted from criminal acts, and which are* potentially relevant to later criminal prosecution." *Davis,* 547 U.S. at 822 (with deletions by the author in strikethrough and additions in italics).

In any event, the justices reversed the three lower courts, allowing the trial court to admit the certification without its author's testimony, and remanded the case for purposes consistent with its opinion.[1050]

4. The Meaning of 'Opportunity to Cross-Examine'

Is a declarant's presence in the courthouse and availability as a potential defense witness enough to satisfy a defendant's rights under the Confrontation Clause, even if the declarant never takes the stand during the prosecution's case in chief? A recent Sixth Circuit opinion and concurring opinion suggests this is an open question.[1051]

In *Peak v. Webb*, a Kentucky state court convicted Michael Peak of first-degree murder after jurors heard a recording of a co-defendant's custodial statement that inculpated Peak.[1052] The co-defendant was present in the courtroom, and waived his Fifth Amendment right against self-incrimination, but did not take the witness stand during the prosecution's case in chief.[1053] The court overruled the defendant's objection that admitting the statement violated Peak's right to confront the witnesses against him.[1054]

A two-person majority—Judge Danny J. Boggs wrote the court's opinion for himself and Judge Gilbert S. Merritt[1055]—did not dispute that the co-defendant's confession was a testimonial statement that triggered Peak's confrontation rights, as "interrogations by law enforcement fall squarely within [testimonial hearsay.]"[1056] The majority, however, observed that, at the time of defendant's trial, there was no U.S. Supreme Court case directly on point:

> It is an open question whether confrontation requires the witness to actually take the stand . . . . So there seems to be a question of whether confrontation demands the opportunity to cross-examine the declarant who has been called by the prosecution, or merely that the declarant is available at trial to be called and (cross-) examined. This case requires an answer to this question . . . . The Supreme Court simply had not, at the time Peak's conviction

1050. *Nunley*, 491 Mich. at 715.
1051. Peak v. Webb, 673 F.3d 465 (6th Cir. 2012), *reh'g denied*, No. 09-5977, Peak v. Webb, 2012 U.S. App. LEXIS 8624 (6th Cir. Apr. 26, 2012), *cert. denied*, 133 S. Ct. 931 (2013).
1052. *Id.* at 467.
1053. *Id.* at 469.
1054. *Id.*
1055. *Id.* at 466.
1056. *Id.* at 472 (quoting *Crawford*, 541 U.S. at 53).

> became final, clearly held that the ability to cross-examine immediately is required by the Confrontation Clause.[1057]

The panel explained that "[w]e are not convinced that the opportunity to call a witness, as opposed to the opportunity to immediately cross-examine a witness, satisfies the Confrontation Clause."[1058] But, the court said, there was room for argument,

> It is not unreasonable to believe, as did at least three justices on the Kentucky Supreme Court, as well as the trial-court judge, that confrontation only requires that a declarant be made available in the courtroom for a criminal defendant to call during his own case. It can be argued that this ability is equivalent to cross-examination. The defendant can, for example, employ leading questions in questioning a hostile witness on direct examination just as he could in cross-examination. More basically, the defendant has had the ability to confront the witness face-to-face, and to question the witness about the testimonial statement while the witness is under oath.[1059]

Because of the absence of a Supreme Court case directly on point, the panel declined to reverse Peak's conviction, citing a federal habeas statute that accords great deference to lower court decisions.[1060] Judge Merritt, in his concurring opinion, opined that "it is doubtful that a witness who appears in court ready for the defendant's examination can be said to meet the 'unavailable' element of the test under the Sixth Amendment."[1061]

Judge Eric L. Clay, however, said a Confrontation Clause violation *clearly* occurred in Peak's case:

> Because a defendant has the right to be confronted with his accusers, the prosecution consequently has the burden to confront the defendant. This requires that the prosecution subpoena the witness, that the prosecution put that accusing witness on the stand, and that the witness actually testify. It is

1057. *Peak*, at 473.
1058. *Id.* at 474.
1059. *Id.* at 473-74 (citations omitted).
1060. *Id.* at 474 (citing *Bullcoming*, 131 S.Ct. at 2718).
1061. *Id.* at 475 (Merritt, J., concurring).

> not the defendant's obligation to present the prosecution's witnesses or to cure the prosecution's errors.[1062]

He added, "[t]he Supreme Court has similarly never held that a defendant waives his Confrontation Clause right if he fails to call an available accuser to the stand and cure the prosecution's violation of his Confrontation Clause right."[1063] Judge Clay then explained his view that a Confrontation Clause violation that forces a defendant to call a hearsay declarant as part of his, and not the prosecution's, case in chief puts him at an unfair disadvantage:

> If the defendant calls the witness, the prosecution avoids its responsibility under the Confrontation Clause of producing the witness by putting him on the stand and is alleviated of its burden to provide direct examination. However, if the defendant chooses not to call the witness, only the version of the facts that the prosecution finds helpful to its case is introduced; there is no compliance with the requirements of the Confrontation Clause, and the prosecution avoids the possibility that the witness will be effectively cross-examined or change his story in response to cross-examination, and thereby jeopardize the prosecution's case. The prosecution also avoids the responsibility of being the proponent of the witness' testimony.
>
> Indeed, in this case, the prosecution likely did not call Meeks to the stand because Meeks disputed the reliability and veracity of his recorded admissions and accusations and would likely discredit the prosecution's evidence. By purporting to resolve the Confrontation Clause violation against Peak by merely requiring Meeks to waive his Fifth Amendment right but not put him on the stand, the trial court permitted the prosecution to introduce all of the testimonial, hearsay evidence that it hoped to admit but avoid the introduction of any contradictory evidence. The prosecution should not be permitted to resort to such opportunistic manipulation.[1064]

It is patently unfair, he wrote, for courts to present the defendant with a false choice—to either (a) acquiesce to the trial court's admission

---

1062. *Id.* at 479 (Clay, J., dissenting) (citing Taylor v. Illinois, 484 U.S. 400, 410 (1988)).
1063. *Peak*, 673 F.3d at 480.
1064. *Id.* at 481.

of testimonial hearsay without an opportunity to cross-examine the declarant, or (b) to call the declarant as part of his case in chief who will inculpate the defendant and thus appear to be the proponent of the declarant's testimony.[1065] Judge Clay disagreed with his colleagues' holding that the state court's decision did not require habeas relief.[1066] In his view, the state court decision did, in fact, "result[] in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States[.]"[1067] Accordingly, he would have reversed the federal district court's denial of Peak's habeas petition.[1068]

The Sixth Circuit denied Peak's petition for rehearing en banc[1069] and the Supreme Court denied the defendant's petition for certiorari.[1070]

IX. AUTHENTICATION AND IDENTIFICATION

There were no significant cases discussing Rules 901 through 903[1071] during the *Survey* period.

X. CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

There were no significant cases discussing Rules 1001 through 1008[1072] during the *Survey* period.

XI. APPLICABILITY

I discuss in Part VII.C that the rules of evidence do not apply in suppression hearings when the court rules on a preliminary question of admissibility—whether law enforcement officials violated an individual's constitutional rights in obtaining certain evidence, and thus whether to admit or suppress the evidence.[1073] There were no other significant cases concerning Rule 1101[1074] during the *Survey* period.

1065. *Id.*
1066. *Id.* at 482.
1067. *Id.* (citing 28 U.S.C. § 2254).
1068. *Id.* at 487.
1069. *Peak*, 673 F.3d at 465.
1070. Peak v. Webb, 133 S. Ct. 931 (2013).
1071. *See* MICH. R. EVID. 901-03; FED. R. EVID. 901-03.
1072. *See* FED. R. EVID. 1001-08; MICH. R. EVID. 1001-08.
1073. FED. R. EVID. 104(a), MICH. R. EVID. 104(a), FED. R. EVID. 1101(d)(1), MICH. R. EVID. 1101(b)(1). *See also* United States v. Matlock, 415 U.S. 164, 172-75 (1974).
1074. *See* MICH. R. EVID. 1101; FED. R. EVID. 1101.

XII. CONFRONTATION CLAUSE ISSUES NOT INVOLVING HEARSAY

In Part VIII.C, I discuss the extent to which the U.S. Supreme Court's 2004 decision in *Crawford*, and its progeny, have restrained prosecutorial efforts to admit out-of-court (hearsay) statements, documents, and reports.[1075]

I now discuss the Sixth Amendment's impact not on out-of-court testimony, but as a guarantee of criminal defendants' ability to effectively cross-examine adverse witness already testifying in court.

A. The Right to Confront One's Accusers

1. The Michigan Rape-Shield Statute and Questioning Concerning a Victim's Sexual History

The Michigan rape-shield statute, Section 520j of the penal code, provides that evidence of specific instances of a rape victim's past sexual conduct, along with reputation and opinion of evidence of his or her past conduct, is inadmissible in criminal-sexual-conduct cases:

> [U]nless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.[1076]

Section 520j, the Michigan Court of Appeals explained in a 1978 case:

> [R]epresents an explicit legislative decision to eliminate trial practices under former law which had effectually frustrated society's vital interests in the prosecution of sexual crimes. In the past, countless victims, already scarred by the emotional (and

---

1075. *See supra*, Part VII.C.

1076. MICH. COMP. LAWS ANN. § 750.520j(1) (West 2012). The federal courts have promulgated a similar, but non-statutory, rape-shield provision. *See* FED. R. EVID. 412. Its purpose is to "encourage[] victims of sexual abuse to report their abusers by protecting the victims' privacy." United States v. Ogden, 685 F.3d 600, 606 (6th Cir. 2012).

> often physical) trauma of rape, refused to report the crime or testify for fear that the trial proceedings would veer from an impartial examination of the accused's conduct on the date in question and instead take on aspects of an inquisition in which complainant would be required to acknowledge and justify her sexual past.
>
> Thus, the evidentiary exclusion of [Section 520j,] like comparable provisions in statutes of other jurisdictions, strives to foster a number of salutary purposes.
>
> "Primarily, * * * (rape shield statutes) serve the substantial interests of the state in guarding the complainant's sexual privacy and protecting her from undue harassment. In line with these goals, they encourage the victim to report the assault and assist in bringing the offender to justice by testifying against him in court. Insofar as the laws in fact increase the number of prosecutions, they support the government's aim of deterring would-be rapists as well as its interest in going after actual suspects. These statutes are also intended, however, to bar evidence that may distract and inflame jurors and is of only arguable probative worth. To the degree that they aid in achieving just convictions and preventing acquittals based on prejudice, they naturally further the truth-determining function of trials in addition to more collateral ends. In order to assess the rape shield laws one must ask whether these state interests, as embodied in particular statutory standards applied in specific factual contexts, outweigh the defendant's valued right to meet the prosecution's case with proof that he is indeed innocent. Where the balance inclines toward the accused, any provision excluding his evidence cannot be squared with the Constitution."[1077]

In *People v. Benton*, however, the defendant, a Genesee County teacher at the time of the acts, argued that her Sixth Amendment rights trumped Michigan's rape-shield statute when she sought to cross-examine and impeach the male victim, a former student, concerning the victim's past sexual encounters with a thirteen and a fourteen-year-old girl after he testified that "defendant placed a condom on his penis and

---

1077. People v. Khan, 80 Mich. App. 605, 613-14; 264 N.W.2d 360 (1978) (quoting Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 54-55 (1977)).

put his penis into her vagina because he did not know how."[1078] The court of appeals disagreed.[1079]

The panel—Judges Jane E. Markey writing on behalf of herself and Judges Deborah A. Servitto and Kirsten Frank Kelly[1080]—began their analysis by acknowledging that a trial court's admission of evidence of a victim's sexual conduct:

> [M]ay be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past.[1081]

The trial court must balance the victim and defendant's rights,[1082] and employing some degree of circular reasoning, the supreme court has held that the trial judge must "be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation."[1083] Applying these principles to the facts, the appellate court concluded that past conduct would have insufficient impeachment value, as:

> [T]he victim never stated, directly or indirectly, that his sexual contact with defendant was his first sexual experience. Indeed, when the prosecutor asked the victim why he needed defendant's assistance with the condom and with penetration the second time, the victim stated, "Cause *every time* I did . . . the *girl* put my penis in her vagina for me." (Emphasis added.) We disagree with defendant's contention that this statement could only be

1078. People v. Benton, 294 Mich. App. 191, 195; 817 N.W.2d 599 (2011).
1079. *Id.* at 197-99.
1080. *Id.* at 193.
1081. *Id.* at 197 (quoting People v. Hackett, 421 Mich. 338, 348-49; 365 N.W.2d 120 (1984)).
1082. *Id.* at 198 (citing People v. Morse, 231 Mich. App. 424, 433; 586 N.W.2d 555 (1998)).
1083. *Id.* (quoting *Hackett*, 421 Mich. at 349).

> understood as referring to the victim's first sexual encounter with defendant. The phrase "every time" refers to more than one occasion, not a single prior incident. Further, the victim's reference to "the girl" suggested someone other than defendant, considering that defendant was a grown woman and that the victim referred to defendant as "Miss Allanah" throughout his testimony.[1084]

For this and other reasons, the court of appeals affirmed the defendant's conviction.[1085] The supreme court denied leave to appeal, over the objection of Justices Hathaway and Marilyn Kelly.[1086]

2. Screens Between Young Witnesses and Defendants

A court's use of a witness screen, which prevents a testifying child-rape victim from seeing his or alleged attacker in court (but not vice versa) is not violative of the defendant's right to "to be confronted with the witnesses against him"[1087] when courts utilize such screens in the appropriate circumstances.[1088] That is the apparent answer, as the Michigan Supreme Court let stand a 2010 decision of the Michigan Court of Appeals reaching that result.[1089]

The Revised Judicature Act of 1961[1090] authorizes various means of reducing anxiety on witnesses testifying in prosecutions for child abuse, criminal sexual conduct, home invasion, soliciting a minor and embezzlement, upon a showing that such measures "are necessary to protect the welfare of the witness."[1091]

Courts, in various circumstances and upon the proper showing, must exclude from the courtroom "all persons not necessary to the

---

1084. *Benton*, 294 Mich. App. at 198.

1085. *Id.* at 207.

1086. People v. Benton, 491 Mich. 917; 813 N.W.2d 286 (2012). I should note that although I have omitted a discussion of the Sixth Circuit's treatment of the Michigan habeas case of *Gagne v. Booker*, as it is not relevant to the purpose of this article (discussing developments in federal and state developments in the rules and laws of evidence), readers interested in educating themselves about the history, purposes, and constitutional limits of rape-shield provisions should certainly pore over the majority, concurring and dissenting opinions. *See* Gagne v. Booker, 680 F.3d 493, 528 (6th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 481 (2012).

1087. U.S. CONST. amend. VI.

1088. People v. Rose, 490 Mich. 929, 929; 805 N.W.2d 827 (2011), *cert. denied*, 132 S. Ct. 2773 (2012).

1089. *Id.*

1090. MICH. COMP. LAWS ANN. §§ 600.101 – 600.9948 (West 2008).

1091. MICH. COMP. LAWS ANN. § 600.2163a(14) – (17).

proceeding," seat the defendant "as far from the witness stand as is reasonable and not directly in front of the witness stand," and insist upon the lawyer's use of a "questioner's stand or podium" during all questioning of the witness.[1092] In determining whether such measures are necessary to protect the witness' welfare, the courts must consider "(a) [t]he age of the witness[,] (b) [t]he nature of the offense or offenses[,] (c) [t]he desire of the witness or the witness's family or guardian to have the testimony taken in a room closed to the public[, and] (d) [t]he physical condition of the witness."[1093]

In a per curiam opinion, a court of appeals panel of Judges Christopher M. Murray, Henry W. Saad, and Michael J. Kelly[1094] began their analysis by quoting the now-retired Justice Sandra Day O'Connor's majority opinion in *Maryland v. Craig*,[1095] where the high court held that "a defendant's right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where denial of such confrontation is necessary to further an important public policy and only where the reliability of the testimony is otherwise assured."[1096] Two years earlier, in *Coy v. Iowa*,[1097] the U.S. Supreme Court had invalidated an Iowa statute that permitted such screens merely upon a prosecutor's motion in child-sexual-assault cases at trial on Confrontation Clause grounds.[1098] The court rejected the statute, as it "create[d] a legislatively imposed presumption of trauma."[1099]

Justice O'Connor wrote a concurring opinion in *Coy*, in which she stated that confrontation "rights are not absolute but rather may give way in an appropriate case to other competing interests so as to permit the use of certain procedural devices designed to shield a child witness from the trauma of courtroom testimony."[1100] Writing for herself and then-Justice Byron R. White, she then opened the door to her later opinion in *Craig*:

> I agree with the Court that more than the type of generalized legislative finding of necessity present here is required. But if a court makes a case-specific finding of necessity, as is required by a number of state statutes, our cases suggest that the strictures

1092. *Id.*
1093. MICH. COMP. LAWS ANN. § 600.2163a(14).
1094. People v. Rose, 289 Mich. App. 499, 500; 805 N.W.2d 827 (2011).
1095. 497 U.S. 836 (1990).
1096. *Rose*, 289 Mich. App. at 514 (quoting *Craig*, 497 U.S. at 850).
1097. 487 U.S. 1012 (1988).
1098. *Id.* at 1020-22 (1988) (opinion of Scalia, J.).
1099. *Id.* at 1021.
1100. *Id.* at 1022 (O'Connor, J., concurring).

> of the Confrontation Clause may give way to the compelling state interest of protecting child witnesses.[1101]

Then, of course, came *Craig*, which the *Rose* court quoted extensively in its decision:

> Justice O'Connor reiterated that the Court had already recognized that the states have a compelling interest in protecting minor victims of sex crimes from further trauma and embarrassment. And, on a similar basis, she concluded that a "State's interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant's right to face his or her accusers in court." But the state may not limit face-to-face confrontation unless the state makes an adequate showing of necessity. *The requisite finding is case-specific; the trial court must hear evidence and determine whether the procedure "is necessary to protect the welfare of the particular child witness who seeks to testify*". . . . In order to warrant dispensing with face-to-face confrontation, the trial court must find that the emotional distress suffered by the child would be both caused by the presence of the defendant and more than *de minimis* distress caused by nervousness, excitement, or reluctance to testify.[1102]

In *Rose,* a therapist (Vanderbent) for Ronald Rose's eight-year-old alleged victim, "J.B.," testified in court that she was

> [T]reating J.B. for symptoms related to trauma, including nightmares, bedwetting, difficulty concentrating, zoning out, and anger outbursts. JB had also expressed fear about having to come and testify in court—that she did not want to see Rose and "was very fearful." J.B. had even stated that she feared that she could not testify in his presence. VanderBent stated that it was her opinion that testifying face to face might trigger some traumatic experiences and cause "numbing, shutting down, not being able to speak even." She opined that if J.B. were to see Rose, it could be traumatic for her, but the use of a screen that would permit others to see her without J.B. being able to see Rose would sufficiently safeguard her emotional and psychological well-

---

1101. *Id.* at 1025 (citations omitted).

1102. *Rose*, 289 Mich. App. at 515 (quoting *Craig*, 497 U.S. at 852-57) (emphasis added) (citations).

> being. Further, when asked whether J.B. "would be psychologically and emotionally unable to testify if we didn't have some sort of protection that goes beyond re-configuring the courtroom," VanderBent opined that it was "a likely possibility, yes."[1103]

The therapist had the following exchange with defense counsel during cross-examination:

> *Q.* Is she able to articulate this fear clearly?
> *A.* Yes.
>
> *Q.* Does she exhibit any symptoms of fear?
> *A.* Yes. She's very fearful, very shaky, talks about being very nervous, stomach aches.
>
> *Q.* This is related to testifying?
> *A.* In front of the defendant.
>
> *Q.* Specifically in front of the defendant.
> *A.* Correct.[1104]

Having heard this testimony, the trial court granted the prosecutor's motion to permit screening the defendant from the young witness' sight, over defense counsel's objections on constitutional confrontation and statutory grounds.[1105] The appellate panel conceded that the trial court erroneously relied on Section 2163a as "none of [its] protections includes the use of a witness screen."[1106] However, the court held that that fact alone "does not preclude trial courts from using alternative procedures permitted by law or court rule to protect witnesses. And trial courts have long had the inherent authority to control their courtrooms, which includes the authority to control the mode and order by which witnesses are interrogated."[1107] Returning to the confrontation issue, the court held that the evidence clearly established for the trial court

---

1103. *Id.* at 506.
1104. *Id.* at 506-07.
1105. *Id.* at 507-08.
1106. *Id.* at 509 (citing MICH. COMP. LAWS § 600.2163a (2008)).
1107. *Id.* (citing MICH. R. EVID. 611(a); People v. Banks, 249 Mich. App. 247, 256; 642 N.W.2d 351 (2002)).

> [T]hat the use of the witness screen was necessary to protect J.B. when it invoked MCL 600.2163a and stated that it was "necessary to permit this to protect the welfare of this child." In making its findings, the trial court also clearly referred to the fact that JB had expressed fear of Rose and that, given her age, the nature of the offenses, and her therapist's testimony, there was "a high likelihood" that testifying face to face with Rose would cause her to "regress in her therapy, have psychological damage" and could cause her "to possibly not testify . . . ." These findings were sufficient to warrant limiting Rose's ability to confront JB face to face. In addition, aside from J.B.'s inability to see Rose, the use of the witness screen preserved the other elements of the confrontation right and, therefore, adequately ensured the reliability of the truth-seeking process. Consequently, the trial court's decision to permit J.B. to testify with the witness screen did not violate Rose's right to confront the witnesses against him.[1108]

For this and other reasons, the court of appeals affirmed the defendant's conviction.[1109] The Michigan Supreme Court initially granted the defendant's application for leave to appeal,[1110] but vacated that order and denied the application for leave during the *Survey* period.[1111]

The sole dissenter from this order denying leave, Justice Marilyn Kelly, vehemently disagreed with the second part of the court of appeals' opinion that the screen did not violate the defendant's due-process rights under the Fourteenth Amendment, because "by impinging on the presumption of innocence . . . [t]he only inference that a reasonable juror could draw from the use of the witness screen is that JB was afraid of defendant because he abused her."[1112] She emphasized that Section 2163a provides numerous other means of protecting the witness' welfare, such as "rearranging the courtroom so that the child cannot see the defendant," stating, "that would allow reasonable jurors to draw innocuous inferences rather than brand the defendant as guilty."[1113] The

1108. *Rose,* 289 Mich. App. at 516-17 (citations omitted).
1109. *Id.* at 532.
1110. People v. Rose, 488 Mich. 1034; 793 N.W.2d 235 (2011).
1111. People v. Rose, 490 Mich. 929; 805 N.W.2d 827 (2011).
1112. *Rose,* 490 Mich. at 932 (Marilyn Kelly, J., dissenting).
1113. *Id.* at 933-34.

U.S. Supreme Court denied the defendant's petition for a writ of certiorari after this decision.[1114]

B. Waiver of One's Confrontation Rights

An attorney may waive his client's confrontation rights without the client's personal, affirmative waiver, the Michigan Supreme Court held in *People v. Buie*,[1115] so long as "the decision constitutes reasonable trial strategy, which is presumed," and "as long as the defendant does not object on the record."[1116]

This holding came about after James Henry Buie's jury trial, resulting in his conviction for two counts of first-degree criminal sexual conduct (CSC) involving a victim under the age of thirteen, three counts of first-degree CSC involving the use of a weapon and, finally, felony firearm.[1117] A physician examined the two minor victims, took rectal and vaginal swabs and transmitted them to law-enforcement agencies.[1118] A laboratory employee at the Michigan State Police tested the swabs for the presence of DNA, entered the DNA data into a computer database and eventually tied the DNA to the defendant.[1119] Before trial, Buie's trial counsel consented to the physician and laboratory employee's testimony via two-way videoconferencing.[1120]

The Michigan Court Rules permit the use of videoconferencing in lieu of a witness' physical presence in the courtroom at trial only upon consent of both parties and upon a showing of "good cause."[1121]

Whether Buie himself personally objected at trial was a matter of great dispute in the appellate litigation as the majority (Justice Stephen J. Markman, writing for himself, Chief Justice Robert P. Young Jr., and Justices Brian K. Zahra and Mary Beth Kelly[1122]) concluded that the defendant, through counsel, consented,[1123] and the dissenters (Justice Michael F. Cavanagh, writing for himself and Justice Marilyn Kelly[1124])

1114. Rose v. Michigan, 132 S. Ct. 2773 (2012).
1115. 491 Mich. 294; 817 N.W.2d 33 (2012).
1116. *Id.* at 313.
1117. *Id.* at 298.
1118. *Id.* at 297-98.
1119. *Id.* at 298.
1120. *Id.*
1121. MICH. CT. R. 6.006(C). The rule does not require the consent of *both* parties in "evidentiary hearings, competency hearings, sentencings, probation revocation proceedings, and proceedings to revoke a sentence that does not entail an adjudication of guilt, such as youthful trainee status[.]" MICH. CT. R. 6.006(C)(1).
1122. *Buie*, 491 Mich. at 320.
1123. *Id.* at 319-20.
1124. *Id.* at 324 (Cavanagh, J., dissenting).

concluded he had "unequivocal[ly] object[ed]."[1125] Immediately before the physician's testimony by video, defense counsel, somewhat ambiguously, said his client "wanted to question the veracity of these proceedings, so I'll leave that to the Court's discretion."[1126] The court then had a brief discussion with its information-technology staff, and the video testimony proceeded without further interruption.[1127]

The Michigan Supreme Court noted that waiver of some rights—e.g., by way of a guilty plea or a decision to proceed in pro per—requires a defendant's personal waiver, but most other rights permit a "waiver . . . . effected by action of counsel."[1128] "As to many decisions pertaining to the conduct of the trial, the defendant is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney."[1129] Evidentiary objections are generally counsel's to raise.[1130] Accordingly, the court held, if "the decision constitutes reasonable trial strategy, which is presumed, the right of confrontation may be waived by defense counsel as long as the defendant does not object on the record."[1131]

Applying this holding to the facts of Buie's trial, Justice Markman observed that trial counsel's expression of his client's concern about video testimony was not "phrased as an objection" and that testimony proceeded after the brief discussion as to the testimony's mechanics without any additional inquiry.[1132] That the trial court directed "a member of its information technology staff explain *how* the video equipment worked . . . clearly suggests that the court believed that the statement did not constitute an objection but constituted a request for further information about the operation of the video equipment."[1133] Even in view of testimony at a later evidentiary hearing, Buie failed on appeal to show that the trial court clearly erred in its "findings of fact—specifically, that defendant did not object to the use of the video testimony."[1134] Thus, the supreme court found no confrontation violation in the trial court's admission of the physician and forensic scientist's

1125. *Id.*
1126. *Id.* at 298.
1127. *Id.*
1128. *Buie,* 491 Mich. at 305 (quoting People v. Carter, 462 Mich 206, 218; 612 N.W.2d 144 (2000)).
1129. *Id.* at 306 (quoting New York v. Hill, 528 U.S. 110, 114-15 (2000)) (citations omitted).
1130. *Id.* at 311 (quoting *Hill,* 528 U.S. at 115).
1131. *Id.* at 313.
1132. *Id.* at 316.
1133. *Id.*
1134. *Buie,* 491 Mich. at 317.

testimony via videoconference.[1135] Accordingly, the justices reversed the court of appeals' earlier decision[1136] and remanded the case to the panel to consider other issues.[1137]

XIII. CONCLUSION

The Michigan Campaign Finance Network has estimated that candidates and interested parties spent over $12 million to sway the outcome of the November 2012 election for three of the seven seats on the Michigan Supreme Court.[1138] The net result, however, was no change in party control, with Republicans holding a four-to-three majority on the court as they have since January 2011.[1139] As of January 2013, the only personnel change was the departure of Justice Marilyn J. Kelly and the arrival of fellow Democrat Bridget M. McCormack, a University of Michigan Law School professor who co-directed the Michigan Innocence Clinic, "a non-DNA clinic representing wrongfully convicted Michigan prisoners."[1140] Given Justice McCormack's professional background and party affiliation, it will probably be no surprise if, in most close cases involving evidentiary questions, the new judge takes positions consistent with her predecessor. On the other hand, we know that expectations are only that—expectations.

But Justice McCormack's arrival was not the only personnel change that could affect Michigan case law. At the beginning of 2013, Democratic Justice Diane M. Hathaway, whose arrival in 2009 briefly allowed Democrats to take control of the supreme court for a two-year term,[1141] faced significant pressure to resign.[1142] Federal authorities

---

1135. *Id.* at 319. The justices also held that the trial court did not abuse its discretion in finding "good cause" under the court rules to permit testimony via videoconference where "defense counsel consented to the use of the video technology and that defendant did not object on the record." *Id.*

1136. People v. Buie, 291 Mich. App. 259; 804 N.W.2d 790 (2011).

1137. *Buie*, 491 Mich. at 320. The appellate panel of Judges Jane Beckering, William C. Whitbeck, and Michael J. Kelly affirmed Buie's conviction. People v. Buie, 298 Mich. App. 50; 825 N.W.2d 361 (2012).

1138. *America's Most Expensive, Most Secretive Judicial Election*, MICH. CAMPAIGN FIN. NETWORK (Oct. 29, 2012), http://www.mcfn.org/press.php?prId=168.

1139. David Eggert, *Election Results 2012: Michigan Supreme Court Stays Conservative; 2 Incumbents Win Along with 1 Newcomer*, MLIVE (Nov. 7, 2012), http://www.mlive.com/politics/index.ssf/2012/11/election_results_2012_michigan_2.html.

1140. *McCormack, Bridget Mary*, UNIV. OF MICH. L. SCH., *available at* http://www.law.umich.edu/FacultyBio/Pages/FacultyBio.aspx?FacID=bridgetm.

1141. The Associated Press, *GOP's Taylor Loses High Court Bid*, TRAVERSE CITY RECORD-EAGLE, Nov. 4, 2008, *available at* http://record-eagle.com/statenews/x75062984/GOPs-Taylor-loses-high-court-bid.

alleged she fraudulently concealed her own assets to illegally qualify for a "hardship" modification of a home mortgage.[1143] She succumbed to that pressure, resigned her seat on January 21, 2013 and subsequently pled guilty to one count of felony bank fraud in U.S. District Court in Detroit.[1144] Gov. Rick Snyder appointed her successor, Macomb County Circuit Judge David F. Viviano, a Republican, slightly over a month later.[1145] Justice Viviano is a former litigator with the law firm of Dickinson Wright, PLLC, and attended the University of Michigan Law School and the conservative Hillsdale College for his undergraduate studies.[1146] Unsurprisingly, the expectation is that Justice Viviano, a Republican appointee, will be a more conservative judge than his Democratic predecessor.[1147]

As we look to subsequent *Survey* periods, what follows are some questions that only the future will answer:

- Will President Obama, with a second four-year term, have the opportunity to further shape the the U.S. Supreme Court, and what impact will the Obama-appointed Justices have in regard to evidentiary rulings?
- For how long will Justice Antonin G. Scalia, now the most-senior Associate Justice, remain on the Supreme Court? Will he continue to drive the court's post-*Crawford* jurisprudence, and in what direction? Relatedly, with the high court at loggerheads in *Williams*[1148] (which saw no majority opinion), how will the court handle Confrontation Clause issues in cases involving evidence of forensic laboratory analysis?

1142. Rich Perlberg, *Partisanship shouldn't blur Michigan Supreme Court justice's home case*, LIVINGSTON CNTY. DAILY PRESS & ARGUS, Nov. 25, 2012, *available at* http://www.livingstondaily.com/article/20121125/OPINION01/211250332/Rich-Perlberg-Partisanship-shouldn-t-blur-Michigan-Supreme-Court-justice-s-home-case; Tim Skubick, *Justice Diane Hathaway's legal troubles tarnish Michigan Supreme Court*, MLIVE, Nov. 23, 2012, *available at* http://www.mlive.com/politics/index.ssf/2012/11/tim_skubick_justice_diane_hath.html; Chad Livengood, *Hathaway to fight federal effort to seize Florida property*, DETROIT NEWS, Nov. 22, 2012, *available at* http://www.detroitnews.com/article/20121122/METRO/211220389#ixzz2G5G4TeJF.

1143. *See supra* note 1142.

1144. Chad Livengood, *Former Michigan Justice Hathaway Admits Fraud, May Face Jail Time*, DETROIT NEWS, Jan. 30, 2013, http://www.detroitnews.com/article/20130130/POLITICS02/301300347.

1145. Jonathan Oostling, *Gov. Rick Snyder Appoints Judge David Viviano to Michigan Supreme Court*, MLIVE, Feb. 27, 2013, http://www.mlive.com/politics/index.ssf/2013/02/gov_rick_snyder_appoints_judge.html.

1146. *Id.*

1147. *Id.*

1148. Williams v. Illinois, 132 S. Ct. 2221 (2012).

• More locally, will the Michigan Supreme Court expand the scope of its interpretation of the Confrontation Clause beyond requiring prosecutors to call the authors of expert medical reports to the stand in cases involving the defendant's mental state?[1149]

• Will Michigan courts continue to rule that statutory evidence provisions trump court rules of evidence without violating the separation-of-powers doctrine?[1150]

Perhaps the next *Survey* issue will have some answers, but it is certain to also bring new questions. Until then, I must again break the fourth wall to express my thanks to you, the reader, for taking the time to read this article. I hope you found it useful and informative, and I welcome any feedback you can provide.

1149. *See* People v. Fackelman, 489 Mich. 515; 802 N.W.2d 552, *cert. denied*, 132 S. Ct. 759 (2011).

1150. *See, e.g.*, Estate of Jilek *ex rel.* Janek v. Stockson, 490 Mich. 961, 962-63; 805 N.W.2d 852 (2011) (Cavanagh, J., dissenting); People v. Mack, 493 Mich. 1, 4-5; 825 N.W.2d 541(2012) (Kelly, J., dissenting); People v. Watkins, 491 Mich. 450, 499-500; 818 N.W.2d 296 (2012) (Kelly, J., dissenting).