EVIDENCE

LOUIS F. MEIZLISH[†]

Table of Contents

---

† Member, State Bar of Michigan, 2011-Present. B.A., 2004, University of Michigan; J.D., 2011, *cum laude*, Wayne State University Law School. Editor in Chief, *The Wayne Law Review*, 2010-11; Editor in Chief, *The Michigan Daily*, 2003-04.

The 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 could not have produced this work without the endless support and encouragement from my colleagues, friends, and, most of all, my fiancée, Dr. Erin Miller; my parents, Sheldon and Aida Meizlish; and my uncle, Leonard Meizlish.

I. A GENERAL INTRODUCTION, AND RULES 101-06: PRESERVATION OF ERROR FOR APPEALS AND THE RULE OF COMPLETENESS

A. A General Introduction

This *Survey* Article on evidence covers the period of June 1, 2012 to May 31, 2013. While evidence certainly has more stability than other areas of the law (*see, e.g.*, search-and-seizure law, of late), courts will always find themselves struggling with close calls on which pieces of evidence a jury should be able to see, and which it should not.[1] That will not change.

So what I have tried to do in this article is give *you*, the reader, a fair snapshot of where the law affecting trial practice in Michigan stands *today*. To that end, I have summarized the important published cases from the courts that dispense controlling precedent to the lower federal and state courts in Michigan.

I seek to not only describe the implications of these recent opinions on various areas of evidentiary law ("The *Jones* Court held..."), but to also contextualize the most-recent opinions against a backdrop of the particular rule[2] the cases interpret, the policies underlying the rule, and

1. *See generally The Stop and Frisk Case Takes Another Turn,* N.Y. TIMES (Nov. 14, 2013), http://www.nytimes.com/2013/11/15/opinion/the-stop-and-frisk-case-takes-another-turn.html?_5=0&_r=0.

2. By "rule," I also mean statute or constitutional provision.

the courts' apparent posture toward the rule and the policies. Furthermore, I want to assist readers who are new to a particular area of evidentiary law in understanding the rule and its application to trial practice.[3]

No author (moreover, no lawyer) enters any discussion without his or her own biases and opinions. However, I try to relegate the majority of my opinions to footnotes so as not to distract the reader from the "survey" purpose of this *Survey* article. I will let you be the judge if I have succeeded in that regard.

Finally, allow me to thank the current and immediate past editors of the *Wayne Law Review*, first for their confidence in selecting me to write this article, first in 2012 and again in 2013, and secondly, for their diligent scrubbing and scrutinizing of my work, which is no small task.

B. Appeals and Error[4]

1. Issue Preservation

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.[5] Specificity is critical, as "an objection on one ground is insufficient to preserve an appellate argument based on a different ground."[6] The rules require that "'if the [trial] court's ruling is in any way qualified or conditional, the burden is on counsel to [again] raise objection to preserve [the] error.'"[7]

The major exception to this default rule is the "plain-error" doctrine.[8] If a party fails to preserve its claim of error in the trial court, it must make three showings on appeal to avoid forfeiture of the issue: "1) error .

3. If I do not cover an area of the law in this *Survey* Article, you may want to peruse last year's evidence article, which I also wrote. *See* Louis F. Meizlish, *Evidence, 2012 Ann. Survey of Mich. Law*, 58 WAYNE L. REV. 739, 743 (2012).

4. The issue-preservation and standard-of-review sections are substantially similar to the corresponding portions of last year's article, as the case law has been mostly static. *See id.* at 743-45.

5. *Id.* at 743. *See* 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).

6. People v. Danto, 294 Mich. App. 596, 605; 822 N.W.2d 600 (2011).

7. United States v. Nixon, 694 F.3d 623, 628 (6th Cir. 2012) (alteration in original) (quoting United States v. Brawner, 173 F.3d 966, 970 (6th Cir. 1999)).

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

. . occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights."[9] In the 1999 case of *People v. Carines*,[10] 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.[11]

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."[12]

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").[13] "One who waives his rights . . . may not then seek appellate review of a claimed deprivation of those rights, for his waiver has *extinguished any error*."[14]

2. *Standard of Review*

Assuming a party has preserved the issue, the appellate tribunal—in Michigan state courts or the Sixth Circuit—reviews the trial court's evidentiary rulings for an abuse of discretion.[15] In Michigan, an abuse of discretion in admitting or excluding evidence occurs when a "decision falls outside the range of principled outcomes."[16] The Sixth Circuit has similarly held that an abuse of discretion occurs when the reviewing

9. 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)).

10. *Id.*

11. *Id.* at 763-64.

12. *Id.* (quoting *Olano*, 507 U.S. at 736-37) (internal quotation marks omitted).

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

14. People v. Carter, 462 Mich. 206, 215; 597 N.W.2d 130 (2000) (emphasis added) (quoting United States v. Griffin, 84 F.3d 912, 924 (7th Cir. 1996) (internal citations omitted)). The only caveat to this otherwise hard-and-fast rule applies in criminal cases: a court may review such a decision in spite of defense trial counsel's waiver if trial counsel's decision to waive any objection constituted ineffective assistance of counsel within the meaning of the federal and state constitutions. People v. Marshall, 298 Mich. App. 607, 610, 616 n.2; 830 N.W.2d 414 (2012), *vacated in part on other grounds*, 493 Mich. 1020; 829 N.W.2d 876 (2013).

15. People v. Danto, 294 Mich. App. 596, 599; 822 N.W.2d 600 (2011); United States v. Sims, 708 F.3d 832, 834 (6th Cir. 2013) (citing United States v. Stout, 509 F.3d 796, 799 (6th Cir. 2007)).

16. Meizlish, *supra* note 3. *Danto*, 294 Mich. App. at 599 (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).

tribunal is "left with the definite and firm conviction that the district court committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors."[17]

Before reviewing the ultimate evidentiary ruling, however, the appellate tribunal must determine if the trial court's 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, in which case the appellate tribunal will subject the preliminary legal ruling to de novo review.[18] In interpreting a rule of evidence, the court utilizes the principles of statutory interpretation.[19]

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."[20]

In *People v. Lukity*,[21] the Michigan 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 in mind that it is an abuse of discretion to admit evidence that is inadmissible as a matter of law.[22]

To confuse matters even further, if some of the evidentiary rulings collectively present a legal question—such as whether the trial court deprived a criminal defendant of his constitutional right to present a

---

17. United States v. Qin, 688 F.3d 257, 261 (6th Cir. 2012) (quoting United States v. Jenkins, 345 F.3d 928, 936 (6th Cir. 2003)). Be aware, however, of the Sixth Circuit's intra-circuit split as to the proper standard for reviewing determinations as to the admissibility of other acts pursuant to Rule 404(b). *See infra* note 232.

18. Meizlish, *supra* note 3, at 744. 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)).

19. People v. Snyder, 301 Mich. App. 99, 104; 835 N.W.2d 610 (2013) (citing People v. Caban, 275 Mich. App. 419, 422; 738 N.W.2d 297 (2007)).

20. 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)).

21. People v. Lukity, 460 Mich. 484; 596 N.W.2d 607 (1999).

22. *Id.* at 488.

defense[23]—the court will review the matter de novo.[24] Generally, "however, a trial court's decision on a close evidentiary question cannot be an abuse of discretion."[25]

Finally, assuming a party can establish that 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.[26]

In fact, the Michigan Court of Appeals held that "[a] preserved trial error in admitting or excluding evidence is not grounds for reversal unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative."[27] Furthermore, even if the error was of constitutional magnitude (so long as it was non-structural), it "will not merit reversal if it is harmless beyond a reasonable doubt."[28]

Similarly, under federal case law, there is a 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."[29] The harmless-error rule's purpose is "to prevent the reversal of a just conviction due to a technicality."[30]

---

23. *See infra* Part IV.C.3.

24. People v. King, 297 Mich. App. 465, 472; 824 N.W.2d 258 (2012) (citing People v. Unger, 278 Mich. App. 210, 247; 749 N.W.2d 272 (2008)).

25. People v. Kodlowski, 298 Mich. App. 647, 663; 828 N.W.2d 67 (2012) (citing People v. Sabin, 463 Mich. 43, 67; 614 N.W.2d 888 (2000) (after remand)).

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

27. *King*, 297 Mich. App. at 472.

28. *Id.* (citing People v. Graves, 458 Mich. 476, 482; 581 N.W.2d 229 (1998)).

29. United States v. Clay, 667 F.3d 689, 700 (6th Cir. 2012) (quoting United States v. DeSantis, 134 F.3d 760, 769 (6th Cir. 1998)) (internal quotation marks omitted).

30. 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)).

3. The Absence of Review for Prosecutors: The Implications of the Double Jeopardy Clause and the New Michigan Court Rule on Directed Verdicts

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."[31] For prosecutors, this means that once jeopardy attaches, a trial resulting in the fact finder's verdict of not guilty, or in a directed verdict, is final and unreviewable.[32] In fact, in the recent case of *Evans v. Michigan*, the U.S. Supreme Court reversed the Michigan Supreme Court and held that when a trial court erroneously directs a verdict of not guilty, as in *Evans* for the prosecution's failure to prove a fact that was *not* an element of the offense, the verdict is nevertheless unreviewable.[33]

This is perhaps the *strictest* of all possible standards of review: no review at all. Especially relevant to this article's purpose was the *Evans* Court's reminder that "an acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence."[34] For prosecutors, this means that, in some circumstances, they must immediately appeal adverse evidentiary rulings—hopefully before the trial even starts, as "jeopardy . . . terminates notwithstanding *any* legal error."[35]

However, in *Evans*, Justice Sonia M. Sotomayor, writing for an eight-member majority,[36] suggested that states that take exception to the court's ruling as to erroneous *judicial* acquittals have a remedy:

> *Nothing obligates a jurisdiction to afford its trial courts the power to grant a midtrial acquittal*, and at least two States disallow the practice. Many jurisdictions, including the federal system, allow or encourage their courts to defer consideration of a motion to acquit until after the jury returns a verdict, which mitigates double jeopardy concerns.[37]

---

31. U.S. CONST. amend. V. The state constitution also contains a double-jeopardy provision. *See* MICH. CONST. art. I, § 15.

32. Evans v. Michigan, 133 S. Ct. 1069, 1073 (2013), *rev'g* People v. Evans, 491 Mich. 1; 810 N.W.2d 535 (2012).

33. *Id.*

34. *Id.* at 1074 (citing Sanabria v. United States, 437 U.S. 54, 68-69, 78 (1978)).

35. *Id.* at 1080 (emphasis added).

36. Chief Justice John G. Roberts Jr. and Justices Stephen G. Breyer, Ruth Bader Ginsburg, Elena Kagan, Anthony M. Kennedy, Antonin G. Scalia, and Clarence Thomas joined the opinion.

37. *Evans*, 133 S. Ct. at 1081 (emphasis added) (citations omitted).

In response, the Michigan Supreme Court amended Rule 6.419 of the Michigan Court Rules, which took effect on September 1, 2013, and applies to felony criminal cases.[38] The court declined Justice Sotomayor's invitation to eliminate directed verdicts prior to a jury verdict.[39] However, Michigan's high court did amend the rule to permit, but not require, a judge to defer a motion for directed verdict until after the close of proofs—but before the jury reaches a verdict—or until after a jury verdict.[40]

Of course, neither Justice Sotomayor's suggestion nor the new version of Rule 6.419 provides a remedy for erroneous evidentiary rulings that contribute to an acquittal by the fact finder or a directed verdict from the judge.

C. The Rule of Completeness

The rule of completeness, Rule 106 of the Michigan Rules of Evidence, provides that "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."[41] The corresponding federal rule is virtually identical.[42]

The rule of completeness' purpose is to allow the fact finder to hear statements "that place in context other writings admitted into evidence which, viewed alone, may be misleading."[43] The rule does not bar the statement's proponent from introducing an incomplete or out-of-context statement; rather, it allows the opposing party to "supplement" the

38. MICH. CT. R. 6.419. The provisions of Rule 6.419, at present, do not extend to misdemeanor criminal cases. MICH. CT. R. 6.001(A)-(B). Accordingly, it appears that the rule for directed verdicts in civil cases—Rule 2.615—applies to misdemeanor trials. MICH. CT. R. 6.001(B), (D) (providing that the civil rules are generally applicable when the felony rules are inapplicable). The civil rule, unlike the former and current felony criminal rule, neither expressly prohibits nor expressly permits a trial judge to defer ruling on a motion for directed verdict. MICH. CT. R. 2.516.

39. MICH. CT. R. 6.419(A).

40. MICH. CT. R. 6.419(B).

41. MICH. R. EVID. 106.

42. FED. R. EVID. 106.

43. United States v. Jamar, 561 F.2d 1103, 1108-09 (4th Cir. 1977) (citing Advisory Committee's Note to Rule 106 in KENNETH R. REDDEN & STEPHEN A. SALTZBURG, FEDERAL RULES OF EVIDENCE MANUAL (2011), and MCCORMICK ON EVIDENCE § 56 (2d ed. 1972)).

incomplete statement with its remainder or other statements that properly contextualize it.[44]

The Sixth Circuit, however, has held that the remainder of the writing or recording must "be relevant to the issue, and only those parts which qualify or explain the subject matter of the portion offered by opposing counsel should be admitted."[45] When a party invokes the rule of completeness, a federal district court considers

> (1) whether the additional evidence explains the evidence already admitted; (2) whether it places the admitted evidence in its proper context; (3) whether its admission will serve to avoid misleading the trier of fact; and (4) whether its admission will insure a fair and impartial understanding of all of the evidence.[46]

1. Relevance of the Remainder of a Criminal Defendant's Redacted Confession

That relevancy requirement came into play in Rodney S. Dotson Jr.'s federal trial for sexual exploitation of a minor and possession of child pornography when the government introduced a redacted confession by the defendant and the defendant unsuccessfully sought to introduce the entire unredacted statement.[47]

The defendant lived with his girlfriend, M.C., and her four-year-old daughter, A.C.[48] M.C. found inappropriate photographs of her daughter on the memory card of Dotson's phone.[49] After M.C. delivered the memory card to the authorities, police searched the card and discovered inappropriate videos of A.C., along with images of other children the defendant had obtained via the Internet.[50] At trial, the government introduced the following statement by Dotson—redacting the words in regular font, but allowing the jury to read the words in bold:

> **My name is Rodney Dotson this is me at my worse. I'm disgraced with my actions. But this is me,** I was born and raised mostly in New York. Come from a family of high

44. People v. McGuffey, 251 Mich. App. 155, 161; 649 N.W.2d 801 (2002).

45. United States v. Dotson, 715 F.3d 576, 582 (6th Cir. 2013) (quoting United States v. Gallagher, 57 F. App'x 622, 628 (6th Cir. 2003)).

46. United States v. McAllister, 693 F.3d 572, 584 (6th Cir. 2012) (quoting United States v. Glover, 101 F.3d 1183, 1190 (7th Cir. 1996)).

47. *Dotson*, 715 F.3d at 577-79.

48. *Id.* at 578.

49. *Id.*

50. *Id.*

expectations and very good moral values. I was mainly with my mom my whole [life], my dad was in and out after I was born. She worked a lot to take care of us. So me, my older sister and two younger siblings stayed with my grandma in New York. She had a sick way of lookin at life but at 3 or 4 years old (me) I started noticing things about women and myself and didn't know why. At around that time I started having dreams at least I thought they were dreams but while I took a bath my grandma would start touching my privates and it felt good but I can't be sure whether it was a dream or just me being messed with. 1995 well we moved to Bolivar, tn life looked pretty good a fresh start ya' know, a fresh life. Things were gonna be great ya' know? But they weren't. I formed a habit of staying up late me and my brother (little brother) shared a room, mostly he slept with my mom and dad. So I was alone but I wandered a lot and most nights my dad was in my big sisters room. Didn't know why but eventually discovered he was touching her. He left and came back because my mom Idk loved em. So he was better, we all thought but one day I woke up early in 95' my dad wanted to take me to Walmart We shopped and stuff. When we got out of Walmart just me and him we drove to a location unknown to this day and he wanted to see my private so I showed he touched it I was kinda scared but he was my dad. This went on till 96' and by then It got worse his family molested me and my sister taught me how to have sex and my dad especially took great interest in me. One morning my dad was in my room told me to put my shirt over my head and pull my pants down so I did like usual but this time was different my mom woke up early too and was gonna come in my room he ran into the bathroom and left me like I was. I confessed everything to her and he was gone. 97'-99' I spent in NY back with my grandma things we different the neighborhood changed and everything. My problem with molestation still wasn't gone tho, now I had a mentally ill neighbor who messed with younger boys he worked for my grandma from time to time mowing the grass washing windows et. So one day while taking the trash out I met him and he automatically grabbed and squeezed my private and wouldn't let go till I touched his so I did. Never told anyone because I thought ppl would call me gay and treat me different. 99' lost myself, everything I've become was surrounded by anger, rage and distrust of authority figures. I continued to live with my mom for the next 8 year. Mom and dad permanently separated mom doesn't know how shes gonna pay for the hotel room

where we lived while going to Lexington High School. It was a battle day in day out I was 17 failing classes, uncertainty of where I'm a living so I left and drifted from place to place situations are getting worse I was home less mostly helped sell drugs to get by. Then a blessing happened **I met [M.C.] she was down and out her babies father kept leaving and she needed a father figure and somebody to spend her life with. So I stayed with her we were happy, her daughter and all of us were happy. Anytime we needed each other we were there ya know? But things started to get bad we were starting to not afford things. So we moved from [redacted street address] to a trailor Park where [A.C.] had her mom and I had mine with [M.C.] Things were normal outside of the fact we still couldn't afford stuff so once again we moved to my moms we lived in one room. Me [M.C.] and [A.C.], I didn't like the fact that [M.C.] let [A.C.] change in our room but she had to. So I left it alone we stayed there in that one room from May 09' to Feb or March 10' and moved to [redacted street address].** Things once again were wonderful ya' know? I hid my thoughts of wanting to marry [M.C.] for a long time never brought it up or anything. Small house, tention was all around between me and [M.C.] and her family not mention we lived next to an old man, who so many of my friends got either raped or molested by. Things were getting bad, But got better **[M.C.] gotta job and needed me to watch [A.C] or get her from school so I did. I noticed I didn't mind [A.C.] changing were I could see anymore I thought it was normal and ya' know that's what [M.C.] made me believe. So I thought it was ok. But eventually it turned into I guess you can say a bad thing. I was on a site one day looking for a song that I didn't wanna pay for and I found it what I didn't know is once you click on it you get everything that the person uploaded which in this case was the song of course but it came with some little girl pictures which 4 some reason I didn't get rid of them. I kept them and eventually found more and more and just saved them. A few weeks after that I knew something was wrong but the oddest thing least I thought it was odd was I didn't get aroused but I wouldn't delete em' and admitted to [M.C.] during a brief argument that I had a problem and I knew I thought about things that I shouldn't of. She didn't question it. So I went on, weeks passed and [A.C.] changed etc. I watched one time and I felt so bad about it but I didn't wanna make it seem like I lost control of this situation. I was**

gonna keep it to myself and figure out how and why I got this way. So I battled with it. [A.C.] wore clothes that showed too much I thought and I constantly told her to sit another way or told [M.C.] to change her. But images of her were in my head, disgraceful, and distasteful but they were there. And eventually it got worse she was sleepin and her pants were ll fitting any ways and I've seen it so I'd go over this time and pull them down more placed my hand on her bottom and - a picture. Among several others I never got aroused but I liked lookin' at the pictures that night and call myself sick and nasty at the end of the night. I never touched her anywhere else from that point on it never happened again. I made a video, several of those too, one we were watching a movie and she said that lady has some big boobs a part of the movie I forgot to fast forward through but I said there not that big she said yest they were then she raised up her shirt and said hers weren't that big that bothered me I got mad at her for a min. and started watchin the movie again. Then Idky for some dumb reason I told her to do it again and she did and this I recorded it. At that moment I felt as the police or god or something was gonna get me. So I stayed my distance from her for the rest of the night I was afraid. But for some reason I still thought I had a handle on the problem didn't want her to know what I was doing shes not stupid shes really not. I was ashamed for it from the beginning ya' know? I knew I was doing this that's bad enough. So one more time I recorded her I wasn't going to do anything but she wanted me to go to the bathroom to turn on the light for so I did the next thing I know she took her pants off to use it and went to living room sat there and was Idk, thinkin' about a lot and how I told myself it would stop then I said this would be the time then I'm done for good I went in the bathroom and she was on the toilet I was pretendin like I was textin so she wouldn't know I know how that feels to be taken advantage of by somebody who doesn't care if you know or don't. So I was try na hide it, she sat up well stood up and I told her to reach into the tub while I was recording I saw her bottom and I felt like the ppl I hated but its something beyond my control. I have no clue where all of this came from and I don't why it happens randomly but it does. I had a lot of pride and didn't want to admit it to no one because I've always been against things like this. But there it is, my ups and downs, my family I've hurt, so bad I can't imagine the pain

> [M.C.'s] feeling as I write this. And whats going through [A.C.'s] head seeing me gone but I guess one day I can apologize and become the man they need. I know can be it I just need some help. But in the mean time for [A.C., M.C.] and people workin' on this god awful case I'm sry.[51]

The district court granted the government's motion in limine to redact the above statement, over the defendant's objection, and admitted the redacted statement.[52] A jury found the defendant guilty of both charges.[53]

On appeal, a unanimous Sixth Circuit panel agreed that the redacted portions were irrelevant to any issue at trial and affirmed the district court's ruling excluding the evidence[54]:

> The omitted portions—which illustrated that Dotson had a rough upbringing and had been sexually abused as a child; that he considered his girlfriend to be a "blessing" and had intended to marry her prior to encountering financial difficulties; and his concern that the victim knew he was exploiting her—*did not make any fact of consequence related to these statutory offenses more or less probable than it would have been without them*.
>
> . . . .
>
> . . . [T]he fact that Dotson had a troubled upbringing, cared for his girlfriend, and was concerned that the victim knew she was being exploited did not in any way inform his admission that he photographed the victim, made videos of her, and downloaded sexually explicit images of other children from the Internet.[55]

Accordingly, the panel affirmed the defendant's conviction but remanded the matter for sentencing on unrelated grounds.[56]

---

51. *Id.* at 578-81 (emphasis added).

52. *Id.* at 578-79.

53. *Dotson,* 715 F.3d at 581.

54. *Id.* at 577. Judge Jane B. Stranch wrote the opinion on behalf of herself and Judges Raymond M. Kethledge and Helene N. White.

55. *Id.* at 583 (emphasis added). *See* FED. R. EVID. 401 ("Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.").

56. *Dotson,* 715 F.3d at 589.

2. "Completing" a Party's Allegedly Fraudulent Bankruptcy Filing with Later Statements to Illustrate His State of Mind

The government charged Darin L. McAllister, a former FBI agent, with fifteen counts of wire fraud, one count of bank fraud, and three counts of bankruptcy fraud.[57] The evidence at trial showed that after transferring to the FBI's Nashville office in 2005, McAllister obtained loans to purchase a $1.5 million home while working for a monthly salary of only $8,000.[58] His mortgage payments amounted to roughly $7,500.[59] Eighteen months later, McAllister obtained loans to purchase rental properties, signing statements that he "was an entertainment company executive at 'DOJ Productions' who earned $42,000 per month. In the loan application, the address for DOJ Productions was listed as the same address as the Department of Justice in Nashville."[60] While applying for the loans, the defendant directed his tax preparer to write the bank "indicating that McAllister had been self-employed in the music industry for the preceding two years—thereby satisfying the requirements for the type of loan McAllister sought."[61] The defendant also successfully obtained a $100,000 line of credit from the bank, falsely asserting in his application "that he earned an annual salary of $500,000, and that he was the president of his wife's record company, Judah Records."[62]

In 2009, the defendant was unable to make his mortgage/loan payments, and the bank shortly thereafter took possession of his rental properties.[63] McAllister soon filed for bankruptcy protection.[64]

> The record reveals that McAllister made false representations during his bankruptcy proceedings. In his Statement of Financial Affairs, McAllister falsely represented that he had no rental income, that he had no foreclosures, and that he had no property transfers (e.g., a short sale)—all falsehoods which proved to be material and formed the basis for his convictions for bankruptcy fraud.[65]

---

57. United States v. McAllister, 693 F.3d 572, 577 (6th Cir. 2012).
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *McAllister*, 693 F.3d at 577.
64. *Id.*
65. *Id.*

The jury convicted the defendant of all the charges, except for the one count of bank fraud, on which it deadlocked.[66]

In light of the testimony by McAllister's bankruptcy attorney that the defendant made omissions in his bankruptcy filings, in the Sixth Circuit's words, "the defense [reasoned that it] should have been able to use an audio recording of a separate hearing to 'give[] the jury a more complete understanding of the defendant's state of mind.'"[67]

Briefly referencing the *Glover* factors,[68] a unanimous Sixth Circuit panel rejected the defendant's invocation of the rule of completeness, observing that "[t]he audio recording was made at a hearing conducted weeks after he filed his bankruptcy petition. Further, the statements in the audio recording did not contradict the information contained in the petition."[69] Importantly, the panel noted, "The Government did not introduce a writing related to the hearing or any portion of the audio recording."[70] Thus, Judge Damon J. Keith, writing the majority opinion for himself and Judge Bernice Bouie Donald,[71] affirmed the district court's exclusion of the audio recording but remanded the matter to the district court to review the jury-selection process.[72] Judge David W. McKeague concurred with the evidentiary ruling in a separate opinion.[73]

---

66. *Id.*

67. *Id.* at 584.

68. *Id.* (quoting United States v. Glover, 101 F.3d 1183, 1190 (7th Cir. 1996)). The *Glover* factors are whether the evidence (1) explains the admitted evidence, (2) properly contextualizes the admitted evidence, (3) avoids misleading the jury, and (4) insures proper understanding of all the evidence. *Glover*, 101 F.3d at 1190.

69. *McAllister*, 693 F.3d at 585.

70. *Id.* at 584. The panel could have also cited Rule 803(3) in support of its conclusion. *See* FED. R. EVID. 803(3). The defendant's statements at the bankruptcy hearing most likely fell within the traditional definition of hearsay. *See* FED. R. EVID. 801. Notwithstanding the hearsay rule, the state-of-mind exception permits a party to offer "[a] statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), *but not including a statement of memory or belief* to prove the fact remembered or believed." FED. R. EVID. 803(3) (emphasis added). In other words, because the bankruptcy hearing concerned a filing that already took place, any statements the defendant made at the hearing concerning his intent may have been probative of his state of mind at the time of the hearing, *but not of his state of mind at the time of the earlier filing*. Admitting this self-serving hearsay would have allowed the defense to offer the defendant's own after-the-fact explanation of his conduct without giving the opposing party an opportunity to cross-examine him—the kind of circumstance the hearsay rule contemplates.

71. *McAllister*, 693 F.3d at 574.

72. *Id.* at 585-86.

73. *Id.* at 586 (McKeague, J., concurring in part and dissenting in part).

II. RULES 201-02: JUDICIAL NOTICE

A. Judicial Notice Generally

In both the Michigan and federal courts, a court may take judicial notice of facts "not subject to reasonable dispute."[74] 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."[75] The neighboring Seventh Circuit 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 acceptance of a universal truth for the conventional method of introducing evidence."[76]

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."[77]

B. Judicial Notice of Legal Documents to Establish Prior Criminal Convictions

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."[78] 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."[79] Similarly, a court may take judicial notice of the *existence* of legal documents, but it may not take judicial notice of the truth of the statements therein if the truth of the statements is in dispute.[80]

---

74. FED. R. EVID. 201. *See also* MICH. R. EVID. 201.

75. MICH. R. EVID. 201(b). *See also* FED. R. EVID. 201(b).

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

77. MICH. R. EVID. 201(f) (emphasis added). *See also* FED. R. EVID. 201(f).

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

79. FED. R. EVID. 801(c) advisory committee's note to subdivision (c) (emphasis added) (citing Emich Motors Corp. v. Gen. Motors Corp., 181 F.2d 70 (7th Cir. 1950)). See *infra* Part VIII for a more extensive discussion of the hearsay rule.

80. Carrier Corp. v. Outokumpu Oyj, 673 F.3d 430, 442 n.6 (6th Cir. 2012) (citing

In *United States v. Ferguson*,[81] 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."[82] 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."[83]

Following a bench trial in *Ferguson*, the district court convicted the defendant of knowingly possessing child pornography, and thereafter sentenced David Ferguson to a mandatory minimum sentence of ten years.[84] 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.[85] The court held that the federal statute required it to sentence the defendant to a mandatory minimum term of ten years imprisonment.[86] 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 PSR utilized police reports of the prior sexual abuse incidents.[87] In response, the government abandoned its sole reliance on the PSR and asked the Sixth Circuit panel 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.[88] 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 pursuant to federal law.[89]

Scotty's Contracting & Stone, Inc. v. United States, 326 F.3d 785, 790 n.1 (6th Cir. 2003)).

81. United States v. Ferguson, 681 F.3d 826 (6th Cir. 2012). Although the Sixth Circuit issued its *Ferguson* opinion five days into this *Survey* period, this is discussed in the preceding *Survey* issue. Thus, this portion of the article is virtually identical, if not entirely identical, to the corresponding portion of last year's article. *See* Meizlish, *supra* note 3, at 754.

82. *Ferguson*, 681 F.3d at 834 (quoting 21B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5106.4 (2d ed. 2005) (footnote omitted)).

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

84. *Id.* at 828.

85. *Id.* at 830.

86. *Id.*

87. *Id.* at 831-32.

88. *Ferguson*, 681 F.3d at 833.

89. *Id.*

The majority opinion of Judge Arthur L. Alarcón, writing for himself and Judges Julia Smith Gibbons and Karen Nelson Moore,[90] agreed to take judicial notice of the court records the government proffered.[91] In so doing, the court relied on *Shepard v. United States*,[92] in which the U.S. Supreme Court held that lower courts may rely upon

> the "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 determine whether the qualifying or non-qualifying aspect of the statute was violated.[93]

Because the court records at issue in *Ferguson* were the same type of records the *Shepard* Court approved for judicial notice purposes, this appellate panel concluded that it was proper to take judicial notice of the records in determining that the defendant had a prior sexual abuse conviction.[94] For this and other reasons, the court affirmed the defendant's conviction and sentence.[95]

III. RULES 301-02: PRESUMPTIONS

In federal civil cases, the rules provide that "the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption."[96] The Michigan rules contain substantially similar language.[97] This rule, however, does not shift the burden of persuasion, which remains on the party who had it originally.[98] The only significant case during the *Survey* period interpreting a legal presumption was a Sixth Circuit case, *Rudisill v. Ford Motor Co.*,[99] a diversity action in which a three-judge panel interpreted and applied the statutory presumption in Ohio law that certain workplace injuries were the product

90. *Id.* at 828. The opinion's author is a Ninth Circuit appellate judge, who sat on the Sixth Circuit panel by designation. *Id.*

91. *Id.* at 835.

92. Shepard v. United States, 544 U.S. 13 (2005).

93. *Ferguson*, 681 F.3d at 832 (quoting *Shepard*, 544 U.S. at 26).

94. *Id.* at 835.

95. *Id.* at 836.

96. FED. R. EVID. 301.

97. *See* MICH. R. EVID. 301.

98. *Id.*

99. Rudisill v. Ford Motor Co., 709 F.3d 595 (6th Cir. 2013).

of an employer's intent to injure,[100] thus facilitating the plaintiff's aim to escape the strict confines of the state's worker's compensation system and prevail in an intentional-tort action.[101] Because the Sixth Circuit's resolution of this case ties so closely to Ohio law and has only minimal relevance to Michigan or federal evidentiary procedure, I direct interested readers to the case without any further discussion.

IV. RULES 401-15: RELEVANCE, CHARACTER EVIDENCE, OTHER ACTS OF CONDUCT, AND RULE 403 BALANCING

A. Relevance

Only relevant evidence is admissible.[102] In fact, *all* relevant evidence is admissible, *unless* (and this is perhaps the greatest caveat in the legal profession) another rule or a statutory or constitutional provision renders it inadmissible.[103]

The relevancy rule requires only a showing that the evidence has "*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."[104] This definition of relevancy has two components: that the evidence is (a) probative of a fact, and (b) that fact is one that "is of consequence"—that is material to the action.[105]

"The threshold is minimal: 'any' tendency is sufficient probative force."[106] In other words, in Michigan, "evidence is relevant if it 'in some degree advances the inquiry.'"[107] The Sixth Circuit, similarly, has held that "[t]he standard for relevancy is 'extremely liberal' under the Federal Rules of Evidence."[108]

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 is because '[r]elevancy is not an inherent

100. *Id.* at 601-02.

101. *Id.* at 602 (citing OHIO REV. CODE § 2745.01(A)-(B)).

102. FED. R. EVID. 402; MICH. R. EVID. 402.

103. FED. R. EVID. 401; MICH. R. EVID. 401.

104. MICH. R. EVID. 401 (emphasis added). *See also* FED. R. EVID. 401.

105. MICH. R. EVID. 401; FED. R. EVID. 401. *See also* People v. Crawford, 458 Mich. 376, 388; 582 N.W.2d 785 (1998).

106. Hardrick v. Auto Club Ins. Ass'n, 294 Mich. App. 651, 668; 819 N.W.2d 28 (2011) (quoting *Crawford*, 458 Mich. at 390), *appeal denied*, 493 Mich. 687; 821 N.W.2d 542 (2012).

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

108. Dortch v. Fowler, 588 F.3d 396, 400 (6th Cir. 2009) (quoting United States v. Whittington, 455 F.3d 736, 738 (6th Cir. 2006)).

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.'"[109]

1. Evidence that the Victim and Defendant Were Married in Rape Cases

The Michigan Court of Appeals had little trouble explaining to Calvin Martz that marriage is not a defense to a rape charge.[110] Judge Amy Ronayne Krause, writing for herself and Judges Elizabeth L. Gleicher and Mark T. Boonstra,[111] noted that "[t]he barbaric notion that a person cannot rape their spouse has long since been abolished" in affirming a trial court's determination to exclude the defendant's evidence that he and his victim were married.[112]

The panel summarized the facts in the defendant's trial for criminal sexual conduct, unlawful imprisonment, resisting or obstructing a police officer causing serious impairment, and two counts of resisting or obstructing a police officer:[113]

> This case arises out of a long, controlling, and abusive relationship between the complainant, Stephanie, her mother, Karen, and defendant. Defendant claimed to be Stephanie's husband. According to Karen, they were married on May 18, 2000, when Stephanie was 21 years old, by a "Marriage Covenant" document. Stephanie contended that the signature on the document was not hers, and she had not been present when it was created. According to Stephanie, defendant had claimed to be her husband since she was about 14 years old, at which time defendant would have been approximately 46 years old. Stephanie testified that she was afraid of defendant and had a personal protection order (PPO) against him. She explained, however, that her attempts to live away from defendant were undermined by her concern for her mother, with whom defendant continued to live.[114]

---

109. United States v. Parkes, 668 F.3d 295, 304 (6th Cir. 2012) (quoting FED. R. EVID. 401 advisory committee's note).

110. People v. Martz, 301 Mich. App. 247; 836 N.W.2d 243 (2013).

111. *Id.* at 253.

112. *Id.*

113. *Id.* at 247.

114. *Id.* at 248-49.

The victim decided to visit her mother in May 2011, and when the defendant arrived at the home, he "told her 'you're going to stay here and you're going to stick to me like glue.' She also testified that defendant followed her around the house, even accompanying her to the outhouse."[115]

The defendant ordered Stephanie to the bedroom, and the victim testified that she was in fear of Martz because he had previously knocked her jawbone out of alignment.[116] The defendant

> disrobed her and "forced" her to have sex with him, which caused her to bleed "[i]n my private." She testified that defendant believed he had a right to have sex with her because "[h]e thinks that I'm his wife," and had considered her to be so since she was 14 years old. She testified that she was afraid to tell him that she did not want to have sex with him, and in the past when she said so, "[h]e would do it anyway, usually."[117]

Police eventually visited Martz's home to perform a welfare check on Stephanie.[118]

> The police spent several minutes knocking on the door continuously, and they further made announcements with a loudspeaker. Stephanie testified that she heard the police announce themselves, bang on the door, and say her name. She testified that defendant told her and Karen "to be quiet and close the curtains." She observed defendant pace the floor, peek out the curtains, and retrieve a can of pepper spray and take it to the front door. Karen testified that she heard nothing because the house was "pretty darn sound-proof," and she believed any sounds from the door were from a bear that occasionally visited the area. The officers eventually decided to breach the door to the home.
>
> The first two officers through the doors to the home testified that they were hit with a chemical spray causing immediate eye irritation and difficulty breathing. Karen confirmed that defendant had sprayed bear mace. Defendant later explained to officers that he had sprayed bear mace because he believed a

115. *Id.* at 249.
116. *Martz*, 301 Mich. App. at 249.
117. *Id.* at 249-50.
118. *Id.* at 251.

> bear was outside, although when "he recognized that it was a person with a gun," he decided to spray the mace anyway. As the officers retreated, one fell off the porch and broke his ankle. The officers then noticed "a commotion" in the house, and Stephanie "kind of spilled" out of the door. They noticed that it appeared that someone was holding onto the back of her shirt. Karen testified that she tried to restrain Stephanie from leaving the house because she was concerned that the mace would harm her. Stephanie testified that defendant was the one who grabbed her shirt, and that he told her "that God told him to spray the police officers."[119]

Stephanie was able to escape from the house.[120] Other police officers returned on a later date with an arrest warrant and took Martz into custody.[121]

At trial, the defendant sought to admit various legal documents, among them, one that purported to convey all of Stephanie's rights to Martz.[122] Another document discussed the victim's religious beliefs and stated that any legal document Stephanie executed required Martz's consent.[123] Another document bore the following words from the defendant: "As Stephanies [sic] husband, Calvin F Martz, I only have authority for consent in all matters conserning [sic] Stephanie … and my consent is not given. You are discriminating against Stephanies [sic] and my religious rights.''[124] The trial court excluded the documents as irrelevant.[125]

Whether Stephanie consented to any of the legal instruments was immaterial to the court's analysis.[126] Judge Ronayne Krause agreed that the documents were irrelevant to the case.[127] "None of the proffered documents, even if taken at face value, make it less probable that defendant used force or coercion to accomplish sexual penetration."[128] The court explained,

---

119. *Id.* at 251-52.
120. *Id.*
121. *Id.*
122. *Martz*, 301 Mich. App. at 252.
123. *Id.*
124. *Id.* (alterations in original).
125. *Id.*
126. *Id.* at 252.
127. *Id.*
128. *Martz*, 301 Mich. App. at 253.

> [T]he most they could show would be that defendant and Stephanie believed themselves married to each other, that defendant had assumed the right to make decisions regarding Stephanie's medical care and contractual arrangements, and that Stephanie had issues with hallucinations while on certain medications. Absolutely none of those things conferred upon defendant a right to have nonconsensual sex with Stephanie. Furthermore, absolutely none of those things in any way disprove a coercive relationship between the two of them. Indeed, a casual reading of the documents strongly suggests a controlling and coercive relationship.[129]

To that end, the court observed in a footnote, "If anything, [the documents'] exclusion from evidence could only have worked in defendant's favor."[130]

The court then briefly addressed the defendant's contention that the trial court erred in preventing him from calling as witnesses two officers who arrested him a week after the incident that gave rise to the resisting-and-obstructing charges.[131] The appellate panel affirmed the trial court, observing that "the arresting officers would not have had any personal knowledge of the events that occurred at the search and rescue. Consequently, their testimony would not have shed light on any issue of consequence. The trial court therefore did not abuse its discretion in finding their testimony irrelevant."[132] Accordingly, the panel affirmed the defendant's conviction.[133]

2. Relevance of the Defendant's Statements on Capital Punishment at Trial

Fourteen-year-old Dakotah Wolfgang Eliason would often spend weekends at the home of his grandparents, Jean and Jesse "Papa" Miles.[134] Jean Miles testified that her husband and the defendant had a strong relationship, that Dakotah was a good grandson, and that nothing appeared unusual during the weekend of March 5, 2010, when the Miles' grandson was visiting.[135]

---

129. *Id.* at 253-54.
130. *Id.* at 254 n.5.
131. *Id.* at 254-55.
132. *Id.* at 255.
133. *Id.*
134. People v. Eliason, 300 Mich. App. 293, 295; 833 N.W.2d 357 (2013).
135. *Id.* at 296.

> On March 6, 2010, defendant's sister returned to their father's home while defendant remained at his grandparents' house. Jean saw defendant during the evening and briefly spoke with him when he came downstairs to use the restroom; defendant did not at the time appear angry or upset. At approximately 7:30 p.m. that evening, Jean went to her bedroom to watch television; Jesse was in the living room, where he slept, watching television. Defendant was in an upstairs bedroom.
>
> Jean awoke at approximately 3:00 a.m. the next morning when she heard a "pop." Upon awakening, she heard defendant's voice, and thought defendant told her, "I shot Papa." The next thing she remembered was that she had a gun in her hands; she could not recall whether defendant gave her the gun or whether she picked it up. After discovering what happened, she instructed defendant to call 9-1-1, and paramedics responded to the call but were unable to save Jesse.[136]

A Michigan State Police trooper and Berrien County sheriff's deputy responded to the scene.[137] The defendant executed a *Miranda*[138] waiver and confessed to the officers that sometime between the late evening of March 6 and the early morning of March 7 he retrieved a handgun that his grandfather kept on a coat rack.[139] He returned to his room and sat in a chair for two or three hours while he "was contemplating homicide or suicide."[140] He then fatally shot his grandfather while the latter was sleeping on the couch.[141] "Although defendant told [Trooper Brenda] Kiefer that he shot Jesse out of 'sadness' and 'pent up anger,' he was not angry with Jesse or Jean, but instead was angry with his own parents."[142]

The defendant also told Berrien County Deputy Sheriff Eugene Casto that he felt his life had turned into an episode of "Law and Order."[143] The defendant also said, "You know I wish I could take it back but now I understand the feeling that people get when they do that. Now I understand how they feel."[144] During the same conversation,

---

136. *Id.*
137. *Id.*
138. Miranda v. Arizona, 384 U.S. 436, 444 (1966).
139. *Eliason*, 300 Mich. App. at 296-97.
140. *Id.* at 297.
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*

Eliason referenced a paper his father "had written for a criminology class about the different forms of execution."[145]

Shortly thereafter, Detective Fabian Suarez interviewed the defendant, after the defendant again waived his *Miranda* rights.[146]

> Defendant explained to Suarez that he had not slept much before the shooting, and that he shot Jesse after taking the loaded handgun from the coat rack. He could not explain why he shot Jesse, and indicated that Jesse never harmed him physically or emotionally. However, defendant indicated that he was contemplating either committing suicide or shooting Jesse that night, but decided to kill Jesse because he was not ready to die. And, in a sense admitting to a self-awareness of his actions, defendant stated that at one point he thought to himself, "what am I doing, why do I have to do this, why do I have the gun, I know better than this…."
>
> As to the shooting, defendant was in the living room looking at Jesse for approximately 45 minutes trying to decide what to do before he shot Jesse. Defendant then aimed the gun at Jesse from approximately seven feet away and pulled the trigger, shooting him in the head. Defendant had not previously considered hurting Jesse, but "[s]omething snapped" that night because everything he had been thinking of that evening "just buil[t] up to the point that you don't know what you're doing." According to defendant he "blacked out for a couple minutes" before he shot Jesse.[147]

Defendant told Suarez that he considered using knives rather than the gun because he was not sure whether he wanted the killing to be quiet or loud. Defendant also considered using either a pillow to smother Jesse or wash cloths to gag him.[148] A Berrien County jury convicted the defendant of first-degree premeditated murder and one count of felony firearm.[149] The defendant appealed.[150]

On appeal, the defendant argued that his counsel was ineffective for failing to object to the evidence of Eliason's statements regarding his

---

145. *Eliason,* 300 Mich. App. at 297.
146. *Id.* at 298.
147. *Id.* at 298-99 (alterations in original).
148. *Id.* at 298 n.5.
149. *Id.* at 295.
150. *Id.*

thoughts on capital punishment and the paper his father wrote about the subject.[151] This evidence, he contended, was irrelevant and unfairly prejudicial.[152]

The Michigan Court of Appeals rejected the defendant's contention that this evidence was irrelevant.[153] Given that an element of first-degree murder is premeditation, the statements "were relevant to a matter in controversy because they tended to show defendant's state of mind prior to the killing. . . . [T]hey demonstrate that defendant considered the consequences of killing before he committed the murder."[154]

Turning to the defendant's contention that the defendant's statements regarding capital punishment were unfairly prejudicial under Rule 403, the court held that "[a]lthough a slight danger existed that the jury might have been misled by comments about capital punishment, the evidence nonetheless tended to show that defendant acted with premeditation and the evidence was not particularly inflammatory."[155]

Accordingly, the panel—Judge Christopher M. Murray, writing for himself and Judge Peter D. O'Connell[156]—affirmed the defendant's conviction but remanded the matter to the trial court for resentencing in light of the U.S. Supreme Court's recent opinion in *Miller v. Alabama*.[157] Judge Elizabeth L. Gleicher concurred with her colleagues in affirming Eliason's conviction (and the underlying evidentiary ruling), but she dissented on sentencing grounds.[158]

3. Relevance of Blood and Holes in the Victim's Clothing in Assault-with-Intent-to-Murder Cases

A Jackson County jury convicted Dustin Arthur Marshall of assault with intent to commit murder, possession of a firearm by a felon, and possession of a firearm during the commission of a felony.[159] On appeal, the defendant argued that the trial court erred in admitting into evidence the victim's bloody clothing along with bullets that "appeared to match

151. *Eliason,* 300 Mich. App. at 300-01.
152. *Id.*
153. *Id.* at 301.
154. *Id.*
155. *Id.* at 302.
156. *Id.* at 318.
157. *Eliason,* 300 Mich. App. at 318 (citing Miller v. Alabama, 132 S. Ct. 2455 (2012)).
158. *Id.* at 318-19 (Gleicher, J., concurring in part and dissenting in part).
159. People v. Marshall, 298 Mich. App. 607, 610; 830 N.W.2d 414 (2012), *vacated in part*, 493 Mich. 1020; 829 N.W.2d 876 (2013).

the shell casings recovered from the crime scene."[160] When defense trial counsel stated that he had no objection to the court's admission of this evidence, the Michigan Court of Appeals held that counsel waived any error.[161] The court, however, considered the issue from the standpoint of whether counsel's waiver constituted ineffective assistance of counsel within the meaning of the Sixth Amendment and the Michigan constitution.[162] The court of appeals rejected the defendant's argument that this evidence was irrelevant.[163]

A panel of Judges Deborah A. Servitto, E. Thomas Fitzgerald, and Michael J. Talbot, in a per curiam opinion,[164] concluded that the clothing "showed bullet holes supporting the alleged number of shots that were fired, the location of the victim's wounds, and the degree to which the victim bled. This evidence was probative of the circumstances surrounding the victim's injuries and the shooter's intent during the assault."[165] For the purpose of Rule 403 balancing of probative value against unfair prejudice, the court held that the bloody clothing "was not so shocking or gruesome that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice."[166] Furthermore, the panel observed, "that the shell casings recovered from the crime scene matched the caliber and brand of ammunition found at the location where defendant was staying was relevant to connect defendant to the shooting and show that he was the source of the gun used in the shooting."[167] Accordingly, the panel affirmed the defendant's conviction and sentence, for these and other reasons.[168]

4. Relevance of the Defendant's Injuries, Police Officers' Excessive Force, and Police Procedures Regarding Use of Force in Criminal Resisting-Arrest Cases

The recent case of *City of Westland v. Kodlowski,*[169] a misdemeanor case that began in district court and traversed three appellate tribunals,

160. *Id.* at 616.

161. *Id.* at 616 n.2 (citing People v. Carter, 462 Mich. 206, 214-19; 612 N.W.2d 144 (2000), and People v. Ortiz, 249 Mich. App. 297, 311; 642 N.W.2d 417 (2001)).

162. *Id.*

163. *Id.* at 617.

164. *Id.* at 609.

165. *Marshall*, 298 Mich. App. at 617.

166. *Id.* (citing MICH. R. EVID. 403).

167. *Id.*

168. *Id.* at 610, *vacated in part*, 493 Mich. 1020; 829 N.W.2d 876 (2013) (Only Part II of the court of appeals judgment regarding prosecutorial misconduct was vacated.)

169. 298 Mich. App. 647; 828 N.W.2d 67 (2012), *vacated in part*, 495 Mich. 871; 837 N.W.2d 285 (2013).

illustrates the minimal showing a party must make to establish the relevancy of its evidence. In *Kodlowski*, the defendant, Jeffrey Kodlowski, appealed his misdemeanor conviction in the Westland district court for violating the municipality's ordinance against resisting arrest.[170] The ordinance provides that "[n]o person shall resist arrest, or physically obstruct an arrest, by any officer empowered to make arrests."[171] The Wayne County Circuit Court affirmed, and the court of appeals granted the defendant's application for leave to appeal.[172]

Westland police officers arrived at the defendant's home during a marital dispute, which involved the defendant accusing his wife of infidelity.[173] While the police were present, the defendant's wife insisted that the defendant return her cellular telephone, to which the defendant responded, "I'm not giving the phone back. You'll have to arrest me."[174] The defendant calmed slightly, but the situation remained tense as the officers and the defendant's wife searched the home for her telephone.[175] Eventually Kodlowski's wife took the defendant's wallet and said she would not return it until he returned her telephone, then began leaving the home, at which juncture the officers believed the situation was calm enough that they could leave as well.[176] However, as Officer Little

> was walking out of the door, he felt defendant grab and squeeze his left arm. As witnessed by [Officer] Dawley, defendant then "spun" Little around so that he was facing defendant. Little then used his arm to create distance between himself and defendant, and after telling defendant that he was under arrest, Little and Dawley each grabbed onto one of defendant's arms so that he could be handcuffed.
>
> Defendant then "started pulling and just kind of thrashing his body, swinging his arms to try to make [Little] let go." Little indicated that as defendant twisted and attempted to break from the officers' grip, the officers and defendant ended up on the couch. Dawley then instructed defendant to stop resisting, but defendant continued to thrash his body and swing his arm. While

170. *Id.* at 652-53.
171. *Id.* at 655 n.7 (quoting WESTLAND, MICH., ORDINANCES § 62-36(a) (2009)).
172. *Id.* at 652.
173. *Id.* at 653.
174. *Id.* at 654.
175. *Kodlowski*, 298 Mich. App. at 654.
176. *Id.* at 655.

> trying to secure defendant in handcuffs, defendant kicked backward, "like a rearward kick," striking Dawley.
>
> After defendant continued to twist, Dawley applied a brachial stun to defendant's neck, yet defendant continued to twist and fight the officers Dawley then pulled out his baton and struck defendant on his arm and the top of the baton "also hit the back of [defendant's] head." Dawley testified that after he struck defendant's arm, defendant released his grip, Officer Dawley dropped the baton, grabbed the handcuffs, and the officers were then able to secure defendant with the handcuffs. Dawley indicated that he struck defendant once with the baton.[177]

Both the defendant and his wife testified that he did not resist the officers.[178]

Prior to trial, the district court granted the prosecution's motion *in limine* to exclude evidence of the nature and treatment of the injuries the defendant alleges he sustained as a result of the arrest as well as evidence of the Westland Police Department's policy on the use of force, but it permitted Kodlowski to testify that he was injured during the incident.[179] The defendant alleged on appeal that the officers "inflicted a large gash several inches long on the back of his head, which required . . . emergency medical attention."[180] The jury convicted the defendant of resisting arrest but acquitted him of a charge of assault and battery upon Little.[181]

In the Michigan Court of Appeals, Judge Christopher M. Murray, writing for a two-person majority of himself and Judge Jane E. Markey,[182] affirmed the trial court's ruling that evidence of the defendant's hospitalization and the department's use-of-force procedures was irrelevant.[183] Judge Murray explained that

> [t]he extent of defendant's injuries or whether the officers employed excessive force does not make it any less or more probable that defendant battered the officers or resisted arrest. Both charges focus on the conduct of defendant, not on the

177. *Id.* at 655-56.
178. *Id.* at 656.
179. *Id.* at 656-57.
180. *Id.* at 656 n.1.
181. *Kodlowski*, 298 Mich. App. at 657-58.
182. *Id.* at 673.
183. *Id.* at 663-65.

> conduct of the officers. Therefore, we conclude that even if the officers employed excessive force, it is irrelevant to prove or disprove that defendant battered the officers or resisted arrest.[184]

The majority conceded that "while the evidence . . . may be slightly relevant to show that the officers used greater force than indicated at trial," thus impeaching the officers, because the evidentiary question was "close," any ruling would survive the deferential abuse-of-discretion standard of review.[185] Accordingly, the court affirmed the defendant's conviction for this and other reasons.[186] Judge Douglas B. Shapiro dissented on other grounds.[187]

About five months after the *Survey* period concluded, the Michigan Supreme Court peremptorily reversed the district court's evidentiary ruling in a one-page order.[188] The evidence of the defendant's injuries "was relevant to the defendant's claim that the arresting officers fabricated charges to justify their actions."[189]

---

184. *Id.* at 664.

185. *Id.* at 665 n.8 (citing People v. Sabin, 463 Mich. 43, 67-68; 618 N.W.2d 888 (2000) (after remand)).

186. *Id.* at 673.

187. *Kodlowski*, 298 Mich. App. at 673-77 (Shapiro, J., dissenting).

188. City of Westland v. Kodlowski, 495 Mich. 871; 837 N.W.2d 285 (2013).

189. *Id.* The court did not reverse the conviction, however, "as the error did not result in a manifest injustice because the defendant was not entirely deprived of his fabrication defense." *Id.* (citing People v. Lukity, 460 Mich. 484, 492; 596 N.W.2d 607 (2006)). Judge Shapiro's dissent in the court of appeals shed a great deal of light on the majority's misunderstanding of the relevancy requirement.

Again, evidence is relevant when it has "*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." MICH. R. EVID. 401 (emphasis added). *See also* FED. R. EVID. 401. The court has emphasized that any means *any*: "'The threshold is minimal: "any" tendency is sufficient probative force.'" Hardrick v. Auto Club Ins. Ass'n, 294 Mich. App. 651, 668 (2011) (quoting People v. Crawford, 458 Mich. 376, 390; 582 N.W.2d 785 (1998)), *appeal denied,* 493 Mich. 687; 821 N.W.2d 542 (2012). As Judge Shapiro noted, the prosecution and defense witnesses contested whether the defendant, in fact, resisted arrest or battered the officers:

> Defendant testified that he merely tapped the officer on the arm to get his attention in order to tell him something before the officer left. On the audio recording, the officer is heard to say, "[D]on't touch me," and the defendant responds, "I'm sorry." Little agreed that the defendant apologized and testified that defendant was compliant and stepped back. Little also agreed that his partner, Officer Kyle Dawley, then said "You know, fuck him, let's take him." The recording does not reveal either officer telling defendant that he was under arrest or asking him to surrender. Instead, on the recording, immediately after Dawley makes this remark, a physical altercation is heard. During that altercation, defendant was struck in the head with a baton and stunned with a Taser.

5. Relevance of a Criminal Defendant's Lack of Concern that Police Were Looking for Him

For a brief discussion of the relevance of a defendant's dismissive response upon learning that police were searching for him, see *infra* Part VIII.A.2.

6. 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 Edwing Ronal Morales of two counts of making false statements while purchasing firearms from a federally licensed dealer.[190] 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."[191]

The defendant had lied in 2009 when he told the dealer that he was not purchasing the guns on behalf of another person.[192] He then unsuccessfully sought to admit a 1979 circular from the U.S. Bureau of Alcohol, Tobacco, Firearms and Explosives, which "explained that the

---

Id. at 673-74 (Shapiro, J., dissenting). Furthermore, the dissent noted that Kodlowski's wife testified that

> before any physical contact occurred, Dawley was making '"bullying, sarcastic remarks" to defendant such as "You're an idiot" and "Push my buttons, just try to push my buttons". She also testified that when defendant asked the officers to leave his home, Dawley said, "Try to make me leave, just go ahead and try to make me leave" and that the altercation happened, as can be heard on the tape, a few seconds after defendant asked for the officers' badge numbers.

Id. at 674 n.1. The testimony of the defendant and his spouse, *if true*, would establish that police were bullying the defendant and that he did not resist arrest. To that extent, the trial *should* have been a credibility battle between the officers and the Kodlowskis. "[I]f 'there is credible evidence both to support and to negate the existence of an element of the crime, a factual question exists that should be left to the jury.'" People v. Maynor, 256 Mich. App. 238, 245; 662 N.W.2d 468 (2003) (quoting People v. Terry, 224 Mich. App. 447, 451; 569 N.W.2d 641 (1997)). Evidence of the nature and scope of the defendant's injuries would have the effect of corroborating *his* version of the story—that the officers assaulted *him*, not the other way around. Accordingly, the court misapplied Rule 401 by excluding the evidence of the defendant's injuries.

190. United States v. Morales, 687 F.3d 697, 699 (6th Cir. 2012). Although the Sixth Circuit issued its opinion during *this Survey* period, I wrote about *Morales* in the preceding *Survey* issue. *See* Meizlish, *supra* note 3, at 758-59. The wording of this portion of this article, accordingly, is virtually, if not entirely, identical to the corresponding portion of last year's *Survey* article on evidence.

191. *Morales*, 687 F.3d at 699-701.

192. *Id.* at 699.

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.'"[193]

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.[194] Accordingly, Judge Alan E. Norris, writing for a unanimous panel of himself and Judges Danny J. Boggs and Raymond M. Kethledge,[195] concluded that the circular was not probative of the defendant's good-faith defense—he could not have relied 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.[196] The panel affirmed the conviction for this and other reasons.[197]

7. Relevance of a Criminal Defendant's Statements in Court During Bankruptcy Proceedings to Illustrate His State of Mind When He Filed for Bankruptcy

For a brief discussion of the relevance, in criminal bankruptcy-fraud cases, of a defendant's statements in court to complete or contextualize his state of mind in earlier bankruptcy filings, see *infra* Part I.C.2.

B. Character Evidence, Other Acts of Conduct for Non-Character Purposes, and Other Acts of Conduct for Character Purposes

Subject to various exceptions in federal and state rules and statutes,[198] "[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."[199] In other words, character evidence "is inadmissible to prove a propensity to commit such acts."[200]

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

193. *Id.* at 701.
194. *Id.* at 702.
195. *Id.* at 698.
196. *Id.* at 702 (citing FED. R. EVID. 401).
197. *Morales*, 687 F.3d at 702.
198. See *infra* Part IV.B for further discussion.
199. MICH. R. EVID. 404(a). The corresponding federal rule contains nearly identical language. FED. R. EVID. 404(a)(1).
200. People v. Crawford, 458 Mich. 376; 582 N.W.2d 785 (1998).

convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance."[201]

Many of the disputes in this area of evidence concern whether a party is offering for a propensity purpose or a non-propensity purpose, or, if there is no dispute that the evidence's sole purpose is to establish an individual's propensity, whether an exception applies that allows such evidence for such a purpose. Cases that analyze these questions are discussed below.

1. Character Evidence

One of the exceptions in both the federal and state rules is that a defendant in a criminal case may offer evidence of a "pertinent" character trait.[202] The courts have held, in fact, a defendant has "an absolute right to introduce evidence of his character to prove that he could not have committed the crime."[203]

Any such character evidence must be in the form of either reputation or opinion, and not specific acts of conduct,[204] unless the case is one of those rare circumstances in which the subject's character "is an essential element of a charge, claim, or defense."[205]

Once a defendant places his character into evidence, the prosecution may cross-examine the witnesses about specific acts of conduct by the defendant, but, again, it may not prove those specific acts with extrinsic evidence.[206] "[A] witness who has testified to the defendant's good character by proof of general reputation may be questioned as to the grounds of knowledge upon which that witness's assertion is based."[207]

---

201. Old Chief v. United States, 519 U.S. 172, 181 (1997) (quoting United States v. Moccia, 681 F.2d 61, 63 (1st Cir. 1982)). Character evidence of *witnesses* generally "must be limited to the particular character trait of truthfulness or untruthfulness." 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)).

202. MICH. R. EVID. 404(a)(1); FED. R. EVID. 404(a)(2)(A).

203. People v. King, 297 Mich. App. 465, 478; 824 N.W.2d 258 (2012) (quoting People v. Whitfield, 425 Mich. 116, 130; 388 N.W.2d 206 (1986)).

204. *Id.*; MICH. RS. EVID. 404(a)(1), 405(a); FED. RS. EVID. 404(a)(2)(A), 405(a).

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

206. MICH. R. EVID. 404(a)(1); FED. R. EVID. 404(a)(2)(A); MICH. R. EVID. 405(a); FED. R. EVID. 405(a).

207. People v. Fields, 93 Mich. App. 702, 707; 287 N.W.2d 325 (1979) (citing People v. Dorrikas, 354 Mich. 303; 92 N.W.2d 305 (1958)). "It is generally recognized that a cross-examiner may not frame his questions to assume that the former misconduct inquired about was a fact. Consequently, it has been stated that the proper form of inquiry of a character witness is 'Have you heard . . .' and not 'Do you know . . . .'" *Id.* at 709 (citing People v. Stedman, 41 Mich. App. 393, 396; 200 N.W.2d 370 (1972)).

In *People v. King*, Kent County authorities charged Raymond Eric King with two counts of first-degree criminal sexual conduct.[208] At trial, the defendant's granddaughter testified that twice during the night of October 26, 2008, King attempted vaginal intercourse, partially penetrating her one of those times.[209] Earlier in the evening, the defendant had retrieved his granddaughter, then thirteen, from the Kent County Juvenile Detention Facility, where he worked, after her arrest for shoplifting.[210] The jury heard testimony of other acts of molestation by the defendant against his daughter (the victim's mother) and one of the victim's sisters.[211]

> During the investigation of this case, Jennifer[, the defendant's daughter and the victim's mother,] secretly tape-recorded a conversation with defendant. In the conversation, defendant recalled "what happened between [Jennifer] and [defendant] when [Jennifer] was younger[.]" Defendant explained the incident as having woken up with Jennifer on top of him moving around and he was "feeling unloved" and "so alone." When confronted with the victim's allegations, defendant did not deny them, but said he did not remember because of his use of drugs and alcohol.[212]

The defendant also told a detective during an interview that he could not recall the events of the night in question because of drug and alcohol abuse.[213]

A panel of the Michigan Court of Appeals summarized the defense evidence as follows:

> [King] presented the testimony of several relatives who were living in the Chicago household when Jennifer visited. They testified they observed no inappropriate sexual activity. Two nieces and a nephew testified they had stayed with defendant when they were in high school or grade school and nothing inappropriate happened. Another nephew, who was a minister, a high school principal, and a former superintendent at the

208. *King*, 297 Mich. App. at 468.
209. *Id.* at 469.
210. *Id.*
211. *Id.* at 469-70.
212. *Id.* at 470-71 (some alterations added).
213. *Id.* at 471.

> detention facility, testified to defendant's stellar reputation for truth and honesty.
>
> Defendant's wife, Tammi King, testified that on the night defendant picked the victim up from the detention facility, she observed defendant and the victim in the kitchen arguing over the shoplifting incident. Defendant slapped the victim, and Mrs. King tried to defuse tensions by offering to fix the victim something to eat. Afterward, she escorted the victim to an upstairs bedroom. Mrs. King went back downstairs, but later checked to confirm the victim was asleep in the upstairs bedroom. She went back downstairs, finished her work in the kitchen, and retired for the evening with defendant in their downstairs bedroom.
>
> Defendant testified, denying that he sexually abused the victim, or JR [the victim's sister], or Jennifer. With respect to Jennifer, however, he remembered a time when she was visiting only for a short time, maybe a week, and Jennifer had climbed atop him and rubbed against him in a sexual manner. Defendant testified that he did not sexually respond. Defendant also testified that on one occasion the victim behaved similarly. He denied he initiated any sexually motivated contact with either Jennifer or the victim.[214]

The jury convicted the defendant of both counts of first-degree CSC, and he appealed.[215]

On appeal, the defendant argued that the trial court erred when it precluded his trial counsel from asking Matthew Fenske, supervisor at the Kent County Juvenile Detention Facility, about the "defendant's reputation for interacting with teenagers" at the facility.[216] In the court of appeals, Judge Jane E. Markey, writing for herself and Judge Patrick M. Meter,[217] agreed that the trial court abused its discretion in excluding character evidence pertaining to the defendant's reputation at the facility, but nevertheless she concluded that the error was harmless:[218]

---

214. *King*, 297 Mich. App. at 471-72.

215. *Id.* at 468.

216. *Id.* at 478.

217. *Id.* at 487. Judge E. Thomas Fitzgerald wrote a separate opinion dissenting from the court's opinion as it pertained to the defendant's sentence. *Id.* at 487-88 (Fitzgerald, J., concurring in part and dissenting in part).

218. *Id.* at 479.

> [T]he fact that defendant likely behaved appropriately with teenage detainees was implicitly already before the jury, which had heard evidence of defendant's longtime employment as a youth specialist at the juvenile detention facility. It would be reasonable for the jury to infer that if defendant had a reputation for behaving inappropriately with teenage detainees, he would not have remained employed.[219]

The panel further observed that the trial court permitted the defendant to present testimony by his relatives that he behaved appropriately with teenagers in his home.[220] This evidence, the panel opined, was far more probative than the proposed testimony that the defendant behaved appropriately with teenagers in a different setting.[221] Judge Markey noted that opinion testimony of the form the defendant would have presented would have opened the door to cross-examination about specific acts of conduct that would prejudice his defense before the jury.[222]

The majority took the occasion to express its ambivalence toward character evidence: "Both the value and the wisdom of presenting character evidence have been doubted. It is thought that such evidence typically adds little of relevance to the determination of the actual issues in a case and is likely to inject extraneous elements."[223]

The panel observed that the prosecution's case was "very strong," and "[t]he jury obviously found the prosecution's evidence more credible than that of defendant and his wife."[224] Accordingly, it declined to reverse the defendant's conviction, as it "d[id] not affirmatively appear more probable than not that the error was outcome determinative."[225] Therefore, the court affirmed the defendant's conviction and sentence for this and other reasons.[226]

2. *Other Acts of Conduct for Non-Character Purposes (Rule 404(b))*

The general prohibition on propensity evidence, Rule 404(b), forbids "[e]vidence of other crimes, wrongs, or acts . . . to prove the character of

---

219. *King*, 297 Mich. App. at 479.
220. *Id.* at 480.
221. *Id.*
222. *Id.*
223. *Id.* (quoting People v. Whitfield, 425 Mich. 116, 129; 388 N.W.2d 207 (1986)).
224. *Id.*
225. *King*, 297 Mich. App. at 487 (citing People v. Lukity, 460 Mich. 484, 495-96; 596 N.W.2d 607 (1999)).
226. *Id.* at 487.

a person in order to show action in conformity therewith."[227] However, the rules do not bar such evidence for a *non*-propensity, or non-character, 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."[228] While many often refer to such evidence as "prior bad acts,"[229] the Michigan rules specifically provide that such acts need be neither "prior" nor "bad" to trigger Rule 404(b)'s application, and the federal rules' wording leads directly to the same conclusion.[230] Accordingly, I refer to such evidence merely as "*other* acts."

In Michigan, to admit such 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."[231] The Sixth Circuit's approach differs slightly. There, the applicable test

> requires 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."[232]

---

227. MICH. R. EVID. 404(b)(1). *See also* FED. R. EVID. 404(b)(1).

228. MICH. R. EVID. 404(b)(1). *See also* FED. R. EVID. 404(b)(2).

229. 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 . . . .").

230. *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" (emphasis added)); FED. R. EVID. 404(b)(1) ("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)).

231. 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)).

232. United States v. Poulsen, 655 F.3d 492, 508 (2011) (quoting United States v. Mack, 258 F.3d 548, 552-53 (6th Cir. 2001)). In the Sixth Circuit, however, a dispute brews over the appropriate standard of review that 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). The *Clay* majority's approach is as follows:

> First, we review for clear error the factual determination that other acts occurred. Second, we review *de novo the legal determination that the acts were admissible for a permissible 404(b) purpose*. Third, we review for abuse of discretion the determination that the probative value of the evidence is not

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 . . . ."[233]

a. Differentiating "Background," or "Res Gestae," Evidence from "Other Acts" Evidence

The Sixth Circuit has held 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.'"[234] Michigan courts have

---

substantially outweighed by unfair prejudicial impact.

Id. at 693 (emphasis added) (citing United States v. Hardy, 228 F.3d 745, 750 (6th Cir. 2000)).

The *Clay* dissent criticizes this standard as "manag[ing the] trial from afar." *Id.* at 703 (Kethledge, J., dissenting). Judge Raymond M. Kethledge opined that "I think we are simply wrong to say that we know just as well as the district court whether certain evidence is admissible for a proper purpose in light of all the issues and evidence at trial." *Id.* As Judge Kethledge noted, *Clay* was in conflict with *United States v. Haywood*, in which the Sixth Circuit held that "*all evidentiary rulings* are subject to abuse of discretion standard of review." *Haywood*, 280 F.3d 715, 720 (6th Cir. 2002) (citing Trepel v. Roadway Express, Inc., 194 F.3d 708, 716 (6th Cir. 1999)); *Clay*, 667 F.3d at 703 (Kethledge, J., dissenting) (citing United States v. Haywood, 280 F.3d 715, 720 (6th Cir. 2002)). The *Haywood* Court specifically rejected a de novo standard for reviewing determinations that other acts were admissible for a proper purpose. *Haywood*, 280 F.3d at 720. The Sixth Circuit has acknowledged this conflict but elected not to resolve it during the *Survey* period. *See* United States v. De Oleo, 697 F.3d 338, 344 (6th Cir. 2012).

233. People v. Danto, 294 Mich. App. 596, 599-600; 822 N.W.2d 600 (2011) (citations omitted) (quoting People v. Mardlin, 487 Mich. 609, 615-16; 790 N.W.2d 607 (2010)).

234. 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), and United States v. Barnes, 49 F.3d

similarly held that "[e]vidence of 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."[235] In other words, an "intrinsic" act is not an "other" act.

In the recent case of *Flagg v. City of Detroit*, the Sixth Circuit explained,

> "[B]ackground evidence" that "has a causal, temporal or spatial connection with the charged offense . . . is a prelude to the [central allegation], is directly probative of the [central allegation], arises from the same events as the [central allegation], forms an integral part of a witness's testimony, or completes the story of the [central allegation]."[236]

In another case, the Sixth Circuit observed,

> Background evidence is a narrow category of evidence that typically provides context for the jury, either because it is directly probative, acts as a prelude to the offense or arises from the same events, forms an integral part of a witness's testimony, or completes the story of the offense.[237]

i. The Kilpatrick Case: Flagg v. City of Detroit

Flagg was a federal civil rights lawsuit against the City of Detroit and its disgraced former mayor, Kwame M. Kilpatrick, by three minor children whose mother, Tamara Greene, died in a Detroit shooting in 2003.[238] Speculations exist that Greene, an exotic dancer, performed for Kilpatrick and his security detail in the fall of 2002 at the mayoral mansion.[239] Whether the party ever occurred, whether Greene was present, and whether her death months later had any connection to the party and/or its host has been the subject of endless discussion in the

---

1144, 1149 (6th Cir. 1995)).

235. 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)).

236. Flagg v. City of Detroit, 715 F.3d 165, 175-76 (6th Cir. 2013) (quoting United States v. Hardy, 228 F.3d 745, 748 (6th Cir. 2000) (citation omitted)).

237. *De Oleo*, 697 F.3d at 344 (citing United States v. Marrero, 651 F.3d 453, 471 (6th Cir. 2011)).

238. *Flagg*, 715 F.3d at 169.

239. Charlie Leduff, *Who Killed Tamara Greene?*, DETROIT NEWS (Mar. 14, 2008), http://www.detroitnews.com/article/20080314/METRO/803140383.

metropolitan Detroit area. "It was rumored that Tamara Greene performed at this party as an exotic dancer, and that Carlita Kilpatrick, Kwame Kilpatrick's wife, arrived at the party unexpectedly and assaulted Greene."[240] The plaintiffs, Greene's children, alleged in a federal suit that the former mayor and the city deprived them of their right to the courts by obstructing the investigation and concealing the circumstances of their mother's death.[241] But for Kilpatrick and the city's acts of obstructing and conspiring to obstruct the investigation, the plaintiffs alleged, the minor children would have been able to file suit and recover in a wrongful-death lawsuit against the killer(s) in state court.[242]

The plaintiffs alleged a series of events during the investigation that suggested a cover-up. For example, the original principal investigator into the killing, Sgt. Marian Stevenson of the Detroit Police Department's homicide division, reported that

> [o]n May 21, 2003, an anonymous caller to DPD linked Greene to the party. The next day, Commander Fred Campbell of the DPD's Central Services Bureau, who was three levels above Stevenson in the chain of command, met with Stevenson and Lieutenant Billy Jackson, who headed Squad 8 until his promotion in the fall of 2003, to discuss the investigation. Campbell also briefed several DPD superiors. As the investigation proceeded, then-Chief of Police Jerry Oliver allegedly requested the investigative file "numerous" times, after which file items went missing on multiple occasions.
>
> Stevenson discovered that case notes concerning the Greene murder investigation had been erased from her computer hard drive, and that four floppy disks containing investigation materials had been taken from a locked case on her desk. Stevenson later realized that additional materials were missing from the Greene file, including a spiral notebook in which Stevenson recorded her investigative activities and handwritten notes from witness interviews. Also missing was a videotape of Greene's funeral, which purportedly showed "a couple" of police

240. *Flagg*, 715 F.3d at 169.

241. *Id.* The children's "1983" lawsuit arose under the federal civil rights statutes. *Id.* (citing 42 U.S.C. § 1983).

242. *Id.* at 172.

> officers from DPD Homicide and two members of the EPU in attendance.[243]

Less than a year into the investigation, Oliver's successor as police chief, Ella Bully-Cummings, reassigned the investigation to the cold-case squad, even though cold cases were usually two years old or older.[244]

> Stevenson testified that she had never had a homicide investigation "taken" from her, and was on the verge of pursuing leads that would have led her to question members of Kilpatrick's EPU and staff. Shortly after the transfer of the Greene investigation, Stevenson [and two supervisors in the cold-case unit] were allegedly transferred to inferior positions within DPD without credible explanation. Also, Stevenson testified that after her transfer, among other things, her house was broken into twice and she repeatedly observed DPD officers near her residence. These incidents caused Stevenson to be concerned for her safety and motivated her to move out of the precinct.[245]

Stevenson's successor as chief investigator of the Greene killing, Sgt. Odell Godbold, initially encountered no significant difficulties during his investigation.[246] However,

> [b]eginning in late 2004, Godbold's investigation into Greene's murder began to run into obstacles, including Godbold's reassignment to a building that did not house the case file and the disappearance of a cell phone recovered from the murder scene. Godbold testified that he was permitted to continue the Greene investigation for a few months, until Assistant Chief of Police Walter Martin discovered that Godbold had shown the Greene file to the head of DPD's Major Crimes division at his request. According to Godbold, after that, Martin took the file away from him. In August 2005, Godbold arrived at work to find the Cold Case squad shut down. Godbold was assigned—by whom, he did not know—to a non-leadership role in Squad 6, a demotion

243. *Id.* at 170.
244. *Id.*
245. *Flagg*, 715 F.3d at 170.
246. *Id.*

> practically, if not officially, which contributed to his decision to retire in 2006.[247]

Godbold believed that the department concealed various anonymous tips that would have been helpful to him during the investigation—tips he later discovered while working at Crime Stoppers following his retirement.[248] Godbold's successor did additional investigation but did not explore the alleged party because he saw no evidence connecting Greene's killing to it.[249]

Furthermore,

> [i]n addition to deficiencies in DPD's investigation of Greene's murder, Plaintiffs cite certain DPD promotions as evidence of Kilpatrick's desire to stall the DPD investigation. They claim Kilpatrick appointed Bully-Cummings as Chief of Police with the expectation that she would be loyal to him, citing Bully-Cummings's past assistance to Carlita Kilpatrick with obtaining a city vehicle and the text messages wherein Bully-Cummings appeared to be colluding with Kilpatrick on matters related to [former Deputy Chief Gary] Brown's removal. Plaintiffs suggested that Lieutenant Brian Stair was promoted to head of the DPD's Internal Affairs section as a reward for allegedly sharing a memorandum by Brown—which discussed allegations against Kilpatrick's EPU as well as the alleged party—with Kilpatrick and his chief of staff, Christine Beatty. Plaintiffs also cited Godbold's suspicions that Lieutenant Tolbert, Deputy Police Chief Saunders, and Assistant Police Chief Martin were promoted in exchange for hindering the Greene murder investigation.[250]

In 2008, upon the plaintiffs' request, the district court entered an order directing the city to preserve all e-mails between Beatty, his chief of staff, police chief, and other senior officials from September 1, 2002 onward.[251] The city later reported that it destroyed the emails upon Kilpatrick and Beatty's resignations in 2008.[252] The district court found that the City "'clearly acted culpably and in bad faith' in destroying

247. *Id.* at 170-71.
248. *Id.*
249. *Id.* at 171.
250. *Id.*
251. *Flagg*, 715 F.3d at 171.
252. *Id.*

emails sent and received by Kilpatrick, Beatty, [Corporation Counsel Ruth] Carter and Bully-Cummings."[253]

To sustain their burden, the plaintiffs' obligation with respect to Kilpatrick was to demonstrate that the former mayor, as an individual actor, "directly participated' in the alleged misconduct, at least by encouraging, implicitly authorizing, approving or knowingly acquiescing in the misconduct, if not carrying it out himself."[254] To sustain their burden against the City of Detroit, the plaintiffs' burden was to "prove that the deprivation occurred pursuant to a municipal 'policy or custom,'"[255] although a "single decision can constitute a policy, if that decision is made by an official who 'possesses final authority to establish municipal policy with respect to the action ordered.'"[256]

Chief District Judge Gerald E. Rosen, however, who presided over the case,[257] concluded that that the plaintiffs could not meet their burden and granted Kilpatrick and the city's motions for summary judgment.[258] The plaintiffs appealed those judgments, which included the judge's ruling to exclude evidence of Kilpatrick's other conduct, citing Rule 404(b)'s prohibition on propensity evidence.[259]

The district court had excluded evidence that Kilpatrick and the City retaliated against a former internal-affairs investigator, Deputy Chief Gary Brown, and a former member of Kilpatrick's security detail, Officer Harold Nelthrope, due to Brown's investigation of misconduct by Kilpatrick and the security detail.[260] Brown and Nelthrope had sued in state court, obtaining a jury verdict against Kilpatrick for $6.5 million, before settling the case out of court.[261] The state court suit revealed that Kilpatrick's chief of staff had heavily immersed herself in Brown's investigation, had ordered the department to personally apprise her of developments in any investigation of the mayor's security detail, had confiscated Brown's investigatory files, and that the mayor and his chief of staff had ordered the chief of police to fire Brown.[262]

The court had also excluded evidence that Kilpatrick and his administration interfered with the state's investigation into his security

253. *Id.* at 172.
254. *Id.* at 174 (citing Shehee v. Luttrell, 199 F.3d 295, 300 (6th Cir. 1999)).
255. *Id.* (citing Meyers v. City of Cincinnati, 14 F.3d 1115, 1117 (6th Cir. 1994)).
256. *Id.* at 174-75 (citing Pembaur v. City of Cincinnati, 475 U.S. 469, 480-81 (1986)).
257. *Flagg*, 715 F.3d at 165-68.
258. *Id.* at 172 (citing Flagg v. City of Detroit, 827 F. Supp. 2d 765 (E.D. Mich. 2011)).
259. *Id.* at 172.
260. *Id.* at 175.
261. *Id.*
262. *Flagg*, 827 F. Supp. 2d at 787-88.

detail.[263] The evidence strongly suggested that Kilpatrick, his corporation counsel, and his chief of staff had great involvement in the selection of Michigan Attorney General Michael A. Cox to lead an "outside" investigation into the incident.[264] In fact, Cox and the city's corporation counsel, Ruth Carter, were former colleagues as Wayne County assistant prosecutors, and, during this time, Carter had text-messaged Kilpatrick "that she had spoken to Attorney General Cox in the wake of news stories that he and the [Michigan State Police] would be conducting this investigation, and that he had asked 'who we would rather be cleared by,' 'him or [Wayne County Prosecutor Mike] Duggan.'"[265] Finally, the plaintiffs pointed to the unusual circumstances of

> [t]he Attorney General's decision to personally interview Defendant Kilpatrick, without the participation of the MSP officers who had conducted most of the activities in this investigation. Only Attorney General Cox, his assistant Thomas Furtaw, Defendant Kilpatrick, and Ruth Carter were present for this interview, and the session was not recorded. One of the MSP investigators, Detective Sergeant Mark Krebs, testified that this treatment of Defendant Kilpatrick differed from that of "every other investigative participant," and that the circumstances of his interview were "completely unheard of." Likewise, MSP Colonel Robert Bertee described this interview process as "ridiculous" and "unprecedented in [his] 30 years [with] the Michigan State Police." When Col. Bertee expressed this concern to Thomas Furtaw, he was told to "consider it a meeting between two elected officials."[266]

The Sixth Circuit, in a unanimous opinion by Judge R. Guy Cole Jr. for himself and Judges Eugene E. Siler Jr. and Jeffrey S. Sutton,[267] saw no grounds to disturb the district judge's conclusion that the evidence of Kilpatrick's retaliation against Brown and his interference in the state investigation did not constitute "background evidence."[268]

---

263. *Id.* at 789.

264. *Id.*

265. *Id.* at 789.

266. *Id.* at 790 (citations omitted).

267. *Flagg*, 715 F.3d at 168-69.

268. *Id.* at 176-77. If the critical question in *Flagg* was whether Kilpatrick and his administration interfered with the Greene investigation, and the evidence would have shown that Kilpatrick retaliated against Brown, the former deputy chief, for interfering with the Greene investigation, it would seem that the plaintiffs' Rule 404(b) evidence *was* background evidence, as it was "'inextricably intertwined' with evidence of the crime

Judge Cole observed that the standard of review for evidentiary rulings is "abuse of discretion," and an "abuse of discretion exists only if the Court is 'firmly convinced that the district court has made a mistake.'"[269] He acknowledged that "[o]ne could construct plausible arguments that the excluded evidence is intrinsic to the denial of access allegations central to this case, but Plaintiffs do not do so."[270] Furthermore, "any connection between the excluded evidence and the Greene investigation is highly speculative."[271] Thus, the panel held, the plaintiffs failed to "firmly convince" its members that the district court erred in concluding that the evidence was extrinsic to the matters at issue in the suit.[272]

Accordingly, the panel then turned to whether the evidence, as an extrinsic or non-background "other act," "was admissible under Rule 404(b)."[273] Judge Cole observed that the plaintiffs' failure to establish a non-character purpose for admitting the evidence doomed their argument.[274]

> The district court rejected motive as a proper purpose for admitting the evidence regarding Brown's firing because, without a propensity inference, any proof of motive would have "extremely limited value." The Plaintiffs' argument that "[t]he jury will want to know why Kilpatrick acted as he did," is a valid reason to admit allegations that the Manoogian Mansion party occurred (since its coverup is the alleged motive for stalling the Greene murder investigation), but does not explain why evidence of Kilpatrick's interference with Brown's and the State's investigations should be admitted. Plaintiffs' observation that the City destroyed potential evidence of motive may describe grounds for sanctions, but it is irrelevant to the proper purpose analysis. The district court did not abuse its discretion by refusing to admit the evidence to prove motive.[275]

---

charged, . . . [or] part of a continuing pattern of illegal activity." United States v. Rozin, 664 F.3d 1052, 1063 (6th Cir. 2012) (citations omitted).

269. *Flagg*, 715 F.3d at 175 (quoting United States v. Logan, 250 F.3d 350, 366 (6th Cir. 2001)).

270. *Id.* at 176.

271. *Id.*

272. *Id.*

273. *Id.* at 175-77.

274. *Id.*

275. *Flagg*, 715 F.3d at 176-77.

Accordingly, the Sixth Circuit affirmed the district court's dismissal of the plaintiff's suit for this and other reasons.[276]

ii. Background Evidence in Medicare-Fraud Cases to Establish the Co-Conspirators' Relationship to One Another

The federal government alleged that Juan De Oleo and his co-conspirators defrauded Medicare by operating "sham" medical clinics, hiring a doctor and procuring enough equipment for the clinic to appear to be a real clinic, and then paying Medicare beneficiaries to submit false claims for treatment they never received.[277] As the Sixth Circuit summarized,

> De Oleo got his start with fraudulent clinics down in Florida. There, he worked as a medical assistant at a clinic owned by Jose Rosario. After the government cracked down on fraud in Florida, De Oleo and his co-conspirators, including his wife Rosa Genao, moved their conspiracy to Michigan. While in Michigan, De Oleo partnered with Rosario to open Xpress Medical Center.[278]

Xpress submitted false claims to Medicare from its Michigan operations, and indictments were quickly issued in the weeks after it began doing so.[279] After hearing testimony as to the clinics' activities in Florida and in Michigan, a federal jury in Detroit found the defendant guilty of money laundering, Medicare fraud, and conspiracy to commit Medicare fraud.[280]

A unanimous Sixth Circuit panel of U.S. District Judge Amul R. Thapar, writing for himself and Judges R. Guy Cole Jr. and Raymond M. Kethledge,[281] concluded that testimony as to the Florida activities was permissible background evidence not subject to Rule 404(b).[282]

> For example, the testimony explained how De Oleo and [clinic owner Jose] Rosario met . . . , how De Oleo introduced [Rosa Genao, his wife and co-conspirator] to Rosario . . . , why Rosario moved to Michigan . . . , and showed that De Oleo knew about Rosario's scheme to open fraudulent clinics in Michigan. . . .

---

276. *Id.* at 177, 178-79.
277. United States v. De Oleo, 697 F.3d 338, 344 (6th Cir. 2012).
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.* at 340. Judge Thapar, from the Eastern District of Kentucky, sat by designation on the Sixth Circuit panel. *Id.*
282. *Id.* at 344.

> And Rosario testified about his involvement in the other clinics as part of telling the story about how he and his co-conspirators moved from Florida to Michigan.[283]

The panel further held that, even if the Florida activities constituted extrinsic "other acts" as opposed to intrinsic "background evidence," such evidence would nevertheless have been admissible under Rule 404(b).[284] First, the defendant did not dispute on appeal that there was sufficient evidence that the other acts occurred, satisfying the first prong of other-acts admissibility.[285] Second, the government's purpose in offering the acts, as the district court observed, was to establish the defendant's "knowledge, intent, or plan."[286] His trial counsel argued during opening statements that the defendant was a mere "acquaintance" of Rosario, and thus the government needed to show the defendant knew Rosario's purpose in opening the Michigan clinics.[287] The panel observed that "'where there is thrust upon the government, [] by virtue of the defense raised ..., the affirmative duty to prove that the underlying prohibited act was done with a specific criminal intent, other acts evidence may be introduced under Rule 404(b).'"[288]

Finally, the panel held that the other acts survived Rule 403 balancing.[289] The testimony "was crafted so as not to overly prejudice De Oleo and Genao."[290] Further, the trial court instructed the jury to consider the evidence only for non-character/non-propensity purposes.[291] Judge Thapar noted that "[l]imiting instructions are one factor that the district court can consider in conducting a 403 balancing test for other acts evidence."[292] Accordingly, the Sixth Circuit affirmed the defendant's conviction for this and other reasons.[293]

---

283. *De Oleo*, 697 F.3d at 344.
284. *Id.* at 343 ("De Oleo loses under even de novo review.").
285. *Id.*
286. *Id.*
287. *Id.* at 344.
288. *Id.* (alterations in original) (quoting United States v. Johnson, 27 F.3d 1186, 1192 (6th Cir. 1994)).
289. *De Oleo*, 697 F.3d at 344
290. *Id.* (quoting United States v. De Oleo, No. 09-20221, 2011 U.S. Dist. LEXIS 23683, at *6-7 (E.D. Mich. Mar. 9, 2011)).
291. *Id.*
292. *Id.* (citing United States v. Hardy, 643 F.3d 143, 153 (6th Cir. 2011)).
293. *Id.*

C. Other-Acts Evidence Generally

1. Other Acts of Fraud in One State to Establish the Defendant's Knowledge of the Fraud in Another State

The evidentiary objection as to other acts in *United States v. Tasis* was quite similar to that in *De Oleo*,[294] as in both cases the government successfully offered evidence of the defendants' and co-conspirators' Medicare frauds in Florida to help prove the defendants' Medicare frauds in Michigan.[295] A federal jury in Detroit convicted Joaquin Tasis of fraud, and the Sixth Circuit summarized the case:

> Tasis and several coconspirators recruited homeless Medicare recipients who had tested positive for HIV, hepatitis or asthma. The clinic paid the "patients" small sums in exchange for their insurance identification, then billed Medicare for infusion therapies that the Center never provided. The racket worked—for a while. During four months in 2006, the Center billed Medicare $2,855,785 and received $827,000 in return. All told, the scheme lasted fifteen months, during which Tasis and his collaborators submitted $9,122,159.35 in Medicare claims.[296]

The other-acts evidence was the following:

> [C]oconspirator Daisy Martinez testified for the government. Martinez, it turns out, had worked with the Tasis brothers before. Over Tasis's objection, Martinez testified that she and Tasis had orchestrated a similar scam in Florida. The court instructed the jury to consider Martinez's testimony about the Florida conspiracy only as it related to Tasis's "intent, plan and knowledge."[297]

The defendant, at trial and on appeal, objected to evidence of the other acts in Florida.[298] The Sixth Circuit, however, observed that the government complied with Rule 404(b) by offering the evidence for non-character purposes.[299]

---

294. *Id.* at 338. *See also supra* Part IV.B.2.a.ii.
295. United States v. Tasis, 696 F.3d 623, 627 (6th Cir. 2012).
296. *Id.* at 625.
297. *Id.* (citation omitted).
298. *Id.* at 627.
299. *Id.*

> The court thus may admit prior-acts evidence only if it goes to a noncharacter issue—only in other words if the evidence is "material" to matters "in issue" in the case and "probative" of them, as opposed to evidence used merely to show a defendant's propensity to go down a once-trodden criminal path again.[300]

Those non-character purposes, the Sixth Circuit acknowledged, were "to show why Martinez trusted Tasis and to prove Tasis's knowledge of the Michigan conspiracy."[301] A unanimous panel of Judge Jeffrey S. Sutton, writing for himself, Judge Richard A. Griffin, and U.S. District Judge Lesley Wells,[302] in fact, observed that the defendant put his knowledge at issue at trial "when he testified about his business relationship with the Medical Center but denied ever knowing about the fraud."[303] Furthermore,

> [d]efense counsel put Martinez's trust at issue by asking during cross-examination if it was "common practice for [her] to trust the people that [she] work[ed] with," to which she replied, "Yes." . . . A factfinder could infer that unless Martinez had trusted Tasis, she would not have joined him in a criminal enterprise.[304]

Thus, given that the district court gave the jury an instruction to consider the other acts only for non-character purposes, the appellate panel concluded that the trial court did not err in admitting the other-acts testimony and affirmed the conviction for this and other reasons.[305]

2. Other Acts of the Defendant's Accomplice in Extortion Cases

In *People v. Allan*, the state charged David Lee Allan with conspiracy to commit extortion.[306] The prosecution alleged that the victim had consensual sexual intercourse with the defendant's daughter, who then conspired with her father (the defendant) to demand money from the victim or else accuse him of rape.[307]

---

300. *Id.* (quoting United States v. Johnson, 27 F.3d 1186, 1190 (6th Cir. 1994)).

301. *Tasis,* 696 F.3d at 627.

302. *Id.* at 624. Judge Wells, of the Northern District of Ohio, sat by designation on the Sixth Circuit panel. *Id.*

303. *Id.* at 627.

304. *Id.* (some alterations added).

305. *Id.* at 627-28.

306. People v. Allan, 299 Mich. App. 205, 208; 829 N.W.2d 319 (2013).

307. *Id.*

At trial, the defendant sought to have one Jamie Pickering testify that Jennifer (the defendant's daughter) would have "her boyfriends call people, impersonate defendant, and request money for a brain surgery for Jennifer that she was not getting."[308] A per curiam panel of Judges William C. Whitbeck, E. Thomas Fitzgerald, and Jane M. Beckering,[309] however, found no error in the trial court's exclusion of Pickering's testimony:

> Evidence that Jennifer had her boyfriends call people, impersonate defendant, and request money for a brain surgery for Jennifer that she was not getting is too dissimilar to the scheme in the present case to be logically relevant for purposes of MRE 404(b). . . . Moreover, even if the testimony was logically relevant to illustrate a common plan or scheme, its probative value was substantially outweighed by the danger of unfair prejudice. . . . Admission of the testimony would have detracted from the material issues in this case and unnecessarily diverted attention to if and how a different scheme to extort money occurred.[310]

The panel, however, reversed the trial court's judgment of conviction, as the judge failed to administer an oath to the jury, and remanded the matter to the trial court.[311]

3. Other Acts of a Rape Accuser's Mother—Enticing Her Children to Steal—to Establish a Pattern of Dishonest Acts to Serve the Mother's Ends

In *People v. King*,[312] a criminal sexual conduct case, the defense sought to present testimony that the defendant's

> daughter Jennifer, the victim's mother, had in the past required her children to steal things for her. The defense theorized this evidence should be admitted under MRE 404(b) to show that Jennifer had a plan, scheme, or system of enticing her own daughters into dishonest behavior to serve her own ends and that

308. *Id.* at 219-20.
309. *Id.* at 206.
310. *Id.* at 219-20 (citations omitted).
311. *Id.* at 221.
312. People v. King, 297 Mich. App. 465; 824 N.W.2d 258 (2012). *See supra* Part IV.B.1.

> Jennifer and her daughters fabricated the allegations against defendant.[313]

The appellate panel, however, previewing its ruling on this issue, observed that "the touchstone of admissibility of evidence under MRE 404(b), as with all other evidence, is logical relevance."[314] The defendant "failed to establish a logical link between the proffered other acts concerning theft and fabrications of allegations of sexual abuse."[315] The majority explained that, to offer "common scheme" evidence under Rule 404(b), "the other acts and defendant's claim of fabrication must be 'sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system.'"[316] The panel concluded that "Jennifer's alleged common plan or scheme to manipulate her daughters into stealing things for her is too dissimilar to the victim's assertions of sexual abuse to demonstrate a common plan or scheme."[317]

The majority also addressed the defendant's arguments that by excluding his evidence pursuant to Rule 404(b), the trial court violated King's constitutional right to present a defense.[318] Not true, the majority held, because "[t]he Michigan Rules of Evidence do not infringe on a defendant's constitutional right to present a defense unless they are 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'"[319] To that end, the defendant "present[ed] no argument whatsoever that any particular rule is arbitrary or disproportionate to the purposes it was designed to serve, either in general or as applied to the facts of this case."[320] Accordingly, the panel did not explore the question any further.[321]

---

313. *King*, 297 Mich. App. at 468-69.

314. *Id.* at 476 (citing People v. VanderVliet, 444 Mich. 52, 61-62; 508 N.W.2d 114 (1993)).

315. *Id.* at 477.

316. *Id.* (quoting People v. Sabin, 463 Mich. 43, 63; 614 N.W.2d 888 (2000)).

317. *Id.*

318. *Id.* at 473-74.

319. *King*, 297 Mich. App. at 474 (quoting United States v. Scheffer, 523 U.S. 303, 308 (1998) (opinion of Thomas, J.)).

320. *Id.*

321. *Id.*

4. Other Acts of Theft of One of Two Co-Conspirators in a Theft-of-Trade-Secrets Case to Establish the Conspirators' Specific Intent, Their Involvement in a Common Scheme or Plan, or to Establish the Absence of a Mistake

In *United States v. Qin*, a federal grand jury in Detroit indicted Yu Qin and his wife, Shanshan Du,

> with one count of conspiring to obtain trade secrets from [General Motors Co., Du's former employer,] pertaining to motor controls for hybrid vehicles, two counts of unlawfully possessing those trade secrets with intent to provide them to third parties, one count of wire fraud, and, as to Qin only, one count of obstruction of justice.[322]

Qin worked as vice president of engineering at Controlled Power Co. (CPC) along with his wife, who was an electrical engineer at the firm until 2000.[323] CPC's business was "design[ing] and manufactur[ing] electrical power equipment and systems."[324] Both signed agreements to protect the confidentiality of their work from outside entities.[325] Du left CPC and joined the General Motors Co., but

> [o]n January 30, 2005, Du's supervisor at GM, apparently dissatisfied with Du's job performance, offered Du a severance agreement in return for her resignation. Du accepted the offer in writing on March 14, 2005. During Du's exit interview on March 17, 2005, Du certified in writing that she had "returned all GM Records in printed (copies or reproductions), electronic or other tangible form including secret and confidential information in [her] possession or under [her] control, located in [her] office, home or any other off-site location." Du also acknowledged that her "obligation not to disclose secret or confidential information [would] continue[] after the termination of [her] employment."[326]

By the summer of 2005, CPC had discovered that Du's husband, Qin, had been operating a separate firm, Millenium Technologies International, Inc., without CPC officials' knowledge or permission and

322. United States v. Qin, 688 F.3d 257, 260 (6th Cir. 2012).
323. *Id.* at 259.
324. *Id.*
325. *Id.*
326. *Id.*

that MTI "appeared to be in direct competition with CPC, promoting products that CPC's own Research and Development Department—of which Qin was vice president—had been developing for years."[327]

> CPC employees discovered a bag belonging to Qin hidden in a co-worker's office. The bag contained a large quantity of electrical components later identified as CPC property and a large external hard drive determined to be Qin's personal property. [CPC executive Christian] Tazzia reviewed the contents of the hard drive and discovered a directory titled "Shanshan" that contained many electronic documents that appeared to be the property of GM. CPC subsequently advised GM of its discovery of these documents, whereupon GM conducted its own forensic analysis of the hard drive. GM's analysis revealed that the "Shanshan" directory contained 16,262 individual files, the majority of which were confirmed to be the property of GM. The forensic analysis also indicated that all 16,262 files had been copied to the hard drive on February 2, 2005, three days after GM offered Du a severance package. The files contained numerous confidential GM documents, including at least four pieces of GM intellectual property essential to GM's hybrid motor controller card. Most of this intellectual property was information that Du would have had no legitimate reason to possess during the ordinary course of her employment with GM. In fact, even Du's former supervisor did not have access to some of this information, nor would he have had any legitimate need to access it. Other confidential information located in the "Shanshan" directory included detailed specifications for the power transistors used by GM in its hybrid motor inverters; GM's requirements for its hybrid electric vehicle drive train, including the motor, inverter, and controller card; a complete user manual for GM's proprietary suite of engineering and design software used in the development of its hybrid electric vehicles; and documents that detailed GM's E67 engine controller mechanization. According to GM, there was no legitimate need for Du in her capacity as a GM employee to access or possess the vast majority of this information.[328]

---

327. *Id.*
328. *Qin*, 688 F.3d at 259-60.

During the course of its investigation, CPC officials learned that Qin had subordinates at the company perform work for MTI while on CPC company time.[329] They further discovered that

> MTI was engaged in a project to develop a hybrid electric vehicle with Chinese automobile manufacturer Chery Automobile. Qin's hard drive also contained evidence indicating that he had misappropriated CPC resources and information and used them to further his MTI business. In particular, CPC found documents related to its development of a three-phase uninterruptible power system, including source code, circuit board schematic drawings, and marketing materials. All of these materials had been modified, however, such that "CPC" had been replaced with "MTI" as the owner of the intellectual property.[330]

While the government charged Qin and Du only with offenses relating to GM's trade secrets, not CPC's, it nevertheless served upon the defendants a notice of its intent to introduce other acts of conduct under Rule 404(b), specifically, evidence of Qin's theft from CPC, and argued such evidence would "show Defendants' specific intent to commit the charged offenses, their participation in a common scheme or plan, and the absence of mistake, all of which are at issue by virtue of the elements of the criminal charges."[331] The district court granted the defendants' joint motion to exclude the evidence, concluding that the evidence was of minimal, if any, relevance and would not show that he "was stealing things outside of perhaps time."[332]

> I simply don't think there is . . . substantially enough relevance to this and that it could be way more prejudicial than probative because to me its weight only goes to showing that they were, in fact, setting up a business and doing so on CPC time, so the Court is not going to allow [the evidence].[333]

The district court granted a stay, and the government took an interlocutory appeal to the Sixth Circuit.[334]

---

329. *Id.* at 260.
330. *Id.*
331. *Id.* at 261.
332. *Id.*
333. *Id.* (alteration in original).
334. *Qin*, 688 F.3d at 261.

As it commenced its analysis of the district court's evidentiary ruling, the Sixth Circuit considered the first prong of Rule 404(b)—"whether 'there is sufficient evidence to support a finding by the jury that the defendant committed the similar act.'"[335] The panel then cited two cases for the ambiguous proposition that "this test is often met by the accused's admission that the prior act or conviction occurred."[336] Here, however, the court emphasized that the defendant "vigorously denie[d]" the other acts.[337] Accordingly, the court was concerned that introducing the other acts would involve a trial within a trial.[338]

> While the record does not establish that the district court made a definitive finding as to the first prong, it does show that the court considered the evidence and—at least implicitly—found it lacking. Given the parties' positions, the evidence could reasonably support a finding on either side of this contentious issue, and we are inclined to agree that its resolution could easily become a trial unto itself.[339]

In lieu of remanding the matter to the district court to clarify an ambiguous record, a unanimous Sixth Circuit panel of Judge Bernice Bouie Donald, writing for herself, Judge R. Guy Cole Jr., and U.S. District Judge Edmund A. Sargus Jr.,[340] said that "we will assume without deciding that there is sufficient evidence to support a jury finding that Qin appropriated CPC resources for the benefit of MTI."[341]

---

335. *Id.* at 262 (quoting Huddleston v. United States, 485 U.S. 681, 685 (1988)).

336. *Id.* (citing United States v. Clay, 667 F.3d 689, 694 (6th Cir. 2012), and United States v. Jenkins, 345 F.3d 928, 937 (6th Cir. 2003)).

337. *Id.* The opinion is laden with interesting choices of words. For example, the panel emphasized that the defendants not only denied but "vigorously denied" the other acts. It then asserts that the evidence-sufficiency prong of a Rule 404(b) analysis "is *often* met by the accused's admission that the prior act or conviction occurred." *Id.* (emphasis added). In other words, the panel appears to be saying that *courts should hesitate to admit evidence of other acts when the defendant denies that the other acts occurred*. Clearly, it is the court's duty to determine whether there is sufficient evidence that the other act occurred, United States v. Poulsen, 655 F.3d 492, 508 (6th Cir. 2011), but the panel cited no case for the proposition that a defendant's denial of the other acts should have *any weight* in a Rule 404(b) analysis. Instead, it chose to merely note that defendants "often" stipulate to the other acts, as if to suggest that *when the defendant disputes the other act, courts should probably not admit the evidence. Qin*, 688 F.3d at 262.

338. *Qin*, 688 F.3d at 262.

339. *Id.*

340. *Id.* at 257. Judge Sargus, of the Southern District of Ohio, sat by designation on the Sixth Circuit panel. *Id.*

341. *Id.* at 262.

The appellate panel observed that the district court was "likewise silent" on the second prong of the Rule 404(b) analysis.[342] It acknowledged that "the government clearly purported to offer the 404(b) evidence for an admissible purpose: to show Defendants' specific intent, participation in a common scheme or plan, and absence of mistake or accident."[343] The panel's concern, however, was that the government's "purported" non-character purpose was a cover to introduce character evidence:

> [I]t is a fine line the government attempts to draw between conduct that is part of a common scheme or plan and conduct that is in conformity with character. The government argues that '[a]llowing the jury to see the full picture in the context of the common scheme of stealing from employers to benefit their private company makes it more likely the jury will understand that Du's possession of GM trade secrets was for the benefit of MTI and not a mistake.' In essence, the government would be asking the jury to find that Qin and Du stole from her employer by introducing evidence that Qin (possibly) stole from his. This sounds perilously close to the definition of improper character evidence.[344]

The focus of the panel's analysis was whether Qin's thefts from CPC "were 'substantially similar and reasonably near in time' to the specific intent offense at issue.'"[345] They were not "substantially similar," the panel explained, because

> [p]ilfering office supplies—or discarded electrical parts, for that matter—and conducting personal business on company time may well constitute theft, but they are of a fundamentally different character than stealing trade secrets, which involves gaining unauthorized access to highly confidential and valuable intellectual property and converting that information for one's own economic benefit.[346]

---

342. *Id.* at 263.
343. *Id.* at 262.
344. *Qin*, 688 F.3d at 253 n.2.
345. *Id.* at 263 (quoting United States v. Haywood, 280 F.3d. 715, 721 (6th Cir. 2002)).
346. *Id.* at 263.

Finally, the panel then conducted the third prong of a Rule 404(b) analysis—a Rule 403 analysis of weighing probative value versus prejudicial effect—and concluded that its concern of a trial within a trial (which it also discussed in analyzing the first prong) that would confuse the jury outweighed any probative value of Qin's thefts from CPC: "The amount of time and the number of witnesses needed to present and rebut these allegations would almost certainly influence the jury's perception of its relative importance and could cause confusion that this alleged conduct is part of the criminal charges for which Defendants are on trial."[347] Accordingly, in this interlocutory appeal, the panel affirmed the district court's determination to exclude the other-acts evidence of Qin's CPC thefts.[348]

---

347. *Id.* at 264.

348. *Id.* at 265. In my view, both the district judge and the Sixth Circuit panel botched the Rule 404(b) analysis by ignoring the extent to which Qin's actions during the course of his employment at CPC were part of a conspiracy with his wife to use MTI as a vehicle to pool, convert to their own use, and sell the information they stole from CPC and GM.

While Qin was in charge of research and development for a firm (CPC) whose business was "design[ing] and manufactur[ing] electrical power equipment and systems," *id.* at 259, it turned out that he was stealing this intellectual property and "promoting products that [his R&D team] had been developing for years" through MTI, the firm he operated with Du, his wife. *Qin*, 688 F.3d at 265.

MTI had repackaged CPC's intellectual property software and schematic drawings for hardware for energy devices and was working on *a hybrid electric vehicle* with Chinese manufacturer Chery Automotive. *Id.* at 260. At the same time, his wife—a co-owner of MTI—was stealing GM's intellectual property (software, etc., which also happened to be for *hybrid electric vehicles*) and turning over the hard drive containing the software to her husband, Qin. *Id.* at 259-60.

While the appellate panel minimized Qin's role as that of merely "[p]ilfering office supplies . . . and conducting personal business on company time," *id.* at 260, the evidence showed that 1) the "personal business" was MTI; 2) MTI was a joint venture with his wife; 3) *Qin* stole software helpful in developing *hybrid vehicles* from CPC; 4) *Du* stole software helpful in developing *hybrid vehicles* from GM; and 5) MTI was actually working on hybrid vehicles with a GM competitor! *Id.* at 259-60. In other words, *Qin and Du conspired to illegally sell hybrid-energy trade secrets, and MTI was the vehicle for their scheme*. While the Sixth Circuit opined that Qin's other acts of theft were not sufficiently similar to the charged offenses (even though both were stealing information regarding hybrid electric vehicles), *id.* at 263, the "similarity" requirement applies only when the "basis for the relevance of the evidence is similarity." United States v. Czarnecki, 552 F.2d 698, 702 (6th Cir. 1977) (citing United States v. Riggins, 539 F.2d 682 (9th Cir. 1976)). Here, the basis was not similarity, but of a common plan or scheme. *Qin*, 688 F.3d at 261.

5. Other Acts of Discrimination by the Employer's Subordinates in Employment Discrimination Suits

Other-acts evidence can be powerful and, importantly, admissible evidence in employment-discrimination cases, the Sixth Circuit has explained, as it can "go[] to the employer's motive or intent to discriminate, which is a permissible use of such evidence under Rule 404(b)."[349] Other acts of discrimination by the employer's subordinates in employment-discrimination suits can be admissible under Rule 404(b), the Sixth Circuit held, after the district court considers various factors, including "temporal and geographical proximity, whether the various decisionmakers knew of the other decisions, whether the employees were similarly situated in relevant respects, or the nature of each employee's allegations of retaliation."[350]

To introduce other acts of employment discrimination against an employer via Rule 404(b), the "other" decision must be logically related to the one at issue in the case, but the "other actor" need not be the same individual decision maker, the Sixth Circuit recently ruled. [351]

In *Griffin v. Finkbeiner*, a unanimous panel of Judge Karen Nelson Moore, writing on behalf of herself and Judges Richard F. Suhrheinrich and Eric L. Clay,[352] rejected the district court's position that admissibility of other acts in such cases depended "on whether the same person made each allegedly retaliatory personnel decision."[353] The panel approvingly cited language from other courts that relevant factors can include "whether each incident involved 'the same place, the same time, the same decision makers, or whether it's such that the people who are making the decisions reasonably should have known about the hostile environment,'"[354] and "whether such past discriminatory behavior by the employer is close in time to the events at issue in the case, whether the same decisionmakers were involved, whether the witness and the plaintiff were treated in a similar manner, and whether the witness and the plaintiff were otherwise similarly situated."[355]

Citing the U.S. Supreme Court's decision in *Sprint/United Management Co. v. Mendelsohn*, the panel noted that whether Rule

349. Griffin v. Finkbeiner, 689 F.3d 584, 600 (6th Cir. 2012) (citing Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1286 (11th Cir. 2008)).

350. *Id.* at 599.

351. *Id.* at 598.

352. *Id.* at 588.

353. *Id.* at 598.

354. *Id.* at 599 (quoting Bennett v. Nucor Corp., 656 F.3d 802, 809-10 (8th Cir. 2011)).

355. *Griffin*, 689 F.3d at 599 (quoting Elion v. Jackson, 544 F. Supp. 2d 1, 8 (D.D.C. 2008)).

404(b) "evidence is relevant is a case-by-case determination that 'depends on many factors, including how closely related the evidence is to the plaintiff's circumstances and theory of the case.'"[356]

In *Griffin*, plaintiff Gary Daugherty, a black individual, sued the City of Toledo, Ohio, and its former mayor, Carlton Finkbeiner, for racial discrimination and unlawful retaliation in the workplace under federal and Ohio law.[357] Daughtery was an environmental services manager for the city who handled brownfield redevelopment.[358] "Daugherty's annual salary was $48,500, his white predecessor had earned an annual salary of $56,000, and his white subordinate earned an annual salary of $49,000."[359]

The plaintiff spoke with the mayor and other top city officials about the disparity and reported that the mayor told Daugherty a raise would come if he did something "exceptional."[360]

> In 2006, Daugherty assisted two black DPU employees with discrimination complaints against the City. [Environmental Services Division Commissioner Casey] Stephens and [Department of Public Works Director Robert] Williams told Daugherty not to speak with Griffin about discrimination complaints; Stephens told Daugherty that assisting with discrimination complaints was not part of his job duties. Human Resources Director Teresa Gabriel also told Daugherty to stop talking to [former plaintiff Perlean] Griffin; Gabriel complained to Daugherty that a particular complaint with which he had assisted should have gone to Human Resources instead of Affirmative Action.[361]

The plaintiff alleged that city officials evaluated his work in a harsher light than they evaluated his white colleagues' work and did not allow him to act as head of his department when his supervisor was away, even though Daughtery was the deputy head.[362]

> Daugherty also alleges that Finkbeiner used racially derogatory language at meetings attended by the directors of the various

356. *Id.* at 598 (quoting Sprint/United Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 388 n.9 (2008)).
357. *Id.* at 587-88.
358. *Id.* at 589.
359. *Id.*
360. *Id.*
361. *Griffin*, 689 F.3d at 589.
362. *Id.*

> City departments on multiple occasions and otherwise disrespected black employees. Daugherty alleges that Finkbeiner stated that blacks lack parenting skills, black men cannot hold jobs or take care of their families, black women just want to have babies and collect welfare, and black ministers are pimps. At a Director's meeting, Finkbeiner complained that black employees lack drive and professionalism. He once commented, "thank God I was not raised poor and black," and referred to then-Fire Chief Michael Bell (who is black) as "King Kong." Finkbeiner told Youth Commission Co-Director Dwayne Morehead (who is black) to "get out of the lazy mode" and, comparing him to white female employees, said "is that a black stain on the glass ceiling?" At one staff meeting, Finkbeiner yelled at Morehead to sit down when he attempted to leave to go to the restroom, even though several white attendees had left without comment from Finkbeiner. When Morehead recommended that the City hire Morlon Harris, who, like Morehead, is a black man, to serve as Morehead's co-director of the Youth Commission, Finkbeiner responded that "the good old boys on the 22nd floor would not want two black employees running the department" and did not hire Harris. The only racially tinged remark that Daugherty alleges that Finkbeiner made directly related to Daugherty was telling Griffin that Daugherty was "lazy."[363]

Sometime in 2006-07, the mayor implemented an ostensible policy to reduce the rolls of managerial positions and announced the city's elimination of thirty-nine positions, including Daughtery's.[364]

> Of these eliminations, only six resulted in an employee losing his or her job; the remainder involved vacant positions or reassignments. Daugherty's termination letter stated that the funding for his position had been cut from the budget. According to Daugherty, however, his position was largely funded by external grants rather than through the City's operating budget. A few days after Daugherty received the termination letter, Finkbeiner told Daugherty that he had been terminated because he "d[id]n't bust his ass enough."[365]

---

363. *Id.* at 589-90.
364. *Id.* at 590.
365. *Id.*

Prior to trial, the City filed a motion *in limine* to exclude Daugherty's proffered other acts of retaliation.[366]

> Griffin had stated in her affidavit that three of the five other employees terminated in March 2007 had filed complaints with the affirmative action office or charges with the Ohio Civil Rights Commission. One of these employees—Theresa Graven—worked in the DPU, but the other two—Marisol Iberra and Kristy Bollis—worked in other departments. The City also sought to exclude evidence from Griffin and Morehead regarding their own terminations. Griffin was to testify that she was retaliated against and ultimately fired as a result of filing a report and probable-cause recommendation after investigating a race/retaliation complaint against City officials. Morehead was to testify that Finkbeiner had told him that he would lose his job if he continued talking to Griffin and that he was ultimately demoted and terminated after refusing to sever ties with Griffin.[367]

The district court reserved its ruling on the other acts, but it eventually issued an order during trial excluding the other acts in light of the absence of evidence connecting Finkbeiner as the actual decisionmaker with regard to Daugherty's and the other layoffs.[368] The court issued a judgment as a matter of law (a directed verdict) eliminating Finkbeiner as a defendant, leaving the City as the sole remaining defendant.[369] The jury found in favor of the City.[370]

Daugherty appealed, arguing that the district court erred in excluding the other acts evidence in his retaliation claim that went to the jury and in dismissing other claims that did not reach the jury.[371]

The Sixth Circuit held that the district court was correct when it opined that the other-acts evidence "must be logically or reasonably tied to the decision made with respect to [Daugherty]," but that the lower court erred when it "looked only to the existence of a common decisionmaker as the necessary tie."[372] The error was not harmless, the panel observed, because "[l]ike most employment-discrimination

366. *Id.* at 591.
367. *Griffin*, 689 F.3d at 591.
368. *Id.*
369. *Id.* at 591-92.
370. *Id.*
371. *Id.* at 592.
372. *Id.* at 598 (citations omitted).

plaintiffs, Daugherty relied largely on circumstantial evidence to present his case of retaliation to the jury. In such cases, "'each piece of evidence served to complete part of the puzzle of th[e] case' and the absence of any one piece may have influenced the jury verdict."[373] Other-acts evidence in such cases "can provide probative context to an individual employment decision, especially when, as here, the circumstances of that decision are already somewhat suspicious due to evidence of pretext that was sufficient to survive summary judgment."[374] Accordingly, the panel remanded this evidentiary issue to the district court to reassess its ruling on the other-acts evidence by performing a multi-factor analysis that did not turn on the mayor's involvement in each act as a prerequisite to admissibility.[375] The court vacated the judgments against the city and its former mayor.[376]

6. *Other Acts of Conduct for Character/Propensity Purposes*

i. Sexual Molestation of Minors

Section 27a of the Michigan 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 predisposition to commit sexual misconduct against minors.[377] In such cases, the statute provides, "evidence that the defendant committed another [molestation] offense against a minor is admissible and may be considered for its bearing *on any matter to which it is relevant*."[378] To emphasize that section 27a is an exception to the general prohibition on propensity evidence, the Michigan 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."[379]

---

373. *Griffin*, 689 F.3d at 599 (alteration in original) (quoting Robinson v. Runyon, 149 F.3d 507, 515 (6th Cir. 1998)).

374. *Id.*

375. *Id.* at 599-600.

376. *Id.* at 601.

377. MICH. COMP. LAWS ANN. § 768.27a (West 2006). Similarly, Congress, by statute, amended the federal rules to achieve a similar result in Rules 414 and 415. *See* FED. R. EVID. 414, 415.

378. MICH. COMP. LAWS ANN. § 768.27a(1) (emphasis added).

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

The Michigan Supreme Court specifically held, in *People v. Watkins*,[380] 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."[381] 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 commit the charged crime, precisely that which MRE 404(b) precludes.[382]

Furthermore, the *Watkins* court held that while section 27a evidence remains subject to Rule 403 balancing,[383] "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."[384] 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,[385] held that while a court may not exclude section 27a propensity evidence on Rule 403 grounds because it constitutes propensity evidence, such evidence could be excludable in light of, among many reasons,

---

380. People v. Watkins, 491 Mich. 450; 818 N.W.2d 296 (2012).

381. *Id.* at 470. Although the *Watkins* court issued its opinion five days into *this Survey* period, I discussed it in the preceding *Survey* issue. Thus, this portion of the article is substantially similar to the corresponding portion of last year's article. *See* Meizlish, *supra* note 3, at 799-801.

382. *Watkins*, 491 Mich. at 470 (quoting People v. Pattison, 276 Mich. App. 613, 620; 741 N.W.2d 558 (2007), and People v. Allen, 429 Mich. 558, 566; 420 N.W.2d 499 (1988)).

383. *Id.* at 456.

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

385. *Id.* at 496.

> (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.[386]

The court explained its reasoning in determining that the statute trumped the court rule:

> A rule of evidence will prevail over a conflicting statute only if the statute unconstitutionally infringes on this Court's authority under Const 1963, art 6, § 5 to "establish, modify, amend and simplify the practice and procedure in all courts of this state." In accordance with separation-of-powers principles, this Court's authority in matters of practice and procedure is exclusive and therefore beyond the Legislature's power to exercise. This exclusive authority, however, extends *only to rules of practice and procedure*, as "this Court is not authorized to enact court rules that establish, abrogate, or modify the substantive law." Accordingly, our task is to determine whether MCL 768.27a is an impermissible rule governing the practice and procedure of the courts or a valid enactment of substantive law.[387]

Justice Zahra then explained that the statute reflected the legislature's policy considerations outside of court administration and procedure:

> Evidence of guilt in child molestation cases is typically hard to come by because in most cases the only witness is the victim, whose testimony may not be available, helpful, or deemed credible because of his or her age. It may also be difficult for a jury to believe that a defendant is capable of engaging in such egregious behavior with a child. Consistent with our analysis is the fact that federal courts considering the validity of FRE 414 have identified similar policy considerations underlying the rule

386. *Id.* at 487-88. What the *Watkins* court failed to explain is why a court should exclude any evidence on Rule 403 grounds for any of these factors. If the evidence is admissible under section 27a to establish a defendant's *character* or propensity to commit such a crime, it is hard to conceive of a situation in which section 27a evidence will be "unfair[ly] prejudic[ial], [lead to] confusion of the issues, mislead[] the jury," or "waste [the jury's] time." MICH. R. EVID. 403.

387. *Watkins*, 491 Mich. at 472-73 (emphasis added) (citations omitted).

> that are over and beyond the orderly dispatch of judicial business. Those considerations include "[p]romoting the effective prosecution of sex offenses," "the reliance of sex offense cases on difficult credibility determinations," and "the 'exceptionally probative' value of a defendant's sexual interest in children."[388]

Then-Justice Marilyn J. Kelly (who has since retired from the court) vigorously dissented from the majority's conclusion that section 27a trumps Rule 404(b):

> [The Legislature's intent was] to regulate the courts by telling them what evidence juries can hear. The course of action the Legislature prescribes to accomplish its policy goals in MCL 768.27a—telling courts how to operate—is a regulation of the judicial dispatch of litigation. It does nothing more. Simply put, the Legislature cannot "modify . . . the practice and procedure in all courts of this state."[389]

The Michigan Court of Appeals followed *Watkins*' holding regarding propensity evidence in a subsequent child-sexual-molestation case, *People v. Buie*.[390] The *Buie* court briefly summarized the facts as follows:

> Defendant was convicted of sexually assaulting three females: BS and two minors (ages 13 and 9). BS invited defendant into the apartment where she was babysitting the two minors in hopes of trading sex for cocaine, but defendant produced a firearm during the event and sexually assaulted all three victims. Hours later, a physician examined the minor victims and concluded that they had suffered sexual trauma to their genitals. An employee with the Forensic Biology Unit of the State Police concluded that analysis of the DNA samples linked the evidence taken from the victims to defendant.[391]

At trial, the prosecution presented the other-acts testimony of "LB," who told the jury

---

388. *Id.* at 475-76.

389. *Id.* at 502 (M.J. Kelly, J., dissenting) (quoting MICH. CONST. art. VI, § 5).

390. People v. Buie, 298 Mich. App. 50; 825 N.W.2d 361 (2012) (on second remand), *appeal denied*, 494 Mich. 854; 830 N.W.2d 766 (2013).

391. *Id.* at 55.

> that defendant sexually assaulted her in 2004, when she was 13 years old. LB told her sister that defendant had assaulted her and, shortly thereafter, the incident was reported to the police. DNA analysts subsequently determined that defendant's DNA matched sperm cells from LB's vaginal swab and underwear. The results of the DNA testing were entered into CODIS [Combined DNA Indexing System, a DNA databank of convicted felons].
>
> On February 1, 2005, a CODIS hit occurred when the system matched defendant's DNA to the DNA samples taken in this case.[392]

The jury convicted the defendant of two counts of first-degree criminal sexual conduct involving a victim under thirteen, three counts of first-degree criminal sexual conduct involving a weapon, and, finally, felony firearm.[393]

Among the issues the defendant raised on appeal was that LB's testimony constituted impermissible evidence of other acts.[394] Addressing this issue, the appellate panel reiterated *Watkins*' holding permitting other-acts testimony under section 27a and, consistent with *Watkins*, subjected the testimony to Rule 403 balancing:

> He had previously been convicted of sexually assaulting LB when she was 13 years old. LB's testimony established that defendant had a history of sexually assaulting young girls. The testimony also indicated that the manner in which the sexual assaults occurred in both instances were similar. Specifically, defendant engaged his victims initially under a ruse and then proceeded to forcefully sexually assault them while threatening them with a weapon. Multiple penetrations occurred, and the sexual positions were similar. The subject crimes and the incident involving LB also occurred within three years of one another. The evidence of each crime was supported by DNA evidence, establishing defendant as the offender. Evidence of the assault on LB was also relevant in explaining how the police had

392. People v. Buie, 291 Mich. App. 259, 263; 804 N.W.2d 790 (2011), *rev'd*, 491 Mich. 294; 817 N.W.2d 33 (2012).

393. *Buie*, 298 Mich. App. at 54.

394. *Id.* at 70.

> come into possession of defendant's DNA for comparison in this case.[395]

Thus, in a per curiam opinion, a unanimous panel of Judges Jane M. Beckering, William C. Whitbeck, and Michael J. Kelly[396] observed that LB's testimony was prejudicial, but not *unfairly* prejudicial, noting that "undue prejudice refers to 'an undue tendency to move the tribunal to decide on an improper basis.'"[397] LB's testimony did not amount to such undue prejudice, and the appellate panel found no abuse of discretion by the trial court in permitting the other-acts testimony.[398] Accordingly, it affirmed the defendant's conviction for this and other reasons.[399]

ii. Other Acts of Domestic Violence

Similar to section 27a, the legislature enacted section 27b, which provides that, in criminal domestic-violence actions, "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 MRE 403."[400] 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."[401]

In *People v. Mack*, the Michigan Supreme Court explained that, in the same manner as section 27a trumps Rule 404(b)'s prohibition on

---

395. *Id.* at 73.

396. *Id.* at 53.

397. *Id.* at 73 (quoting People v. Vasher, 449 Mich. 494, 501; 537 N.W.2d 168 (1995)).

398. *Id.*

399. *Buie*, 298 Mich. App. at 74.

400. MICH. COMP. LAWS ANN. § 768.27b(1) (West 2006). 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).

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

propensity evidence in child-molestation cases, section 27b trumps Rule 404(b)'s prohibition on propensity evidence in domestic-violence actions.[402] *Mack* was a much shorter memorandum opinion than *Watkins*, reflecting the views of a majority comprising the same Republican judges as in *Watkins*—Chief Justice Robert P. Young Jr. and Justices Stephen J. Markman, Mary Beth Kelly, and Brian K. Zahra[403]—and adopting *Watkins*' reasoning in reaching a similar conclusion.[404]

Now-retired Justice Marilyn J. Kelly, who represented the views of Justice Michael F. Cavanagh and now-retired Justice Diane M. Hathaway,[405] reiterated the view she expressed in *Watkins* that statutes such as sections 27a and 27b, by superseding the rules of evidence, impermissibly infringe on the supreme court's authority under the Michigan constitution to "establish, modify, amend and simplify the practice and procedure in all courts of this state."[406] Justice Kelly and her fellow Democrats urged the court to reconsider *Watkins*.[407]

7. Prohibitions on Other Acts in a Victim's Sexual History: Rape-Shield Provisions

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 evidence of his or her past conduct, is inadmissible in criminal sexual conduct cases.[408] Section 520j, the Michigan Court of Appeals explained in a 1978 case,

> represents 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 often physical) trauma of rape, refused to report the crime or testify for fear that the trial proceedings would veer from an

402. People v. Mack, 493 Mich. 1, 4; 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).

403. *Id.* at 3.

404. *Id.*

405. 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.

406. *Mack*, 493 Mich. at 4-5 (M.J. Kelly, J., dissenting) (quoting MICH. CONST. art. VI, § 5).

407. *Id.* at 5.

408. MICH. COMP. LAWS ANN. § 750.520j(1) (West 2006). The federal courts have promulgated a similar, but non-statutory, rape-shield provision. *See* FED. R. EVID. 412.

> 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.[409]

Similarly, the Sixth Circuit has explained that the purpose of Rule 412 is to "encourage[] victims of sexual abuse to report their abusers by protecting the victims' privacy."[410]

The Michigan statute, however, permits the following evidence as exceptions to the rape-shield: "(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."[411] To admit such evidence under either of these exceptions in the rape-shield statute, the court must find "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."[412]

The corresponding provision in the Federal Rules of Evidence, Rule 412, is similar but differs in some respects.[413] Both the Michigan statute and the federal rule contain an exception for evidence "showing the source or origin of semen, pregnancy, or disease."[414] On the other hand, while the Michigan statute has an exception for "[e]vidence of the victim's past sexual conduct with the actor,"[415] the narrower exception in the federal rule permits "evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, *if offered by the defendant to prove consent or if offered by the prosecutor*."[416] Second, unlike the Michigan statute, the federal rule does not require the trial judge to subject evidence falling within one of the two exceptions to a probative-versus-inflammatory-effect balancing before admitting such evidence.[417] Third, in civil cases only, the federal rule, unlike the Michigan statute, permits evidence of a victim's sexual behavior or disposition "if its probative value substantially outweighs the

---

409. 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)).

410. United States v. Ogden, 685 F.3d 600, 606 (6th Cir. 2012).

411. MICH. COMP. LAWS ANN. § 750.520j(1).

412. *Id.*

413. FED. R. EVID. 412.

414. MICH. COMP. LAWS ANN. § 750.520j(1)(b) (West 2006); FED. R. EVID. 412(b)(1)(A).

415. MICH. COMP. LAWS ANN. § 750.520j(1)(a).

416. FED. R. EVID. 412(b)(1)(B) (emphasis added).

417. MICH. COMP. LAWS ANN. § 750.520j(1); FED. R. EVID. 412(b)(1).

danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy."[418] Finally, the procedural time limits and mechanisms differ slightly between the federal and state provisions.[419]

In *United States v. Ogden*, Daniel S. Ogden met a fifteen-year-old girl online via Yahoo!'s instant-messaging service and told her that he was twenty-five, lived in Pennsylvania, and suffered from cancer.[420] In truth, the defendant did not have cancer, was thirty-four, and lived in Tennessee.[421] During the course of their communications, Ogden

> asked for photos of the victim sunbathing, then pictures of her bras, and pictures of her topless. She sent them. Thereafter, Ogden asked the victim "if he was going to get to see more." He also told her that she could change clothes only in view of her webcam, which broadcasted live video to his computer.
>
> Eventually the victim sent Ogden a number of sexually explicit photos and videos of herself. In one instance, at Ogden's request, she masturbated while Ogden watched on the webcam. He saved these images on an external hard drive.[422]

In September 2005, when the victim was sixteen, the defendant convinced her to meet at a San Francisco hotel, where they rented a room and engaged in sexual intercourse.[423] The girl returned to her parents after her mother telephoned her at the hotel.[424]

A jury convicted the defendant of "persuading a minor to engage in sexually explicit activity for the purpose of producing a visual depiction, use of a 'means of interstate . . . commerce' to persuade a minor to perform sexual acts, receipt of child pornography, and possession of child pornography."[425] On appeal, Ogden alleged that the district court erred in denying his attempts to admit evidence of the victim's chat logs, in which "the victim mentioned sending explicit images of herself to the other men. According to Ogden, the chat logs show that one of those

418. FED. R. EVID. 412(b)(2).
419. MICH. COMP. LAWS ANN. § 750.520j(2) (West 2006); FED. R. EVID. 412(c).
420. United States v. Ogden, 685 F.3d 600, 602 (6th Cir. 2012).
421. *Id.* at 603.
422. *Id.* at 602.
423. *Id.*
424. *Id.* at 602-03
425. *Id.*

men might have originally persuaded the victim to take the explicit pictures later found on Ogden's hard drive."[426]

Here, a unanimous Sixth Circuit panel of Judge Raymond M. Kethledge, writing for himself, Judge Richard A. Griffin, and U.S. District Judge Amul R. Thapar,[427] concluded that Rule 412—and the public policy underlying it—trumped the defendant's contention that excluding the logs violated his constitutional right to "a meaningful opportunity to present a complete defense."[428]

> All the government needed to prove for the enticement charge was that Ogden induced the victim to engage in conduct to produce at least one explicit image. And the record includes the victim's testimony that she masturbated on webcam, at Ogden's request, while he watched. Chat-log evidence that the victim sent images to other men would not impeach the victim's testimony as to this specific incident—and indeed it might have bolstered the testimony. The victim also testified that Ogden made videos of her without her knowledge and that she recognized "videos that he recorded of [her]" among the videos found on Ogden's hard drive. Some of the videos on Ogden's hard drive depicted the victim nude.[429]

Rule 412 operated to bar the victim's chat logs, the panel explained, because "'sexual behavior' includes 'verbal conduct.'"[430] Accordingly, "[g]iven the strength of [the government's interests in protecting the victim's privacy], and the weakness of Ogden's [interests in presenting the logs to the jury], the Constitution did not require admission of the chat logs."[431] Thus, the court affirmed the defendant's conviction and sentence for this and other reasons.[432]

---

426. *Ogden*, 685 F.3d at 604.

427. *Id.* at 602. Judge Thapar, of the Eastern District of Kentucky, sat by designation on the Sixth Circuit panel. *Id.*

428. *Id.* at 605 (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

429. *Id.*

430. *Id.* (citing 23 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 5384 (1st ed. 1980), and United States v. Papakee, 573 F.3d 569, 572-73 (8th Cir. 2009)).

431. *Ogden*, 685 F.3d. at 606.

432. *Id.*

D. Rule 403 Balancing[433]

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."[434] 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."[435] 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."[436] "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."[437]

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),[438] 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 in which the Rule 403 analysis was mostly isolated from the court's application of other rules.

---

433. This portion of the article—an introductory explanation about Rule 403 balancing—borrows heavily, if not entirely, from last year's *Survey* article on evidence. *See* Meizlish, *supra* note 3, at 767.

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

435. People v. Mills, 450 Mich. 61, 75; 537 N.W.2d 909 (1995).

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

437. 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)).

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

Case	Related issues	Cross-reference
People v. Buie[439]	Other Acts of Conduct for Character/Propensity Purposes: Sexual Molestation of Minors	Part IV.C.6.i
People v. Eliason[440]	Relevance of the Defendant's Statements to Police Regarding Capital Punishment in Murder Cases	Part IV.A.2
People v. Kowalski[441]	Expert Opinion as to False Confessions	Part VII.B.1
People v. Marshall[442]	Relevance of Blood and Holes in the Victim's Clothing in Assault-with-Intent-to-Murder Cases	Part IV.A.3
United States v. Semrau[443]	Lie-detector testimony	Part VII.B.2
People v. Watkins[444]	Other Acts of Conduct for Character/Propensity Purposes: Sexual Molestation of Minors	Part IV.C.6.i

In *United States v. Sims*, Andrea Mast, mother of the seven-year-old victim, sent Timothy Sims pictures of her daughter engaging in sexual contact.[445] The defendant possessed those images as well as two disks containing possibly more than ninety images of "both pre- and post-pubescent children engaged in a variety of sexual acts, including bondage and rape."[446] Furthermore,

> Sims admits that on three occasions he surreptitiously filmed a 13 year-old girl (referred to here as M.P.) through her bedroom window. Sims took the video from outside the girl's bedroom, after she had emerged from the shower. Each video focuses on the girl's pubic area and buttocks, but she does not engage in any sexual activity. At the time the videos were made, Sims lived with M.P., her older sister, C.P., and her mother, Sonya Lund.[447]

The government charged Sims with attempted production of child pornography for the videos he filmed and possession of child

439. People v. Buie, 298 Mich. App. 50, 71-74; 825 N.W.2d 361 (2012)
440. People v. Eliason, 300 Mich. App. 293, 301-03; 853 N.W.2d 357 (2013).
441. People v. Kowalski, 492 Mich. 106, 136-38; 821 N.W.2d 14 (2012).
442. People v. Marshall, 298 Mich. App. 607, 617; 830 N.W.2d 414 (2012).
443. United States v. Semrau, 693 F.3d 510, 523-24 (6th Cir. 2012).
444. People v. Watkins, 491 Mich. 450, 486-90; 818 N.W.2d 296 (2012).
445. United States v. Sims, 708 F.3d 832, 833 (6th Cir. 2013).
446. *Id.*
447. *Id.*

pornography for the images he possessed.[448] Shortly before trial, the defendant pled guilty to the possession charges, admitting he possessed the photos that he received from Mast.[449] With the attempted production charges remaining open, the defense moved to exclude "the child pornography that he possessed, text messages of a sexual nature between him and M.P.'s older sister, and e-mails between him and B.M.'s mother."[450] Following the guilty plea, the district court excluded the images because they were "not relevant" to the remaining charges of attempted production of child pornography.[451] Relatedly, the district court also excluded the defendant's statements at the plea hearing where he admitted possessing the images on the ground that the evidence was more prejudicial than probative as to the remaining charge.[452]

Federal prosecutors filed an interlocutory appeal with the Sixth Circuit.[453] A few days later, the district court clarified its ruling, agreeing that the images *were* relevant to establishing the defendant's intent in filming the videos, but it concluded that such evidence was more prejudicial than probative given that the defendant's intent "would not be a critical issue at trial."[454]

A two-person majority of Judge Raymond M. Kethledge, writing for himself and U.S. District Judge Thomas L. Ludington,[455] concluded that the district court erroneously reasoned that the government had a burden of showing that the defendant's videos were lascivious, because "[i]f they were, Sims would presumably be facing an actual-production charge."[456] Here, however, the defendant was facing a charge of attempted production of child pornography.[457] The district court's "faulty premise led the court to conclude that th[e 'lascivious'] element would be the 'pivotal issue' at trial."[458] The district court erred in miscalculating the probative value of Sims' possession of pornographic images when it conducted a Rule 403 analysis because "[t]he intent element of the charged offense requires the government to prove that Sims specifically intended to obtain a lascivious image when he stood outside M.P.'s

448. *Id.*
449. *Id.* at 834.
450. *Id.*
451. *Sims*, 708 F.3d at 834.
452. *Id.*
453. *Id.*
454. *Id.*
455. *Id.* at 832. Judge Ludington, of the Eastern District of Michigan, sat by designation on the Sixth Circuit panel. *Id.*
456. *Sims*, 708 F.3d at 835.
457. *Id.*
458. *Id.*

bedroom window with a video camera."[459] The panel emphasized that the government's burden was to prove the defendant's specific intent beyond a reasonable doubt, and "even someone like Sims might not realistically expect—and thus not intend—to obtain lascivious footage, i.e., child pornography, when filming a girl toweling off after a shower."[460]

The panel then observed that the district court did not distinguish between evidence that is prejudicial, even "highly prejudicial," and evidence that is *unfairly* prejudicial:

> Evidence that lacks inflammatory detail, for example, but that more simply shows that Sims is a consumer of child pornography, might not be unfairly prejudicial at all. It might instead tend primarily to show that Sims hoped to obtain a lascivious image when he filmed M.P. nude through her window. That kind of prejudice would be fair.[461]

Finally, the judges astutely suggested a roadmap for the district court to review its ruling on remand:

> It is clear that the probative value of the evidence at issue here is not uniform. The same is true of the evidence's unfairly prejudicial effect. Evidence that Sims possessed images of toddlers being raped, for example, might be modestly probative but extremely prejudicial. But the balance between probative value and prejudicial effect might well be reversed with respect to some of Sims's own admissions at his plea hearing—admissions that the government specifically sought to admit as a separate item of evidence as soon as they were made. In any event, the court's decisions whether to admit the different kinds of evidence at issue here needs to be more individualized than they were during the plea hearing and in the opinion that followed.
>
> But those decisions should still be made by the district court in the first instance. The reality is that the court was pressed to make its decision here on the fly, after Sims chose to plead guilty to the possession counts only four days before trial. A more

459. *Id.*
460. *Id.*
461. *Id.* at 836.

> deliberate process for considering these issues might yield a more reliable result.[462]

Accordingly, the panel vacated the district court's opinion and remanded the case to the district court to conduct another Rule 403 balancing of the evidence in light of the appellate panel's opinion.[463] The defendant unsuccessfully petitioned the Sixth Circuit for en banc review of the panel's ruling.[464] Judge Helene N. White, dissenting from the majority's ruling, found no abuse of discretion by the district judge in light of "the posture of the case at the time."[465]

V. RULES 501-502: PRIVILEGES

At the height of the Watergate scandal, Chief Justice Warren Burger wrote 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."[466] Privileges generally exist to further the public policy of encouraging confidential communications (such as between spouses, between doctors and their patients, and between attorneys and their clients), as "public policy requires the encouragement of the communications without which these relationships cannot be effective."[467]

A party's proper invocation of a privilege, similar to a court's suppression order, has the powerful impact of rendering otherwise competent, relevant, and admissible evidence inadmissible.[468] Relatedly, while the court rules allow for generally liberal discovery,[469] the rules

---

462. *Sims*, 708 F.3d at 836.

463. *Id.*

464. United States v. Sims, No. 11-2331, 2013 U.S. App. LEXIS 8095 (6th Cir. Apr. 15, 2013).

465. *Sims*, 708 F.3d at 836 (White, J., dissenting). Judge White also dissented from the Sixth Circuit's denial of the defendant's petition for en banc review. *Sims*, 2013 U.S. App. LEXIS 8095.

466. 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)).

467. *Id.* at 211 (quoting CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 72, at 170-71 (3d ed. 1984)).

468. MICH. R. EVID. 402 (emphasis added) (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").

469. MICH. CT. R. 2.302(B)(1).

specifically limit their scope to non-privileged material.[470] In Michigan, courts look to the common law for the parameters of privileges, unless court rules or legislative statutes otherwise modify those privileges.[471]

The only published case in Michigan state courts in this area concerned the scope of Michigan's physician-patient privilege. Michigan statutory law codifies the physician-patient privilege, in relevant part, as follows:

> Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon.[472]

The holder of the physician-patient privilege is the patient himself, and "the privilege exists until waived by the patient."[473] Third-party action does not waive the privilege.[474] The purpose of the privilege "'is to protect the confidential nature of the physician-patient relationship and to encourage a patient to make a full disclosure of symptoms and condition.'"[475] A party to a lawsuit such as a hospital may assert the patients' privilege to prevent disclosure of patient records, regardless of whether its motive in asserting the privilege is to protect the patients' confidentiality or frustrate the opposing party's chances at prevailing in the suit.[476]

In the recent case of *Meier v. Awaad*, a unanimous court of appeals panel of Chief Judge William B. Murphy, writing for himself and Judges Pat M. Donofrio and Elizabeth L. Gleicher,[477] held that the physician-patient privilege operates to bar third parties, such as hospitals or state agencies in possession of patient records, from disclosing contents of physician-patient communications.[478] The panel reached this conclusion

470. *Id.* ("Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action." (emphasis added))

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

472. MICH. COMP. LAWS ANN. § 600.2157 (West 2006).

473. Meier v. Awaad, 299 Mich. App. 655, 668; 832 N.W.2d 251 (2013).

474. *Id.* at 671.

475. *Id.* at 666.

476. *Id.* at 673.

477. *Id.* at 656.

478. *Id.* at 672.

notwithstanding the privilege statute's language that would initially appear to limit its scope to "*a person duly authorized to practice medicine*."[479]

The *Meier* plaintiffs sued the defendants, physician Yasser Awaad, and various entities in the healthcare industry and alleged that the doctor "intentionally misdiagnosed them with either epilepsy or seizure disorder for the purpose of increasing his billings. . . . [and] that, as a result of the false diagnoses, they were subjected to unnecessary and inappropriate medication, treatment, and medical testing."[480] In an attempt to identify potential co-plaintiffs, the plaintiffs subpoenaed the Michigan Department of Community Health to disclose "the names and addresses of all Medicaid beneficiaries who were treated by Dr. Awaad and coded as having been diagnosed with epilepsy or seizure disorder."[481] The department refused to comply with the subpoena without a court order, which the plaintiffs obtained from the Wayne County Circuit Court.[482]

Upon receiving the patient information, the plaintiffs sent a letter asking recipients to contact their counsel immediately, stating, "We believe you may be a witness in an action currently pending in the Wayne County Circuit Court against Dr. Yasser Awaad and Oakwood Hospital concerning the allegations set forth in the attached Complaint."[483] The defendants sought interlocutory leave to appeal in the court of appeals, which the court granted after the parties' briefing.[484]

The court began its analysis by noting "that the privilege precludes the disclosure of treatment histories and even the names of patients."[485] It explained,

> [P]atients armed with the knowledge that their name may not be kept confidential may not be as willing to reveal their full medical history for fear that, ultimately, that information, too, may lose its confidential status. This chilling of the patient's desire to disclose would have a detrimental effect on the physician's ability to provide effective and complete medical

479. *Awaad*, 299 Mich. App. at 669 (emphasis added) (citing MICH. COMP. LAWS ANN. § 600.2157 (West 2006)).

480. *Id.* at 657.

481. *Id* at 658.

482. *Id.*

483. *Id.* at 662.

484. *Id.* at 662-63.

485. *Awaad*, 299 Mich. App. at 666 (citing Dorris v. Detroit Osteopathic Hosp., 460 Mich. 26, 34; 594 N.W.2d 455 (1999), and Schechet v. Kesten, 372 Mich. 346, 351; 126 N.W.2d 718 (1964)).

> treatment and is therefore "necessary" to enable a physician "to prescribe" for a patient.[486]

To that end, "[t]he names, addresses, telephone numbers, and medical information relative to nonparty patients fall within the scope of the physician-patient privilege,"[487] regardless of whether "the patient's identity is redacted."[488]

The plaintiffs made various arguments on appeal. They contended that the defendants, who did not hold the privilege, had no standing to assert the physician-patient privilege.[489] The appellate panel rejected this argument with little discussion, explaining that, "[c]ertainly, a party to a lawsuit has 'standing' or a right to raise issues or challenges with respect to discovery and evidentiary matters."[490]

> We view this argument not in terms of "standing" but as simply challenging the applicability of the privilege and whether it can be successfully invoked under the statute when the information is sought not from the doctor or surgeon who provided the medical care, but rather from a third party who has obtained patient information from the doctor or surgeon.[491]

The court found the Michigan Supreme Court's analysis in *Dorris v. Detroit Osteopathic Hospital* perfectly applicable:

> [I]t seems that it must follow as a natural sequence that when the physician subsequently copies that privileged communication upon the record of the hospital, it still remains privileged. If that is not true, then the law which prevents the hospital physician from testifying to such matters could be violated both in letter and spirit and the statute nullified by the physician copying into the record all the information acquired by him from his patient, and then offer or permit the record to be offered in evidence

---

486. *Id.* (quoting *Dorris*, 460 Mich. at 37-39).

487. *Id.* at 667 (citing Isidore Steiner, D.P.M., P.C. v. Bonanni, 292 Mich. App. 265, 276; 807 N.W.2d 902 (2011)).

488. *Id.* at 668 (citing Johnson v. Detroit Med. Ctr., 291 Mich. App. 165, 169; 804 N.W.2d 754 (2010)).

489. *Id.* at 667.

490. *Awaad*, 299 Mich. App. at 668.

491. *Id.* at 670.

> containing the diagnosis, and thereby accomplish, by indirection, that which is expressly prohibited in a direct manner.[492]

Second, the court rejected as irrelevant to its consideration of the issue the plaintiffs' emphasis on the fact that no patient had yet invoked the privilege.[493] The privilege is self-executing and "exists until waived by the patient."[494]

Furthermore, the court held that the objecting party's motive in objecting to disclosure matters not.[495] The court rejected the plaintiffs' argument that its opponents were "manipulating the physician-patient privilege in order to avoid liability, absent any true concern for protecting the patients' rights."[496] The panel explained that the court had "rejected an argument that a party should not be permitted to invoke the physician-patient privilege when the purpose for doing so is to shield the party from damaging or unfavorable evidence and to withhold relevant evidence from the requesting party."[497] The privilege trumped whatever rights the plaintiffs had in discovery related to their lawsuit, including finding new co-plaintiffs.[498]

Accordingly, the panel reversed the trial court's order allowing discovery of the patient information.[499] The court denied the defendant's request for sanctions because "plaintiffs were proceeding in accordance with the trial court's directives," even if they transmitted the letters to patients the same day as the trial court had permitted them to.[500] It ordered the plaintiffs "to return all copies of the privileged information to the MDCH and to destroy all electronic files containing the information," except for that information concerning plaintiffs who waived their privilege.[501]

---

492. *Id.* at 671 (quoting Dorris v. Detroit Osteopathic Hosp., 460 Mich. 26, 38 n.6; 594 N.W.2d 455 (1999)) (internal quotation marks omitted).

493. *Id.* at 668.

494. *Id.*

495. *Id.* at 673.

496. *Awaad*, 299 Mich. App. at 673.

497. *Id.* (citing Baker v. Oakwood Hosp., 239 Mich. App. 461, 476-78; 608 N.W.2d 823 (2000)).

498. *Id.*

499. *Id.* at 677-78.

500. *Id.* at 674.

501. *Id.* at 677.

VI. RULE 601-15: WITNESSES, IMPEACHMENT, AND JURY DELIBERATIONS

A. Impeachment

One of the means to discredit a witness at trial is through the use of the witness' prior convictions of a crime.[502] In Michigan, for a prior conviction to be admissible for impeachment purposes, it must have "contained an element of dishonesty or false statement,"[503] or (1) "contained an element of theft," (2) was "punishable by imprisonment in excess of one year," and, finally, (3) "the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect."[504] The court of appeals recently downplayed the value of a prior theft conviction to impeach a witness, observing that "'[t]heft crimes are minimally probative on the issue of credibility,' or, at most, are 'moderately probative of veracity.'"[505]

The federal rules mirror Michigan's in that a prior conviction for a crime containing an element of "dishonest[y] . . . or false statement" is almost always admissible to impeach a witness.[506] The Sixth Circuit had occasion to explain during the *Survey* period in *United States v. Washington* that it is not enough that a particular *crime* may involve dishonesty or a false statement; rather, to be automatically admissible for impeachment, *an element of the offense* must have been dishonesty or a false statement.[507]

> Although a witness may have committed crimes tending to reflect poorly on his moral character, Congress in drafting Rule

---

502. *See* MICH. R. EVID. 609; FED. R. EVID. 609. In the absence of a criminal conviction, both the federal and state rules permit a party to impeach a witness with evidence of that witness's dishonest acts, but the rules limit that source of the impeachment evidence (the dishonest acts) to one person: the witness. MICH. R. EVID. 608(b); FED. R. EVID. 608(b). In other words, a party may cross-examine a witness about specific acts that reflect adversely on the witness's character for truthfulness, but, if the witness denies committing the dishonest acts, the examining party may not introduce extrinsic evidence of the dishonest acts – it must, instead, "take the answer."

503. MICH. R. EVID. 609(a)(1).

504. MICH. R. EVID. 609(a)(2).

505. People v. Snyder, 301 Mich. App. 99, 106; 835 N.W.2d 608 (2013) (citations omitted) (quoting People v. Meshell, 265 Mich. App. 616, 635; 696 N.W.2d 754 (2005), and People v. Allen, 429 Mich. 558, 610-11; 420 N.W.2d 499 (1988)).

506. FED. R. EVID. 609(a)(2).

507. United States v. Washington, 702 F.3d 886, 893 (6th Cir. 2012).

> 609(a)(2) directed courts specifically toward crimes "in the nature of *crimen falsi*, the commission of which involve[] some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully."[508]

However, for non-dishonesty/non-false-statement crimes, the federal rules do not require that the crime contain an element of theft.[509] Instead, the federal rules require that the crime was punishable by imprisonment in excess of one year, and then the rules establish different balancing tests depending on whether the case is civil or criminal and whether the witness is the defendant.[510]

The age of the conviction implicates its admissibility in both federal and state courts.[511]

In Michigan, if more than ten years have elapsed since the conviction, or since the defendant's confinement has concluded (whichever is later), the prior conviction is simply inadmissible.[512] On the other hand, such a circumstance in a federal case raises a presumption of inadmissibility, and the court may admit the conviction "only if (1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and (2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use."[513]

Below is a chart that summarizes some of the differences between the federal and state rules as to impeaching a witness with a prior conviction:

508. *Id.* (quoting United States v. Seamster, 568 F.2d 188, 190 (10th Cir. 1978)).
509. FED. R. EVID. 609(a)(1).
510. *Id.*
511. MICH. R. EVID. 609(c); FED. R. EVID. 609(b).
512. MICH. R. EVID. 609(c).
513. FED. R. EVID. 609(b).

Impeachment by Evidence of Conviction of Crime (Rule 609)		
	Michigan	**Federal**
Elements of the conviction		
False statement or dishonesty (felony or misdemeanor)	Admissible	Admissible
Theft (misdemeanor)	Inadmissible	Inadmissible
Theft (felony)	See MRE 609(a)(2) for balancing tests	See FRE 609(a)(1) for balancing tests
Non-theft/non-dishonesty (felony)	Inadmissible	See FRE 609(a)(1) for balancing tests
Convictions Older Than Ten Years	Inadmissible	Presumptively inadmissible, subject to FRE 609(b) balancing test.

The applicability of Michigan's version of Rule 609 became an issue in the recent case of *People v. Snyder*, following Brian Lee Snyder's conviction for larceny in a building by a Van Buren County jury.[514] Snyder had visited a Mattawan antique store in late 2011, enjoyed a meal with the proprietor, William Lesterhouse, and Lesterhouse's sister, and then left.[515] The proprietor testified at trial that he soon noticed four pieces of silver missing, which he later recovered from a jewelry store in Portage, along with his gold watch, which he had not realized was missing until then.[516] The proprietor testified that he never gave Snyder the items, together worth about $2,400, nor did he give the defendant permission to take them.[517]

Conversely, the

> [d]efendant testified that Lesterhouse gave him two of the silver bowls in exchange for some arrowheads and a stone tool, worth approximately $800. According to defendant, Lesterhouse gave defendant the two additional silver pieces and the gold watch. Defendant claimed that after the store closed and they ate

514. People v. Snyder, 301 Mich. App. 99, 102; 835 N.W.2d 608 (2013).
515. *Id.*
516. *Id.*
517. *Id.*

> sandwiches, Lesterhouse made sexual advances toward defendant, which defendant rejected. Defendant testified that he took the box of silver items and the watch and left.[518]

Prior to trial, the defense moved to preclude the prosecution from impeaching the defendant with his 2010 conviction for the identical offense of larceny in a building—a conviction involving the defendant's theft of money from his mother's employer.[519] The trial court denied the defense's motion in an especially brief written opinion, the jury convicted the defendant (presumably after the jury heard about the 2010 conviction, although the appellate opinion is silent on this issue), and the defendant appealed.[520] The Michigan Court of Appeals originally remanded the case to the trial court and instructed the circuit judge to "'conduct an analysis regarding whether defendant's prior larceny conviction was of "significant probative value on the issue of credibility," MRE 609(a)(2)(B), and whether the prejudicial effect of the conviction outweighed the probative value. MRE 609(b).'"[521]

The circuit responded to the remand order with a written opinion, which provided in relevant part as follows:

> 5. The court finds that the crime being used for impeachment is dramatically different from the case the Defendant was now [sic] on trial for.
>
> 6. These differences include but are not limited to the following:
>
> A. Theft of cash versus personal items.
>
> B. Theft from the victim's home versus a business.
>
> C. The Defendant knew the victim in the case now before the court and used the victim's invitation to dinner to gain access to the stolen goods.
>
> D. In the prior conviction for theft, the money was taken without any justification proffered by the Defendant. In the case now before the court, the

518. *Id.*
519. *Id.* at 103.
520. *Snyder*, 301 Mich. App. at 103.
521. *Id.* (quoting People v. Snyder, No. 310208, 2013 WL 1223190, at *7-8 (Mich. Ct. App. Mar. 26, 2013)).

> Defendant's position was that the items in question were given to him by the victim and that no theft occurred.
>
> Consequently, the prior conviction was indicative of veracity and as stated in the court's original finding, the prejudicial impact of the conviction is outweighed by its probative value.[522]

The court of appeals began its analysis by noting that felony convictions for theft crimes are presumptively inadmissible unless "certain conditions are met," namely the conditions of Rule 609 (a)(2).[523] The panel emphasized that, pursuant to Rule 609(a)(2), the trial court must find the conviction to have "'*significant* probative value on the issue of credibility.'"[524] The panel observed that the adjective "significant" modifies the words "probative value" in the rule, and it quoted the dictionary definition of "significant" as "'a noticeably or measurably large amount.'"[525] "Significant" probative value, in the panel's explanation, means more than just *any* or *some* probative value. The trial court's opinion was bereft of any such finding of significant probative value.[526] In a per curiam opinion,[527] the panel of Judges Cynthia D. Stephens, Joel P. Hoekstra, and Amy Ronayne Krause[528] observed that "'[t]heft crimes are minimally probative on the issue of credibility,' or, at most, are 'moderately probative of veracity.'"[529] Because of the absence of evidence supporting the evidence's "significant probative value," the panel concluded that the prior conviction was inadmissible but nevertheless proceeded to consider its potential prejudicial effect for the sake of completing the Rule 609 analysis.[530]

Here, because it was the defendant who was the witness subject to impeachment, it was also the trial court's responsibility (had it attributed significant probative value to the prior conviction), pursuant to Rule

522. *Id.* at 103-04.
523. *Id.* at 105.
524. *Id.* (quoting MICH. R. EVID. 609(a)(2)(B)) (emphasis in opinion).
525. *Id.* at 108 (quoting *Merriam-Webster's Collegiate Dictionary* (2003)).
526. *Snyder*, 301 Mich. App. at 109.
527. *Id.* at 100.
528. *Id.* at 113.
529. *Id.* at 106 (citations omitted) (quoting People v. Meshell, 265 Mich. App. 616, 635; 696 N.W.2d 754 (2005), and People v. Allen, 429 Mich. 558, 610-11; 420 N.W.2d 499 (1988)).
530. *Id.* at 109.

609(a)(2), to find "'that the probative value of the evidence outweighs its prejudicial effect.'"[531]

Under the rule, in evaluating prejudicial effect, "'the court shall consider only the conviction's similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify.'"[532] Here, the panel observed, both the offense for which the defendant was on trial—and the offense for which a court had previously convicted him—were the same: larceny in a building.[533] "Accordingly, with regard to prejudicial effect, 'the scale tilts decidedly towards inadmissibility' because 'the risk is high that a jury would convict the defendant of this offense because it knew he was guilty of the identical offense' in a previous case."[534]

Finally, the panel observed that the defendant's testimony "'was very important to the decisional process,'" and, given that the trial was "a one-on-one credibility contest between Lesterhouse and defendant, defendant had no other way to present his version of events other than to testify."[535]

The trial court's error was not harmless, the panel held, because

> the erroneous admission of evidence of defendant's prior conviction undermined the reliability of the verdict and, therefore, that defendant has met his burden to show that the trial court's error was prejudicial. This case presented a true one-on-one credibility contest. The only evidence supporting defendant's position, that the items were given to him, was his own testimony. The only evidence supporting Lesterhouse's position, that the items were stolen, was Lesterhouse's testimony. Both versions are consistent with the items being recovered at Scott's. Indeed, in this case, there is no "untainted evidence" against which to assess the effect of the trial court's error. Nor did the prosecution attempt to provide this court with any examples of untainted evidence, because the prosecution did not file an appellate brief. Accordingly, on the record before us, we determine that it affirmatively appears more probable than

531. *Id.* at 106 (quoting MICH. R. EVID. 609(a)(2)(B)).

532. *Snyder*, 301 Mich. App. at 106 (quoting MICH. R. EVID. 609(b)).

533. *Id.* at 110.

534. *Id.* (quoting People v. Minor, 170 Mich. App. 731, 736-37; 429 N.W.2d 229 (1988)).

535. *Id.* at 110-11 (quoting People v. Allen, 429 Mich. 558, 611; 420 N.W.2d 499 (1988)).

> not that the evidence of the prior conviction affected the outcome of the case.[536]

Accordingly, the court of appeals reversed the defendant's conviction and remanded the case to the trial court for a retrial.[537]

B. Juror Testimony as to Jury Deliberations and "Compromise Verdicts"

Rule 606(b) of both the Michigan and federal rules prohibit almost any inquiry into the proceedings *inside* the jury room, save for allowing jurors to testify that there was a mistake in entering their verdict on the verdict form.[538] That prohibition extends to barring any inquiry into whether the jury, among themselves, compromised their positions in order to reach a verdict.[539] Specifically, the Michigan rules provide that

> a juror may 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.[540]

The corresponding federal rule is virtually identical.[541] The major exception to the rule prohibiting examination of jurors occurs if the court must determine whether something *outside* the jury room influenced what transpired *inside* the jury room, such as "(1) whether extraneous prejudicial information was improperly brought to the jury's attention, [or] (2) whether any outside influence was improperly brought to bear upon any juror."[542] This rule came into play in the mail- and wire-fraud case of *United States v. Kennedy*, in which the defendant sought to inspect the jury foreman's note to the judge and interview jurors to determine whether they had reached a "compromise verdict."[543]

---

536. *Id.* at 112-13 (citations omitted) (quoting People v. Lukity, 460 Mich. App. 484, 495-96; 596 N.W.2d 607 (1999)).

537. *Id.* at 113.

538. MICH. R. EVID. 606(b); FED. R. EVID. 606(b).

539. United States v. Kennedy, 714 F.3d 951, 960 (6th Cir. 2013).

540. MICH. R. EVID. 606(b).

541. FED. R. EVID. 606(b).

542. MICH. R. EVID. 606(b). The federal rule is virtually identical. *See* FED. R. EVID. 606(b).

543. *Kennedy*, 714 F.3d at 959-60.

The case involved Kenneth Kennedy, his wife, Sheila Kennedy, and their close friend Ann Scarborough, who "solicit[ed] money to invest in S. Kennedy's alleged real estate deals and in her proceedings to obtain an inheritance purportedly worth hundreds of millions of dollars, each with the promise of a lucrative return. But the real estate deals and the large inheritance, like the promised returns, proved fictitious."[544]

At trial, K. Kennedy and Scarborough each faced seven counts of wire fraud and five counts of mail fraud, and Scarborough alone faced one count of money laundering.[545]

At the close of all the proof, the district court submitted the case to the jury with instructions that any written communication to the court during the course of deliberations "should never state or specify the vote of the jury at the time." But the jury nonetheless sent a note during its deliberations stating that a specific number of jurors intended "not to vote guilty." The court informed counsel that it had received a jury note indicating the vote count, but the court did not reveal what that count was.[546]

The judge instructed the jurors to continue deliberating and read a standard "deadlocked-jury" instruction.[547] The same day, the jury found K. Kennedy guilty of all the mail-fraud counts and two of the seven counts of wire fraud, and it found Scarborough guilty of money laundering and all seven wire-fraud counts, but not guilty of the five mail-fraud counts.[548] The district court denied K. Kennedy's motion to inspect the jury note and to interview jurors.[549]

In the appellate panel's words, K. Kennedy "speculate[d] that the convictions on some counts but acquittals on others indicate that the jury was not unanimous regarding any of the counts."[550]

A unanimous panel of Judge Ronald L. Gilman, writing for himself and Judges John M. Rogers and Jeffrey S. Sutton,[551] however, concluded that even if defendant's hypothesis were correct, it would provide no basis to interview or examine jurors because such a theory did not fall within one of the exceptions of Rule 606(b).[552] K. Kennedy did not allege external influence or communication with the jury; "[r]ather, it [was] an

544. *Id.* at 953.
545. *Id.* at 956.
546. *Id.*
547. *Id.*
548. *Id.*
549. *Kennedy*, 714 F.3d at 956.
550. *Id.* at 960.
551. *Id.* at 952.
552. *Id.* at 960.

allegation of improper 'internal influence,' which this court has held cannot provide a basis for post-verdict juror interrogation."[553]

Accordingly, the Sixth Circuit affirmed the defendants' convictions and sentences for this and other reasons.[554]

VII. RULES 701-07: LAY AND EXPERT OPINION TESTIMONY

Opinion testimony, when admissible, is an exception to the default rule that a witness must have "personal knowledge" of the facts to which he or she testifies, as the rules forbid speculation.[555] I devote Part VII of this article to the two kinds of opinion testimony, "lay" opinion[556] and expert opinion.[557]

A. Lay Opinion

In Michigan, Rule 701 provides that opinion testimony by non-experts "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue."[558] The corresponding federal rule is virtually identical.[559]

1. Opinion as to a Defendant's Guilt

Some lay opinions are still off limits. Opinion testimony cannot "invade the province of the jury,"[560] for example, by "'express[ing] an opinion on the defendant's guilt or innocence of the charged offense.'"[561] The court of appeals, however, recently explained that this rule does not bar officers from explaining why suspects' explanations of suspicious conduct did not make sense to the investigators and the reasons that these statements led to further investigation.[562] Whether police officers improperly expressed an opinion about Jesse Heft's guilt during a

553. *Id.* (citing United States v. Logan, 250 F.3d 350, 380-81 (6th Cir. 2001)).
554. *Id.* at 962.
555. MICH. R. EVID. 602; FED. R. EVID. 602.
556. MICH. R. EVID. 701; FED. R. EVID. 701.
557. MICH. R. EVID. 702; FED. R. EVID. 702.
558. MICH. R. EVID. 701.
559. FED. R. EVID. 701.
560. People v. Fomby, 300 Mich. App. 46, 52; 831 N.W.2d 887 (2013).
561. *Id.* at 53 (quoting People v. Bragdon, 142 Mich. App. 197, 199; 369 N.W.2d 208 (1985)).
562. People v. Heft, 299 Mich. App. 69, 83; 829 N.W.2d 266 (2012).

Saginaw County jury trial was one of the questions before the court of appeals in the case of *People v. Heft*.[563]

In *Heft*, a Saginaw homeowner heard "pounding" noises in the early-morning hours on January 24, 2011, leading his mother to telephone 911.[564] Officers responded to the area and observed two men, one of whom was the defendant, running and then suspiciously begin walking.[565] The officers detained the two in separate patrol vehicles to further the investigation.[566] During this time, Officer Jeffery Madaj observed that although the temperature was near zero degrees, Heft was "breathing hard and perspiring."[567] "Officer Walker testified that Heft told him that he was just walking around and that he and Kinville had walked there from Cronk Street."[568]

At trial, the prosecutor had the following exchange with Walker:

> Q. Did [Heft's] explanation make sense to you of what they were doing?
>
> A. Not at all.
>
> Q. Why is that?
>
> A. It was about zero degrees, 1:30 in the morning. I didn't want to be out even though I had to, so it—them just walking around at 1:30 in the morning with it almost below zero just did not make sense. They were—while [Heft], I did speak with him, he was breathing hard, he was perspiring, and so that made me feel like something was afoot, something was not right.[569]

The prosecutor also had this exchange with Walker's colleague, Madaj:

> A. [Co-defendant Adam Kinville] said that he and [Heft] were out for a walk, and they had came from, I believe it was, Cronk Street, which Cronk Street, is it's on the northwest side of the city almost to the city limits. It's—I'm just going to take a stab at it. It's probably four miles as the crow flies north, maybe a little bit less.

---

563. *Id.*
564. *Id.* at 71.
565. *Id.*
566. *Id.*
567. *Id.* at 72.
568. *Heft*, 299 Mich. App. at 71-72.
569. *Id.* at 81-82.

Q. So that's quite a ways away?

A. Yes.

Q. It's zero degrees out?

A. Yes.

Q. It's 1:30 in the morning?

A. Yes.

Q. In the dead of winter?

A. Yes.

Q. Did that seem reasonable to you?

A. No it did not.

Q. What did you do based on the fact he made that statement?

A. Based on his statement and the culmination of loud banging noises coming from the—the neighbor had reported, I didn't think that he was being truthful, so I had him have a seat in the rear of my vehicle.[570]

The officers traced footsteps in the snow from the homeowner-complainant's house to a nearby home, where, testimony established, "[t]he door on the house at 220 Cambrey was broken. Inside, the officers saw freshly tracked snow, a pile of heating registers, and that the hot water heater had been broken off from the pantry."[571] Witnesses testified that the co-defendant, Kinville, had lived there as recently as four to six months prior to the burglary.[572] Officers discovered a van parked around the corner, registered to Heft, that "contained flooring tools, which a person could use to acquire scrap metal for sale," Officer Madaj said.[573] A jury convicted Heft of two offenses—breaking and entering with intent to commit larceny and conspiracy to commit the same.[574]

570. *Id.* at 82.
571. *Id.* at 72.
572. *Id.*
573. *Id.*
574. *Heft*, 299 Mich. App. at 71.

In a per curiam opinion, a unanimous panel of Judges William C. Whitbeck, E. Thomas Fitzgerald, and Jane M. Beckering[575] held that the officers did not improperly opine about the defendant's guilt.[576] "[A] fair reading of the officers' testimony reveals that they did not opine about Heft's guilt but, instead, were explaining the steps of their investigations from their personal perceptions."[577] Accordingly, the panel affirmed the defendant's conviction for this and other reasons.[578]

2. Opinion as to the Identity of Individuals in Video Recordings or Photographs

In a similar vein, a witness may not opine for the jury that a person appearing in photographs or video recordings is the same person as the defendant sitting in the courtroom.[579]

A Wayne County jury convicted William Fomby of first-degree felony murder, armed robbery, and carjacking partially on the basis of the testimony of a certified video forensic technician who opined for the jury as to the identity of certain individuals in certain still photos and surveillance footage.[580]

The Michigan Court of Appeals summarized the technician's testimony as follows:

> [Sgt. Ron] Gibson's testimony identified individuals depicted in still-frame photos—taken from the surveillance video—as the same individuals in the actual video. The purpose was to determine whether the two suspect individuals involved in the shooting and whose images were captured in the surveillance video had been to the BP gas station before the murder. Gibson explained what he was trying to capture in each of the six still photographs. Each photo captured specific individuals: the suspects, the victim, or a woman who Gibson saw accompanying the two suspect individuals earlier in the evening before the

575. *Id.* at 70.

576. *Id.* at 83.

577. *Id.* "The testimony of the officers here was not similar to statements that we have concluded are improper opinions about a defendant's guilt." *Id.* (citing People v. Bragdon, 142 Mich. App. 197, 199; 369 N.W.2d 208 (1985), and People v. Row, 135 Mich. 505, 506-07; 98 N.W. 13 (1904)).

578. *Id.* at 85.

579. People v. Fomby, 300 Mich. App. 46, 52-53; 831 N.W.2d 887 (2013) (citing United States v. LaPierre, 998 F.2d 1460, 1465 (9th Cir. 1993), and United States v. Rodriguez-Adorno, 695 F.3d 32, 40 (1st Cir. 2012)).

580. *Id.* at 47-48.

> murder. When asked about the surveillance video, Gibson identified the victim, the suspect with a shotgun, and the suspect who was holding the victim. Gibson identified Exhibit 4 as a still photo depicting the person in the video who was holding the shotgun and Exhibit 9, another still photo from the video, as depicting the person grasping the victim. Gibson never testified that any of the individuals depicted in either the still photographs or in the surveillance video was defendant.[581]

Finding no error in the trial court's admission of the testimony, the court of appeals held that the technician's testimony complied with Rule 701 because, first, his opinion "was rationally based upon his perception."[582] The technician had captured still photographs of video footage and "provided his opinions regarding the identity of individuals within the video as compared to the still images from portions of the video."[583] His purpose in preparing the stills was to examine the video more closely "to determine whether the two suspect individuals had come to the BP gas station earlier in the evening before the murder took place."[584] The court inferred that he had watched the video several times before developing the still photos.[585]

Second, the court explained, Gibson's testimony was helpful to the jury because it "provide[d] a clearer understanding about whether the two suspect individuals depicted in the video had been to the BP gas station earlier in the evening before the murder took place, a fact at issue in the case."[586] Rather than have the jury watch six hours of video footage in the hope that it would discern the relevant portions, Gibson's testimony helped the jury "to correctly and efficiently determine whether the two individuals seen earlier in the footage were the same individuals who were involved in the murder later depicted in the video."[587]

Thus, Judge Jane E. Markey, writing for herself and Judges Christopher M. Murray and William C. Whitbeck, concluded that the testimony was admissible lay opinion, as it "was (1) rationally based [on] his own perception of the video and (2) helpful for the jury to determine whether the two individuals seen committing the crime in the surveillance video had come to the BP gas station earlier in the

581. *Id.* at 49.
582. *Id.* at 50.
583. *Id.* at 50-51.
584. *Id.* at 51.
585. *Fomby*, 300 Mich. App. at 51.
586. *Id.*
587. *Id.* at 52.

evening."[588] Furthermore, the panel concluded, the technician's testimony did not invade the province of the jury because he did not identify the defendant as the culprit in the videos; rather, he merely linked the persons in the still photographs he prepared to the persons in the videos.[589] Accordingly, the court affirmed the defendant's conviction.[590]

3. Lay Opinion as to the Source of Holes in a Vehicle Body

An Allegan County jury convicted Frederick Harris Jr. of two counts of assault with intent to commit great bodily harm less than murder, possession of a firearm during the commission of a felony, and felon in possession of a firearm, and acquitted him of two counts of assault with intent to murder.[591] In the process of repossessing one of the defendant's vehicles, two individuals reported that they observed the defendant exit his house and threaten to kill them while holding a long gun.[592] As they drove away, they saw a vehicle in Harris' driveway start up and begin following them, and they soon heard what sounded like two gunshots.[593]

Sheriff's deputies investigating the incident visited the defendant on his property, where he consented to a search of his pickup truck.[594] Therein they found a .22-caliber rifle and a shotgun, and "[t]hough the truck was covered in a layer of dew, the guns were dry and the rifle smelled as though it had been fired recently."[595]

The question of lay opinion relates to the testimony of a prosecution witness, Ross Mysliwiec, a sheriff's deputy, evidence technician, and gun owner who was familiar with .22-caliber bullets[596] and testified that damage to the victims' truck was consistent with a .22-caliber bullet.[597] However,

> [o]n cross examination, Mysliwiec admitted that the hole or dent could have been caused by a rock or anything "small enough and hard enough." When examined by the court, Mysliwiec testified

588. *Id.* at 53.
589. *Id.*
590. *Id.*
591. People v. Harris, No. 304521, 2012 WL 5236192, at *1, *2-3 (Mich. Ct. App. Oct. 23, 2012), *appeal denied*, 493 Mich. 968; 829 N.W.2d 209 (2013).
592. *Id.* at *1-2.
593. *Id.*
594. *Id.* at *2.
595. *Id.*
596. *Id.* at *6-7.
597. *Harris*, 2012 WL 5236192, at *7.

> that he owned a .22-caliber rifle and that he has "put probably thousands of rounds through it." However, he could not recall whether he had ever witnessed any damage to a hard metal surface from a .22-caliber bullet.[598]

Given this testimony, the trial court granted defense counsel's motion to strike Mysliwiec's opinion testimony as to the source of the damage on the truck and twice instructed the jury to disregard it.[599]

In a per curiam opinion for the court of appeals, a unanimous panel of Judges Jane E. Markey, Douglas B. Shapiro, and Amy Ronayne Krause[600] found no error in the trial court's decision to initially permit Mysliwiec's testimony and then strike it.[601] Without passing judgment on whether the trial court could have permitted the testimony, the panel observed,

> The testimony was not dependent on scientific, technical, or other specialized knowledge. Moreover, Mysliwiec observed the damage to the pickup and, as an evidence technician and owner of firearms, was familiar with .22-caliber bullets. Mysliwiec's testimony would have assisted the jury in determining whether the damage to the window was caused by a bullet. However, after Mysliwiec admitted that he had never seen damage to a hard metal surface caused by a .22-caliber bullet, the trial court sustained defendant's objection to Mysliwiec's opinion testimony and struck the testimony. In other words, the trial court agreed with defendant that Mysliwiec's testimony was inadmissible.[602]

The panel emphasized that the trial court twice instructed the jury to disregard Mysliwiec's testimony and presumed that the jury followed the trial judge's instructions.[603] The trial court had originally permitted the testimony, citing *People v. Oliver*,[604] in which the Michigan Court of Appeals found no error in a trial court's admission of testimony of

---

598. *Id.* at *6-7.

599. *Id.* at *7-8. Perhaps an easier way to elicit this information from Myliwiec would have been to ask him whether the bullet holes were roughly the same size as .22-caliber bullets, after asking the vehicle owner/driver if the holes were there before the shooting incident.

600. *Id.* at *1.

601. *Id.* at *9.

602. *Id.*

603. *Harris*, 2012 WL 5236192, at *9-10.

604. 170 Mich. App. 38; 427 N.W.2d 898 (1988).

officers who "stated that they were experienced in viewing cars which had been dented by bullets and that they had examined Embry's car."[605] In that case, the court held that "[t]heir opinion assisted the court in determining whether the dents in the car were of the type which could have been made by a bullet."[606] Accordingly, the panel affirmed defendant's conviction and sentence for this and other reasons.[607]

B. Expert Testimony

Under Rule 702, 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."[608] The testimony's proponent must establish that "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."[609]

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 evidence,[610] the federal rules explicitly provide that such data need *not* be in evidence.[611] In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the U.S. Supreme Court held that trial courts must "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable."[612] Both Michigan and federal courts follow the "*Daubert*" standards.[613]

The *Daubert* Court explained that the "reliability" determination "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

605. *Id.* at 50.

606. *Id.* at 50-51.

607. *Harris*, 2012 WL 5236192, at *17.

608. MICH. R. EVID. 702. The corresponding federal rule is virtually identical. *See* FED. R. EVID. 702.

609. MICH. R. EVID. 702.

610. MICH. R. EVID. 703.

611. 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.*

612. 509 U.S. 579, 589 (1993).

613. Gilbert v. DaimlerChrysler Corp., 470 Mich. 749, 781; 685 N.W.2d 391 (2004).

facts in issue."[614] Factors the court can consider in determining whether to admit expert testimony are "whether [a scientific] theory or technique can be (and has been) tested";[615] second, "whether the theory or technique has been subjected to peer review and publication";[616] third, "the known or potential rate of error";[617] and, finally, whether the relevant scientific community generally accepts the theory or technique.[618]

Importantly, courts have held that "the threshold inquiry [is] whether the proposed expert testimony will 'assist the trier of fact to understand the evidence or to determine a fact in issue,'" and that requirement is "not satisfied if the proffered testimony is not relevant or does not involve a matter that is beyond the common understanding of the average juror."[619]

1. Expert Testimony as to False Confessions

In *People v. Kowalski*, the Michigan Supreme Court considered the admissibility of expert testimony on false confessions and whether such testimony invaded the province of the jury to assess a witness's credibility.[620] During their investigation, police officers found the brother and sister-in-law of Jerome Walter Kowalski dead in their home.[621] Police questioned Kowalski, the defendant, four times.[622] During the third interview, the defendant, citing a blackout, acknowledged that there was a "50 percent chance" he was responsible.[623] "'I thought I had a dream Thursday, but it was the actual shooting,'" Kowalski said.[624]

> Defendant confessed to the murders during the last interview session, which followed a night in jail. Defendant stated that he went to his brother's home, walked into the kitchen, and murdered his brother and sister-in-law after a brief verbal

614. *Daubert*, 509 U.S. at 592-93.
615. *Id.* at 593.
616. *Id.*
617. *Id.* at 594.
618. *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' may properly be viewed with skepticism." *Id.* (citation omitted).
619. People v. Kowalski, 492 Mich. 106, 122; 821 N.W.2d 14 (2012).
620. *Id.*
621. *Id.* at 110-11.
622. *Id.* at 111.
623. *Id.*
624. *Id.*

> exchange. The record suggests that defendant initially described shooting his brother in the chest from a distance of several feet, although he eventually changed his account after a detective illustrated through role-playing that defendant's first version of events did not corroborate the evidence recovered from the victims' house. At this point in the pretrial proceedings, defendant's confession is the primary evidence implicating him in the murders.[625]

The trial court denied the defendant's motions to suppress his confession.[626] The prosecution then moved to exclude two defense witnesses who would provide expert testimony as to false confessions.[627] After conducting a *Daubert* hearing, the trial court granted the prosecution's motion to exclude the testimony,[628] an order that the Michigan Court of Appeals affirmed after granting Kowalski's interlocutory application for leave to appeal.[629] The Michigan Supreme Court granted leave to appeal on the following questions:

> (1) whether the defendant's proffered expert testimony regarding the existence of false confessions, and the interrogation techniques and psychological factors that tend to generate false confessions, is admissible under MRE 702; (2) whether the probative value of the proffered expert testimony is substantially outweighed by the danger of unfair prejudice; and (3) whether the Livingston Circuit Court's order excluding the defendant's proffered expert testimony denies the defendant his constitutional right to present a defense.[630]

Justice Mary Beth Kelly, writing for a plurality[631] of herself, Chief Justice Robert P. Young Jr., and Justice Brian K. Zahra,[632] commenced the opinion by making a determination of whether the issue of false

625. *Kowalski*, 492 Mich. at 111.
626. *Id.*
627. *Id.* at 112.
628. *Id.* at 115-17.
629. *Id.* at 117-18.
630. *Id.* at 118-19.
631. I use the term "plurality" because the opinion of the court bore the signatures of only three justices. However, Justice Michael F. Cavanagh's concurring opinion for himself and two other justices established that six justices were largely in agreement. *See Kowalski*, 492 Mich. at 144-46 (Cavanagh, J., concurring). Accordingly, I must note that virtually all of the views that Justice Kelly expressed for the plurality carried the weight of a six-vote majority.
632. *Id.* at 144.

confessions is outside the common knowledge of jurors, because if "'the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute,' then expert testimony is unnecessary."[633]

Justice Kelly explained that "certain groups of people are known to exhibit types of behavior that are contrary to common sense and are not within the average person's understanding of human behavior."[634] In support of this proposition, she cited *People v. Peterson*, in which the court held that expert psychological testimony in child-sexual-abuse cases can explain "delayed reporting of abuse or retraction of accusations that psychologists understand to be common among abuse victims but that jurors might interpret as being inconsistent with abuse."[635] Similarly, in *People v. Christel*, the court permitted expert testimony as to battered-woman syndrome in cases involving domestic violence because such victims "might 'deny, repress, or minimize the abuse' . . . . [Thus,] this type of testimony was 'relevant and helpful when needed to explain a complainant's actions.'"[636] Accordingly, in some instances, she explained, "an expert's specialized testimony may enlighten the jury so that it can intelligently evaluate an experience that is otherwise foreign" or a behavior that is "contrary to common sense and . . . not within the average person's understanding of human behavior."[637]

The plurality held that "expert testimony bearing on the manner in which a confession is obtained and how a defendant's psychological makeup may have affected the defendant's statements is beyond the understanding of the average juror and may be relevant to the reliability and credibility of a confession."[638]

The court considered the other requirements of Rule 702 as it related to each expert. Both would testify as to the existing research and literature on false confessions.[639] The first of two witnesses, social psychologist Leonard Leo, testified at the *Daubert* hearing and

---

633. *Id.* at 123.

634. *Id.* at 124.

635. *Id.* at 123 (citing People v. Peterson, 450 Mich. 349, 363; 537 N.W.2d 857 (1995)).

636. *Id.* at 124 (citing People v. Christel, 449 Mich. 578, 580, 585; 537 N.W.2d 194 (1995)).

637. *Kowalski*, 492 Mich. at 124.

638. *Id.* at 126 (citing People v. Hamilton, 163 Mich. App. 661, 663; 415 N.W.2d 653 (1987)).

639. *Id.* at 132.

> explained that his research classified each confession he believed to be false as either a "proven false" confession, a "highly probable false" confession, or a "probable false" confession. This categorization involved comparing the narrative of a defendant's confession with other evidence, checking whether the confession led to independent evidence, and looking for other indicia of reliability, with a researcher determining whether the confession fell into one of the three categories of false confessions. While some of the facts involved in this analysis came "directly from case files," many were gleaned from secondary sources, including popular media accounts. In addition to classifying confessions by his confidence in their falsity, Leo also classified confessions as "voluntary false confessions," "stress-compliant false confessions," "coerced-compliant false confessions," "coerced-persuaded false confessions," or "non-coerced-persuaded false confessions."[640]

Justice Kelly explained that,

> [o]n the basis of this research, Leo proposed to testify that "false confessions are associated with certain police interrogation techniques," that "some of those interrogation techniques were used in this case," and that "risk factors associated with false and unreliable confessions, especially persuaded false confessions, were [also] present in this case." In support of Leo's opinions, defendant offered research conducted by Leo and by others. Some of this research appeared in peer-reviewed scientific journals, while some appeared in law reviews, which are not peer-reviewed.[641]

The plurality agreed with the trial court that Leo's testimony was unreliable.[642] "Leo decided whether a confession was false on the basis of information he gathered from sources such as newspaper accounts and attorneys representing the confessors."[643] The plurality continued,

> Among the circuit court's observations was that Leo "starts with the conclusion that the confession is false and then he works backwards" to find commonalities. The circuit court concluded

640. *Id.* at 112-13 (citations omitted).
641. *Id.* at 114.
642. *Id.* at 132-34.
643. *Kowalski*, 492 Mich. at 132.

> that, rather than yielding factors common to all false confessions, Leo's method seemed to yield only factors common to confessions Leo believed to be false. This also made it impossible to test Leo's research or compute its rate of error. The circuit court also noted that because Leo did not have a "reliable means to have a study group" that excluded extraneous factors, he had "no ability to estimate the frequency of false confessions." The circuit court found troubling the number of confessions in Leo's studies that involved factors not present in this case, such as a defendant's youth or mental incapacity. Finally, the circuit court was troubled by a lack of "a random sample of confessions, true and false."[644]

Thus, the plurality held, the trial court did not abuse its discretion in excluding Leo's testimony and affirmed the court of appeals' ruling on this issue.[645]

The second of the two witnesses was Jeffrey Wendt, a clinical and forensic psychologist, who would testify "that the 'circumstances of Mr. Kowalski's confession were consistent with the literature on false confessions' and that the interaction between defendant and police 'was consistent with a coerced internalized confession.'"[646]

> Wendt testified that he had administered a battery of standard psychological tests on defendant, performed an extensive clinical interview of defendant, and reviewed both the police reports recounting the circumstances of defendant's police interrogation as well as the transcripts of those interrogations. Wendt testified that these types of data are routinely used at the Center for Forensic Psychiatry. Wendt then combined all these "data sources" to form a psychological profile, which allowed him to discuss how defendant's traits affected his ability to interact with other people. Lastly, Wendt proposed to testify that "[t]he circumstances of [defendant's] confession were consistent with the literature on false confessions" and that the interaction between defendant and the police "was consistent with a coerced internalized confession."[647]

---

644. *Id.* at 132-33.

645. *Id.* at 133-34 (citing People v. Kowalski, No. 294054, 2010 WL 3389741, at *9-10 (Mich. Ct. App. Aug. 26, 2010)).

646. *Id.* at 112.

647. *Id.* at 114-15 (citations omitted). "The Center for Forensic Psychiatry, located

Wendt explained that Kowalski's

> lack of interpersonal strength or drive leaves him vulnerable to being influenced by others. . . . The combination of his, of his cognitive factors in terms of his anxiety and depression; his interpersonal factors, in terms of his, low assertiveness, leave him particularly vulnerable to suggestion by others and influence by others, particularly people who are in positions of authority.[648]

Justice Kelly concluded that Wendt, unlike Leo, would testify "independent of the false-confession literature" that the court found so problematic with Leo's testimony.[649] She noted that

> Wendt testified at length about the data he had gathered from an array of psychological tests he performed on defendant, his clinical interviews of defendant, and his review of the transcripts of defendant's interrogation. Wendt also explained the methods he applied to this data, how he compiled a psychological profile, and what opinions he formed from this analysis.[650]

The trial court, the Michigan Supreme Court plurality concluded, erred when it excluded Wendt's testimony, as, contrary to the trial judge's understanding, Wendt's testimony was not premised on controversial false-confession literature.[651] Accordingly, the court remanded the case to the trial court to again rule on the issue of Wendt's testimony, applying Rule 702 in the process.[652] Justice Kelly cautioned the trial court to use care in conducting Rule 403 balancing and, in doing so, to "consider whether the limits that this Court imposes on expert testimony of this nature and the possibility of a limiting jury instruction reduce the danger of any unfair prejudice."[653] The trial court's original Rule 403 balancing derived from a "faulty" Rule 702 analysis that resulted in its conclusion that Wendt's testimony had no probative value:

---

outside Ann Arbor, hosts Michigan's only certified forensic facility and conducts all competency and criminal responsibility evaluations ordered in Michigan criminal proceedings." *Id.* at 114 n.8.

648. *Kowalski*, 492 Mich. at 114 n.9 (internal quotation marks omitted).

649. *Id.* at 135.

650. *Id.* at 136.

651. *Id.*

652. *Id.*

653. *Id.* at 136-38.

> Accordingly, . . . if the proposed testimony otherwise meets the requirements of MRE 702, the circuit court must consider this benefit in assessing the probative value of the testimony. Because it failed to weigh Wendt's testimony on the probative side of the analysis, the circuit court abused its discretion by excluding the evidence under MRE 403.[654]

Lastly, Justice Kelly addressed the question of whether excluding such expert testimony violated the defendant's Sixth Amendment right to present a defense.[655] "Criminal defendants have a constitutional right to 'a meaningful opportunity to present a complete defense.'"[656] Having said that, Justice Kelly observed that "while the right to present a defense is a fundamental part of due process, 'it is not an absolute right,' and '[t]he accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'"[657]

Evidentiary rules that leave little or no discretion to trial judges to admit reliable defense evidence can implicate the Sixth Amendment right to present a defense, such as a rule prohibiting hypnotically refreshed testimony.[658] In this case, however, the justices concluded that

> [t]he very act of conducting a *Daubert* hearing establishes that a circuit court's gatekeeping role under MRE 702 is neither "arbitrary" nor "disproportionate to the ends [it is] asserted to promote" because "the Constitution permits judges to exclude evidence that is . . . only marginally relevant or poses an undue risk of harassment, prejudice, [or] confusion of the issues" and evidence that fails to meet the requirements of MRE 702 will always be only marginally relevant or risk confusing the trier of fact.[659]

Accordingly, the court affirmed the trial court and the Michigan Court of Appeals in excluding Leo's testimony and remanded the case to

---

654. *Kowalski*, 492 Mich. at 137-38.

655. *Id.* at 138-39.

656. *Id.* at 138-39 (quoting Crane v. Kentucky, 476 U.S. 683, 690 (1986)).

657. *Id.* at 139 (citations omitted) (quoting People v. Hayes, 421 Mich. 271, 279; 364 N.W.2d 635 (1984)).

658. *Id.* at 140-41 (citing Rock v. Arkansas, 483 U.S. 44, 56 n.12 (1987)).

659. *Id.* (quoting Holmes v. South Carolina, 547 U.S. 319, 326-27 (2006), and citing *Crane*, 476 U.S. at 690).

the trial court to reconsider Wendt's testimony with a proper Rule 702 analysis.[660]

Justice Michael F. Cavanagh, writing for himself and now-former Justices Marilyn J. Kelly and Diane M. Hathaway,[661] concurred with the plurality that the trial court did not abuse its discretion in excluding Leo's testimony, although he believed that Leo's testimony presented a "close evidentiary question."[662] The concurring justices agreed that a remand to evaluate Wendt's testimony was proper but told the court to take a closer look at "the relationship between the evidentiary rules and defendant's constitutional right to present a defense."[663] Justice Cavanagh added that, "[w]hen the accuracy of a potential conviction rests in large part on the accuracy of a confession, I believe that a trial court should give due consideration to the importance of a defense theory that seeks to undermine the accuracy of the confession."[664]

Justice Stephen J. Markman would have affirmed the trial court's exclusion of both witnesses.[665] Justice Markman's main concern was that the expert testimony was invading a traditional role of the jury of assessing witness credibility.[666] "It is hard to think of a function more central to the traditional jury role than to ascertain the credibility of ordinary witnesses and other persons," he wrote.[667] He explained,

> To introduce into the jury process "expert" witnesses who will testify that persons will sometimes falsely confess is to belabor the obvious and create the illusion that there is some "scientific, technical, or other specialized knowledge" that will assist the jury in carrying out its core responsibility of determining credibility. Thus, the introduction of "experts" into the realm of the mundane does not merely risk *distracting* the jury, but risks the prospect of jurors increasingly *subordinating* their own commonsense judgments—precisely the kind of judgments that form the rationale for the jury system in the first place—to the

660. *Kowalski*, 492 Mich. at 144.
661. *Id.* at 146 (Cavanagh, J., concurring).
662. *Id.* at 145.
663. *Id.* at 145-46 (citing People v. Barrera, 451 Mich. 261, 269; 541 N.W.2d 280 (1996)).
664. *Id.*
665. *Id.* at 146 (Markman, J., concurring in part and dissenting in part).
666. *Kowalski*, 492 Mich. at 147-48.
667. *Id.* at 147.

> false *appearance* of expertise suggested by the presence of expert psychological testimony.[668]

Justice Markman opined that the proposition that false confessions occur at times is not one "that is outside the 'common knowledge' of the average juror. Jurors, as ordinary members of the community with ordinary measures of judgment, common sense, experience, and personal insight, understand that people sometimes falsely confess, although jurors also understand that false confessions are far from the norm."[669] Addressing Wendt's testimony, Justice Markman noted that "when asked whether 'people who have the psychological factors [that make them susceptible to giving false confessions] that you've talked about can just as equally truly confess,' Wendt answered, 'Correct.'"[670] He approvingly quoted the Michigan Court of Appeals' analysis of Wendt's testimony:

> Dr. Wendt admitted that the same personality traits that correlate with false confessions can also lead to true confessions. Dr. Wendt could not identify a specific psychological factor that distinguishes a person who makes a false confession from one who makes a true confession. Thus, his testimony would have been of no help to the jury because the jury would have still been required to weigh defendant's confession against the other evidence in the case to determine whether it was credible.[671]

Justice Markman concurred with U.S. Supreme Court Justice Clarence Thomas' position that "[a] fundamental premise of our criminal trial system is that 'the jury is the lie detector.'"[672] Justice Markman emphasized that holdings such as those in *Kowalski* would "open up the floodgates for expert testimony on a host of reasonably obvious matters of human behavior that have never been generally thought to require expert testimony. As a result, criminal trials will be increasingly converted into battles of psychological experts."[673] He concluded, "[M]aking . . . commonsense credibility determinations has always been at the heart of the jury's role within our criminal justice system, and this

---

668. *Id.* at 147-48.
669. *Id.* at 150.
670. *Id.* at 156 n.5.
671. *Id.* at 156 (quoting People v. Kowalski, No. 294054, 2010 WL 3389741, at *5 (Mich. Ct. App. Aug. 26, 2010)).
672. *Kowalski*, 492 Mich. at 159 (quoting United States v. Scheffer, 523 U.S. 303, 313-14 (1998)).
673. *Id.* at 166.

core responsibility should not, in my judgment, be supplanted by a growing role for psychological expert testimony."[674]

2. Lie Detector Testimony

A federal grand jury indicted Lorne Allan Semrau, a Ph.D. psychologist and operator of two entities that provided psychiatric care to residents of nursing homes, with sixty counts of healthcare fraud, twelve counts of money laundering, and one count of criminal forfeiture.[675] The government alleged that, although Semrau's employees had rendered psychiatric services that Medicare reimbursed at a lower rate, Semrau's firms knowingly submitted claims to the government falsely alleging he performed other services that Medicare happened to reimburse at a

674. *Id.* at 168. *Kowalski* presents a clear tension between two fundamental doctrines of American trial practice, which the plurality and the dissent did not fully explore: the prohibition on speculation, *see* Shaw v. City of Ecorse, 283 Mich. App. 1, 14-15; 770 N.W.2d 31 (2009), and a defendant's constitutional privilege against self-incrimination. *See* People v. Dunn, 46 Mich. App. 226, 230-31; 208 N.W.2d 239 (1973).

Certainly, most defense trial attorneys would prefer to attack the confession extrinsically with expert testimony than place their client on the stand to attack the confession directly, subject to the prosecution's cross-examination. Justice Markman observed that, even in the absence of expert testimony, "defense counsel would be left with what is, in my opinion, the best response to the confession: defendant's *own* explanation regarding why he confessed." *Kowalski*, 492 Mich. at 158 n. 7159 (emphasis added) (Markman, J., dissenting). Wendt could not testify that his research or the circumstances of the case "make it more or less likely that the confession is either true or false, [thus] the expert's testimony is irrelevant." *Id.* at 156 (citing MICH. R. EVID. 401). Thus, it appears that Wendt's testimony would constitute speculation, which "is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." *Shaw*, 283 Mich. App. at 15 (citing Skinner v. Square D Co., 445 Mich. 153, 164; 516 N.W.2d 475 (1994)). The defendant's testimony that he falsely confessed, however, would be *direct* evidence of a false confession.

Thus, in most circumstances, Justice Markman appears to suggest, a defendant *must* take the stand if the defense seeks to attack the confession as false. Of course, such a ruling pressures defendants who confessed to take the stand at trial subject to cross-examination and explain why they "falsely confessed." A defendant could corroborate this testimony with other evidence, such as alibi testimony (that the defendant was elsewhere during the crime) or evidence that suggests a mistaken identification.

A confession is powerful evidence, and it may well be that the defendant's testimony will almost always be the principal manner of attacking a non-coerced but allegedly "false" confession. A confession is powerful evidence of guilt, and leaving it to the defendant to explain why he falsely confessed is not unfair. As the U.S. Supreme Court held in *Barnes v. United States*, "Introduction of any evidence, direct or circumstantial, tending to implicate the defendant in the alleged crime increases the pressure on him to testify. The mere massing of evidence against a defendant cannot be regarded as a violation of his privilege against self-incrimination." 412 U.S. 837, 847 (1973).

675. United States v. Semrau, 693 F.3d 510, 513, 515 (6th Cir. 2012).

higher rate.[676] One of the pieces of evidence Semrau tried to introduce at his trial was the result of a functional magnetic resonance imaging (fMRI) test "that found he was generally truthful when, during the test, he said his billing decisions were made in good faith and without an intent to defraud."[677]

Prior to trial, a federal magistrate judge held a *Daubert* hearing, taking the testimony of the proponent of fMRI testing, Steven J. Laken, and recommended the district court exclude evidence of the test.[678] The district judge adopted the magistrate's report and recommendation in its entirety.[679] A jury convicted Semrau of three counts of healthcare fraud but acquitted him of the remaining counts.[680]

An fMRI scan involves a subject lying down on a bed while a "donut-shaped" magnetic core surrounds the upper part of his body.[681] The magnetic device then receives information about the patient's Blood Oxygen Level Dependent (BOLD) response.[682] Specialists can compare the BOLD responses when an individual rests to responses when they perform various tasks and then monitor changes in brain activity.[683]

The Sixth Circuit described Laken's research as follows:

> Dr. Laken began working closely with a small group of researchers in this field in or around 2003 and conducted a series of laboratory studies to determine whether fMRI could be used to detect deception. Generally, these studies involved a test subject performing a task, such as "stealing" a ring or watch, and then scanning the subject while he or she answered questions about the task. The subjects were usually offered a modest monetary incentive if their lie was not detected. Dr. Laken agreed during cross-examination that he had only conducted studies on such "mock scenarios" and was not aware of any research in a "real-life setting" in which people are accused of "real crimes." He also testified that his studies examined only subjects between the ages of eighteen and fifty, although "we don't see any decreasing or increasing or any changes across

676. *Id.* at 514-15.
677. *Id.* at 515.
678. *Id.* at 516 n.2 (citing United States v. Semrau, No. 07-10074 Ml/P, 2010 WL 6845092 (W.D. Tenn. June 1, 2010)).
679. *Id.*
680. *Id.* at 515-16.
681. *Semrau*, 693 F.3d at 517.
682. *Id.*
683. *Id.*

> accuracy rates in those individuals." Dr. Semrau was sixty-three years old at the time he underwent testing.
>
> Based on these studies, as well as studies conducted by other researchers, Dr. Laken and his colleagues determined the regions of the brain most consistently activated by deception and claimed in several peer-reviewed articles that by analyzing a subject's brain activity, they were able to identify deception with a high level of accuracy. During direct examination at the *Daubert* hearing, Dr. Laken reported these studies found accuracy rates between eighty-six percent and ninety-seven percent. During cross-examination, however, Dr. Laken conceded that his 2009 "Mock Sabotage Crime" study produced an "unexpected" accuracy decrease to a rate of seventy-one percent.[684]

The district court and the appellate panel, as well as Laken himself, conceded that fMRIs as lie detectors have "'a huge false positive problem' in which people who are telling the truth are deemed to be lying around sixty to seventy percent of the time."[685] A test subject's fatigue can also reduce accuracy in the lie-detection tests by twenty-five percent.[686]

> Prior to the scheduled test date, Dr. Laken developed a set of twenty neutral questions and twenty control questions that would be asked during the scanning. The neutral questions—such as "Is today Tuesday?"—provided Dr. Laken with the "baseline" for the results to improve accuracy. The control questions—such as "Have you ever used illegal drugs?" and "Have you ever lied to a court?"—are included "just to fill up empty space" and do not directly contribute to the final analysis. Attorney Gordon and Dr. Laken co-developed Specific Incident Questions ("SIQs") directly relating to the upcoding and AIMS charges. The SIQs for the first scan included questions such as "Did you ever receive varying instructions or guidance regarding which codes to bill, including being told that 99312 would be the appropriate code to use instead of 90862?" and "Did you bill CPT Code 99312 to cheat or defraud Medicare?" The SIQs for the second

684. *Id.* at 517 (citing F. Andrew Kozel et al., *Functional MRI Detection of Deception After Committing a Mock Sabotage Crime*, 54 J. FORENSIC SCI. 220, 228 (2009)).

685. *Id.* at 517-18.

686. *Id.* at 518.

> scan included questions such as "Did you know that AIMS tests performed by psychiatrists [were] not a necessary service that could be separately billed?" The prosecution was not notified that Dr. Semrau was going to take the deception test and thus lacked an opportunity to submit its own questions to Dr. Laken for use during the test or to observe the testing procedures.[687]

Laken would tell the subjects the questions ahead of time to help them prepare.[688]

The Sixth Circuit summarized the Semrau tests and results as follows:

> [O]n December 30, 2009,] Dr. Semrau was placed in the scanner and a display was positioned over his head that flashed the questions. The order of the questions was made random and each the response was recorded. Each scan took around sixteen minutes. During a brief break between scans, Dr. Semrau expressed some fatigue but did not request a longer break. After the second scan, however, Dr. Semrau complained about becoming "very fatigued" and having problems reading all the questions.
>
> On January 4, 2010, Dr. Laken analyzed the scans using his fMRI testing protocol and found that Dr. Semrau answered an appropriate number of questions, responded correctly, and had no excess movement. From the first scan, which included SIQs relating to upcoding, the results showed that Dr. Semrau was "not deceptive." However, from the second scan, which included SIQs relating to AIMS tests, the results showed that Dr. Semrau was "being deceptive." Dr. Laken's report noted, however, that "testing indicates that a positive test result in a person reporting to tell the truth is only accurate 6 percent of the time and may be affected by fatigue." Based on his findings for the second test, Dr. Laken suggested that Dr. Semrau be administered another fMRI test on the AIMS tests topic, but with shorter questions and conducted later in the day to reduce the effects of fatigue. Dr. Laken developed the revised set of SIQs for the third scan.
>
> The third scan was conducted on January 12, 2010 at around 7:00 p.m. According to Dr. Laken, Dr. Semrau tolerated it well

687. *Semrau*, 693 F.3d at 518.
688. *Id.* at 519 n.7.

> and did not express any fatigue. Dr. Laken reviewed this data on January 18, 2010 and concluded that Dr. Semrau's brain activity showed he was "not deceptive" in his answers. He further testified that, based on his prior studies, the third test was "more valid" because Dr. Semrau "didn't have fatigue" and the data produced "has a very high probability of being correct." In fact, Dr. Laken's report stated that "a finding such as this is 100% accurate in determining truthfulness from a truthful person."[689]

During his testimony at the *Daubert* hearing, however, Laken conceded that it was "certainly possible" that Semrau was lying on some of the questions and that he could not establish that the defendant was testifying truthfully in response to any individual question, only that he was generally truthful in response to the battery of questions.[690] "Dr. Laken was unable to state the percentage of questions on which Dr. Semrau could have lied while still producing the same result."[691]

The Sixth Circuit panel of Judge Jane B. Stranch, Judge Helene N. White, and Ninth Circuit Judge Jerome Farris[692] then examined the magistrate's weighing of the *Daubert* factors. It noted that the prosecution did not challenge the magistrate's weighing the first two factors in Semrau's favor—"'[T]he underlying theories behind fMRI-based lie detection are [1] capable of being tested, and at least in the laboratory setting, have been subjected to some level of testing. It also appears that the theories [2] have been subjected to some peer review and publication.'"[693]

Fatal to Semrau was the third *Daubert* factor—"'the known or potential rate of error in using a particular scientific technique and the standards controlling the technique's operation.'"[694] The panel approvingly quoted testimony of a prosecution statistician, Peter Imrey, who observed,

> "There are no quantifiable error rates that are usable in this context. The error rates [Dr. Laken] proposed are based on almost no data, and under circumstances [that] do not apply to the real world [or] to the examinations of Dr. Semrau." Dr.

---

689. *Id.* at 519.
690. *Id.*
691. *Id.*
692. *Id.* at 512. Judge Farris sat by designation on the Sixth Circuit panel. *Id.* at 510.
693. *Semrau*, 693 F.3d at 521 (quoting United States v. Semrau, No. 07-10074 Ml/P, 2010 WL 6845092, at *10 (W.D. Tenn. June 1, 2010)).
694. *Id.* at 520, 521 (quoting United States v. Bonds, 12 F.3d 540, 558 (6th Cir. 1993)).

> Imrey also stated that the false positive accuracy data reported by Dr. Laken does not "justify the claim that somebody giving a positive test result . . . [h]as a six percent chance of being a true liar. That simply is mathematically, statistically and scientifically incorrect."[695]

This conclusion alone justified the trial court's decision to exclude Laken's testimony.[696]

The panel further noted its doubts that any experiment could adequately test lie-detection instruments, as Laken himself conceded "that 'the issue that one faces with lie detection, is what is the real world baseline truth[?]'"[697] Furthermore, the court observed, "only Dr. Semrau knows whether he was lying when he denied intentional wrongdoing, so there is no way to assess with complete certainty the accuracy of the two results finding he was 'not deceptive' (not to mention the one finding that he *was* deceptive)."[698]

The fourth *Daubert* factor, whether the methods and principles hold general acceptance in the scientific community, did not support Laken's fMRI lie-detection testing.[699] Judge Stranch then made additional observations that buttressed the court's analysis: among them, that 1) the sixty-three-year-old defendant was significantly older than the eighteen- to fifty-year-olds who participated in initial studies, and 2) that Semrau participated in a third study after the first two produced differing results.[700] "Dr. Laken's 'decision to conduct a third test begs the question whether a fourth scan would have revealed Dr. Semrau to be deceptive again.'"[701] Laken's attempts to minimize the significance of the "deceptive" finding in the second test were unavailing.[702] The panel explained that,

> [a]lthough Dr. Laken offered various plausible sounding explanations and theories for why these distinctions from his prior studies should be irrelevant, the record reveals uncertainty from the relevant scientific community as to whether and to what extent the distinctions may, in fact, matter. It is likely that jurors,

695. *Id.* at 521 (alteration in original).
696. *Id.*
697. *Id.* at 522 (alteration in original).
698. *Id.*
699. *Semrau*, 693 F.3d at 522.
700. *Id.*
701. *Id.* (quoting United States v. Semrau, No. 07-10074 Ml/P, 2010 WL 6845092, at *13 (W.D. Tenn. June 1, 2010)).
702. *Id.* at 522-23.

> most of whom lack advanced scientific degrees and training, would be poorly suited for resolving these disputes and thus more likely to be confused rather than assisted by Dr. Laken's testimony.[703]

Accordingly, the panel concluded the district court did not abuse its discretion in excluding Laken's testimony.[704]

The panel also affirmed the district court's exclusion of the fMRI analysis on Rule 403 grounds.[705] "First, the test was unilaterally obtained without the Government's knowledge, so the Government had no supervision of the testing and Dr. Semrau risked nothing because the results would never have been released had he failed."[706] Second, using the test results to bolster Semrau's credibility would have invaded the province of the jury given that "'the aura of infallibility attending [lie-detection] evidence can lead jurors to abandon their duty to assess credibility and guilt.'"[707] "Finally," the appellate panel observed, "a jury would not be assisted by hearing that Dr. Semrau's answers were truthful 'overall' without learning which specific questions he answered truthfully or deceptively."[708] Accordingly, the Sixth Circuit affirmed Semrau's conviction for this and other reasons.[709]

3. Expert Testimony in Post-Conviction Proceedings Regarding Whether Trial Counsel's Conduct was Ineffective Under the Sixth Amendment

Michigan courts appear to disfavor expert testimony in post-conviction proceedings during which a criminal defendant seeks to vacate a verdict on the ground that his trial counsel was ineffective within the meaning of the Sixth Amendment right to counsel.[710] To explain the court's ruling, I return to *People v. Marshall*, a Jackson County case I first discussed in Part IV.A.3, in which a jury convicted Dustin Arthur Marshall of assault with intent to commit murder, possession of a firearm by a felon, and possession of a firearm during the

---

703. *Id.* at 523.

704. *Id.*

705. *Semrau*, 693 F.3d at 524.

706. *Id.* at 523.

707. *Id.* (quoting United States v. Scheffer, 523 U.S. 303, 313-14 (1998)). The court noted that this concern renders both fMRI and polygraph lie-detection tests problematic. *Id.* at 523 n.11.

708. *Id.* at 523.

709. *Id.* at 531.

710. People v. Marshall, 298 Mich. App. 607, 619; 830 N.W.2d 414 (2012).

commission of a felony.[711] The prosecution had alleged that the defendant was responsible for a shooting in the city of Jackson on July 5, 2009.[712]

After the guilty verdicts, the defendant filed a motion for a new trial, alleging that his trial attorney's performance deprived him of his right to the effective assistance of counsel within the meaning of the Sixth Amendment and the Michigan Constitution.[713]

> To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different.[714]

The trial court held a postconviction proceeding known as a *Ginther*[715] hearing to take testimony and make a determination regarding the defendant's claim of ineffective assistance of trial counsel.[716] Whereas the defendant testified at the hearing that he had wanted his trial attorney to pursue a claim of self-defense, trial counsel testified that self-defense would have been his first choice as well, but his client wanted to pursue a reasonable-doubt strategy.[717] The attorney testified that when he and his client discussed a self-defense strategy, his client refused to provide names of witnesses who could testify to his claim of self-defense and did not want to disburse funds to hire a private investigator to explore the issue.[718] The trial court credited the trial attorney's testimony over the defendant's and denied the motion for a new trial on Sixth Amendment grounds.[719]

On appeal, the defendant argued that the trial court erred during the *Ginther* hearing when it denied his request to present expert testimony as to "whether defense counsel's performance adhered to community standards and norms."[720] The trial court, the appellate panel noted, was

---

711. *Id.* at 610.
712. *Id.*
713. *Id.* at 611 (citing U.S. CONST. amend. VI; MICH. CONST. art I, § 20; Strickland v. Washington, 466 U.S. 668, 686 (1984)).
714. *Id.* (citing People v. Jordan, 275 Mich. App. 659, 667; 739 N.W.2d 706 (2007)).
715. People v. Ginther, 390 Mich. 436; 212 N.W.2d 922 (1973).
716. *Marshall*, 298 Mich. App. at 612-13.
717. *Id.*
718. *Id.*
719. *Id.* at 613.
720. *Id.* at 619.

the trier of fact for the *Ginther* hearing's purposes, and, for purpose of Rule 702, "found that the proposed testimony would not be helpful because it was 'well aware of the community standards on this issue.'"[721] Accordingly, in a per curiam opinion, the panel of Judges Deborah A. Servitto, E. Thomas Fitzgerald, and Michael J. Talbot[722] affirmed the trial court's denial of the defendant's motion for a new trial for this and other reasons.[723]

4. Expert Testimony of Investigators and Forensic Accountants in Financial-Crimes Cases

The embezzlement case of *United States v. Nixon*[724] illustrates some of the evidentiary issues that can arise in financial-crimes trials, including the overlap between lay and expert opinion, the qualification of experts, and the danger of impermissible testimony as to the law.[725]

Ronda Nixon worked as a bookkeeper at a Catlettsburg, Kentucky, law firm, where she "paid the firm's bills, kept track of the firm's finances in a general ledger, and purchased office supplies."[726] As part of her duties, the defendant had access to the firm's American Express card.[727] In addition to her bookkeeping duties with the firm, the defendant sold Mary Kay cosmetics products in her free time and, to that end, established an account with ProPay, an online service that allows small businesses to accept credit-card payments.[728]

> To charge a client's credit card through ProPay, a consultant logs into her ProPay account online and enters the client's credit card information and the amount of the charge. ProPay then charges the client's credit card the amount specified and deposits that amount, minus ProPay's transaction fee, into the consultant's ProPay account. The consultant can withdraw or transfer cash from her ProPay account as needed, just as one can do with a typical checking account.[729]

721. *Id.*
722. *Marshall*, 298 Mich. App. at 609.
723. *Id.* at 628.
724. 694 F.3d 623 (6th Cir. 2012).
725. *Id.* at 627-32.
726. *Id.* at 626.
727. *Id.*
728. *Id.*
729. *Id.*

Among the defendant's sins was to deposit in her personal ProPay account the proceeds of eight $350 ($2,800) and three $300 ($900) charges to her employer's American Express card, without, of course, the law firm's authorization.[730]

During Nixon's trial for bank fraud, wire fraud, and aggravated identity theft, Benjamin Egan, a financial-crimes investigator with the FBI,

> opined that, based on his review of financial statements, Nixon transferred funds from the trust account to the checking account in order to pay credit card bills that could not otherwise have been paid with checking account funds. Similarly, based on Nixon's confession to him, he confirmed his belief that she stole money from Pruitt.[731]

Robert Rufus was a forensic accountant whom Nixon's employer hired to investigate suspicious charges on the firm's credit-card account.[732] Rufus explained that

> "[f]orensic accounting is the science where you combine investigative and accounting skills together. . . . It's a very comprehensive analysis." Rufus's own investigative report was admitted into evidence, and he testified as to the conclusions in that report, including that Nixon "converted to her own personal use the firm's lawful money, employing four different methods of embezzlement."[733]

i. Overlap Between Lay and Expert Opinion

The reason Rule 701—the rule governing lay opinion—excludes expert opinion is "to preclude a party from surreptitiously circumventing 'the reliability requirements set forth in Rule 702 [of the Federal Rules of Evidence] through the simple expedient of proffering an expert in lay witness clothing' and to 'ensure that a party will not evade the expert witness disclosure requirements.'"[734]

---

730. *Nixon*, 694 F.3d at 626-27.

731. *Id.* at 628.

732. *Id.* at 629.

733. *Id.* (alteration in original).

734. *Id.* at 627-28 (quoting United States v. White, 492 F.3d 380, 400-01 (6th Cir. 2007)).

With a minor caveat, there is no prohibition on a witness providing both lay opinion—an opinion on a matter of which he or she has *personal knowledge*—and expert opinion, an opinion that derives from facts of which he or she is *aware* (that the expert may have heard secondhand) and the expert's training or experience (the witness's "specialized knowledge").[735] That caveat is that "there is either a cautionary jury instruction regarding the witness's dual roles or a clear demarcation between the witness's fact testimony and expert-opinion testimony."[736] "[T]he failure to give a cautionary instruction when a law-enforcement officer testifies as both an expert and a fact witness, without a clear demarcation between the roles, constitutes plain error,"[737] which means that the error will survive the traditional rules of forfeiture of error when a party fails to object.[738]

The court explained that "'permitting police officers to testify as experts in their own investigations and give opinion testimony on the significance of evidence they have collected, absent any cautionary instruction, threatens the fairness, integrity, and public reputation of judicial proceedings, regardless of whether the defendant is actually innocent.'"[739] Having said that, the panel of Judge Ronald Lee Gilman, writing for himself and Judges Danny J. Boggs and Bernice B. Donald,[740] nevertheless concluded that the district court's error in permitting such testimony was harmless.[741] Judge Gilman explained,

> In this case, because so little of Egan's testimony constituted an opinion and, in contrast, so much of Rufus's testimony did, they each had a great imbalance in their "dual roles." There was thus very little mixing of lay and expert testimony by the same witness, so the jury was unlikely to be confused as to their dual roles. In addition, the evidence against Nixon was overwhelming. She admitted that she conducted the transactions in question, so her defense was essentially that she had permission to borrow most of the funds and had planned to pay Pruitt back. According to Nixon, Pruitt simply forgot that he had authorized many of her personal charges. Nixon conceded,

735. *Id.* at 629.

736. *Nixon*, 694 F.3d at 629 (quoting United States v. Lopez-Medina, 461 F.3d 724, 745 (6th Cir. 2006)).

737. *Id.* at 632 (quoting *Lopez-Medina*, 461 F.3d at 744-45).

738. *See* People v. Carines, 460 Mich. 750, 763; United States v. Olano, 507 U.S. 725, 731-34 (1993).

739. *Nixon*, 694 F.3d at 632 (quoting *Lopez-Medina*, 461 F.3d at 745).

740. *Id.* at 624-25.

741. *Id.* at 633.

> however, that she did not fully discharge her debts to Pruitt and that she failed to get authorization for some of the transactions.[742]

ii. Qualification of Experts

A trial court should not specifically qualify a witness as an expert in the jury's presence.[743] "'Instead, the proponent of the witness should pose qualifying and foundational questions and proceed to elicit opinion testimony. If the opponent objects, the court should rule on the objection, allowing the objector to pose voir dire questions to the witness's qualifications if necessary and requested.'"[744]

The Sixth Circuit disagreed with the government's contention that Egan's qualifications as an expert in financial crimes were "obvious."[745] The panel noted that Egan had been an FBI agent for only four months before investigating Nixon's theft, although he had worked for a national accounting firm as an auditor before joining the FBI.[746] Judge Gilman observed that

> [a]lthough his qualifications could have been stronger, he had a background and training in the field of financial investigations, and he testified that he had handled 20 to 30 cases before Nixon's. Any weaknesses in his qualifications would thus go to the weight rather than the admissibility of his opinion testimony.[747]

Rufus, the forensic accountant, had a doctorate in business administration with a concentration in accounting, had spent four years working for the Internal Revenue Service, and, during the twenty-four years that he ran his own accounting firm, had "taught forensic accounting and performed 'a lot of fraud research' during his directorship at the University of Charleston's Forensic Institute."[748]

During Rufus' testimony, the prosecution asked him to identify behavior typical of individuals who embezzle, a question that drew the objection of Nixon's counsel.[749] The defense made no further objection

742. *Id.*
743. *Id.* at 629.
744. *Id.* (quoting United States v. Johnson, 488 F.3d 690, 698 (6th Cir. 2007)).
745. *Nixon*, 694 F.3d at 629-30.
746. *Id.*
747. *Id.*
748. *Id.* at 630.
749. *Id.*

after Rufus testified that he had been a certified public accountant since 1981 and "a certified evaluation analyst . . . [since] 1996. I'm a credited fraud investigator, a certified cost analyst. I'm also certified in financial forensics, and I'm also a licensed private investigator."[750] Accordingly, the panel concluded that

> even though the district court never explicitly ruled that Rufus had the appropriate qualifications to offer his opinion on matters concerning fraud and embezzlement, the proper procedure for qualifying Rufus was used and, based on Rufus's comprehensive experience in the field and the lack of further objection from Nixon's attorney, such a ruling may be inferred.[751]

iii. Permissible Expert Opinion Versus Impermissible Legal Opinion

"'The problem with testimony containing a legal conclusion is in conveying the witness'[s] unexpressed, and perhaps erroneous, legal standards to the jury. This invades the province of the court to determine the applicable law and to instruct the jury as to that law.'"[752] On the other hand, both the federal and Michigan rules provide that opinion testimony "is not objectionable just because it embraces an ultimate issue."[753]

Whether the testimony contains an inadmissible legal conclusion involves the trial court's assessment of "'whether the terms used by the witness have a separate, distinct and specialized meaning in the law *different from that present in the vernacular*.'"[754]

On appeal, Nixon argued that

> Egan should not have been permitted to testify that Nixon "stole money" from Pruitt, that she "forged" Pruitt's signature on the two checks written from the American Express Bank line of credit, or that her actions were in furtherance of a "scheme." Similarly, Nixon contends that the district court plainly erred by permitting Rufus to use the terms "conversion," "embezzlement," and "scheme" in his testimony and report.[755]

---

750. *Id.*

751. *Nixon*, 694 F.3d at 630.

752. *Id.* at 631 (alteration in original) (quoting Torres v. Cnty. of Oakland, 758 F.2d 147, 150 (6th Cir. 1985)).

753. FED. R. EVID. 704(a); MICH. R. EVID. 704.

754. *Nixon*, 694 F.3d at 631 (emphasis added) (quoting *Torres*, 758 F.2d at 151).

755. *Id.*

The appellate panel, however, disagreed and observed that the words "conversion," "embezzlement," "forged," and "stole" were not part of the federal statutes proscribing wire and bank fraud—the charges the defendant faced.[756] The word "scheme," however, does appear in those statutes.[757] Judge Gilman further noted that "Nixon does not assert that the word 'scheme' has a separate, distinct, and specialized meaning under" the federal bank- and wire-fraud statutes.[758] Accordingly, there was little danger that the jury would accept a witness's definition instead of a jury instruction as to the legal meaning of the word "scheme."[759] "[T]he jury instructions in this case did not contain a definition of the term, indicating that the jurors were to apply its common meaning rather than a special legal meaning."[760] The court emphasized that "if an opinion question posed to a lay witness does not involve terms with a separate, distinct and specialized meaning in the law different from that present in the vernacular, then the witness may answer it over the objection that it calls for a legal conclusion.'"[761] Accordingly, the panel concluded, the court did not err in permitting Rufus and Egan to use certain buzzwords like "converted" or "scheme" in their testimony.[762] Thus, the Sixth Circuit affirmed Nixon's conviction for all but one of the seventeen counts, reversing the judgment on count seventeen (using an unauthorized access device) for unrelated reasons.[763]

5. Michigan Court Rule 6.202: Admission of Forensic Laboratory Reports in Criminal Cases Without the Forensic Scientist/ Technician's Testimony (the New "Notice-and-Demand" Rule)

Effective January 1, 2013, the Michigan Supreme Court adopted a new rule governing a trial court's admission of forensic laboratory reports in criminal cases.[764] The new rule applies to both felony cases in circuit court and misdemeanor cases in district court.[765] Some examples of laboratory analysis include testing of a subject's blood for the presence and quantity of alcohol or controlled substances, fingerprint matching, and identification of substances and illicit drugs.

---

756. *Id.* (citing 18 U.S.C. §§ 1028, 1028A, 1343-44).
757. *Id.* (citing 18 U.S.C. §§ 1343-44).
758. *Id.*
759. *Id.* at 631-32.
760. *Nixon*, 694 F.3d at 631.
761. *Id.* at 632 (quoting United States v. Sheffey, 57 F.3d 1419, 1426 (6th Cir. 1995)).
762. *Id.*
763. *Id.* at 638-39.
764. MICH. CT. R. 6.202.
765. MICH. CT. R. 6.202(A).

The first significant provision of Rule 6.202 is a fourteen-day deadline for prosecutors to disclose the laboratory technician's report and certification upon their receipt of same to opposing counsel.[766]

Second, the rule requires that, if the prosecution intends to offer the report into evidence at trial, it must serve notice of such intent to opposing counsel when tendering the report.[767] Similarly, should the *defense* intend to introduce the report, it must serve its notice upon the prosecution within fourteen days of receiving the report.[768]

The most significant development, however, comes third: the "notice-and-demand" aspect of the new rule.[769] Should opposing counsel not object within fourteen days of a party's notice to offer the report into evidence, the rule allows the report's proponent to admit the findings into evidence *without the testimony of the forensic scientist/technician* who created the report and/or arrived at its findings.[770]

Notice and demand: In other words, a party's *notice* starts a fourteen-day clock. If the opposing party fails to object—*demand*—the technician's presence within fourteen days of the notice, the non-proponent has effectively waived any objection to the report's admission into evidence.[771] Thus, Rule 6.202 carves out exceptions to three rules of evidence: authentication, expert testimony, and hearsay.

Authentication: In the absence of a timely objection from the opposing counsel, the court must admit the report even without a laboratory official identifying the report through live testimony as having originated in the laboratory and without an official's testimony that it pertains to an analysis of a specific evidence (such as a blood sample) that the lab received.[772]

Expert Opinion: Utilizing a certificate of accreditation by the forensic laboratory and/or the technician, the rule, in effect, permits the court to qualify the non-present witness as an expert in generating the results appearing in her report and allow the expert to deliver her findings via the report without any live, in-court foundational testimony as to her expertise.[773]

Hearsay and the Confrontation Clause: Although the report contains testimonial hearsay (see Part VIII.E of this article), its proponent may nevertheless offer the report's findings "to prove the truth of the matter

766. MICH. CT. R. 6.202(B).
767. MICH. CT. R. 6.202(C)(1).
768. *Id.*
769. MICH. CT. R. 6.202(C).
770. *Id.*
771. MICH. CT. R. 6.202(C)(2).
772. *See* MICH. R. EVID. 901.
773. *See* MICH. R. EVID. 702.

asserted" (for hearsay purposes) in the absence of the technician's testimony at trial.[774] *But for the court rule*, the court's admission of the report is an obvious violation of the hearsay rule.[775] Finally, as for any Confrontation Clause (again, see Part VIII.E of this article) issue, the U.S. Supreme Court has already blessed notice-and-demand provisions such as Rule 6.202 as not violative of the Sixth Amendment:

> In their simplest form, notice-and-demand statutes require the prosecution to provide notice to the defendant of its intent to use an analyst's report as evidence at trial, after which the defendant is given a period of time in which he may object to the admission of the evidence absent the analyst's appearance live at trial. . . . Contrary to the dissent's perception, these statutes shift no burden whatever. *The defendant always has the burden of raising his Confrontation Clause objection; notice-and-demand statutes simply govern the time within which he must do so.* States are free to adopt procedural rules governing objections.[776]

VIII. RULES 801-07: HEARSAY, HEARSAY EXCEPTIONS, AND CONFRONTATION CLAUSE (*CRAWFORD*) ISSUES

Hearsay is an out-of-court statement "offered in evidence to prove the truth of the matter asserted."[777] 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 ("We know the sky was blue on Tuesday because Out-of-Court Man said it was blue."). The hearsay rule

---

774. *See* MICH. R. EVID. 801(C), 802.

775. *See* MICH. R. EVID. 801(C), 802.

776. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 326-27 (2009) (emphasis added) (citations omitted).

> The proposed rule is based on favorable discussion by the United States Supreme Court in *Melendez-Diaz* . . . . Although the Supreme Court struck down the Massachusetts procedure for admitting forensic evidence without attendance by the forensic analyst, it noted that some states have adopted 'notice and demand' provisions that create a procedure by which forensic reports may be admitted into evidence if the defendant does not object to the report's entry.

MICH. SUPREME COURT, ORDER: PROPOSED ADOPTION OF NEW RULE 6.202 OF THE MICHIGAN COURT RULES (ADM File No. 2010-14), at 2 (2011), *available at* http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/Court%20Rules/2010-14_2011-07-07_formatted-order.pdf.

777. MICH. R. EVID. 801(c). The federal rules clarify 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)(2) (emphasis added).

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."[778] ("I know Out-of-Court Man was alive on Tuesday because I heard him, on that day, say that the sky was blue.")

Because many have struggled with the hearsay rule at some juncture, what briefly follows is a short guide to identify hearsay and then cases that discuss the rule, its various exceptions, and the hearsay rule's close relationship with the confrontation clauses of the state and federal constitutions.

Key to the hearsay rule is that a statement is only hearsay if a party offers it "to prove the truth of the matter asserted."[779] In other words, the party's purpose in offering the statement is the *critical factor* in determining whether the statement is hearsay. I say this because there is usually no dispute that the statement is an "out of court" statement or that it is "offered in evidence"; rather, the dispute revolves around whether it is "to prove the truth of the matter asserted."

778. 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)).

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

A. The witness testifies…	**B. A party offers this testimony for…**	**Hearsay?**	**Why?**
"Declarant told me every day, 'The mafia killed Hoffa.'"	Establishing that the mafia killed Hoffa.	Yes.	There is a perfect match between boxes A and B. A party is trying to prove that "the mafia killed Hoffa" with Declarant's out-of-court statement that "the mafia killed Hoffa."
"Declarant told me every day, 'The mafia killed Hoffa.'"	Establishing that Declarant was obsessed with Hoffa's death.	No.	Boxes A and B do not match. The party is not trying to prove the assertion's truth – it is not trying to prove that the mafia killed Hoffa. It is merely trying to prove that Declarant made the statement (as evidence of the Declarant's obsession with Hoffa's death).

A slightly different example…

A. The witness testifies…	**B. A party offers this testimony for…**	**Hearsay?**	**Why?**
"I heard Officer Y shout commands to the suspect."	Establishing that Officer Y shouted commands to he suspect.	No.	Commands are not assertions, unlike "the sky is blue" or "Louie's article is great!" One cannot prove the truth or falsity of commands like "Stop!" Here, the party's intent in offering Officer A's testimony is to establish "that a statement was made, rather than about the truth of the statement itself, [thus] the testimony is not hearsay." [780]
"Officer Y told me, 'I shouted, "Stop!" at the suspect.'"	Establishing that Officer Y shouted "Stop!" at the suspect.	Yes.	Boxes A and B match. Officer Y asserted to Officer X that he had shouted "Stop" at the suspect. The party seeks to prove that Officer Y did so shout. This is hearsay.

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 of the Sixth Amendment ties closely to the definition of hearsay.

780. *Harris*, 201 Mich. App. at 151.

A. Exclusions/Exemptions from the Definition of Hearsay ("Non-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] "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]

A. Officer Y testifies	**B. Officer X can testify that…**	**Hearsay?**	**Why?**
"I told the suspect to stop."	"Officer Y told me, 'I did *not* tell the suspect to stop.'"	No.	The party (presumably) is not trying to prove that Officer Y did or did not tell the suspect to stop. Rather, the party's intent in offering Officer X's testimony is to establish Officer Y has *told two different versions* of the same event, and thus lacks credibility. Again, the party is trying to prove "that a [prior] statement was made, rather than about the truth of the statement itself, [thus] the testimony is not hearsay."

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

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 it 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 fact finder may consider the prior statement for 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).

What amounts to inconsistency? During the previous *Survey* period, the Michigan Court of Appeals held that "any material variance between the testimony and the previous statement suffices" to establish inconsistency.[785]

To refresh the reader's memory of the facts in *People v. Allan*, a case I first discussed in Part IV.C.2 as it related to evidence of other acts of conduct, the state charged David Lee Allan with conspiracy to commit extortion.[786] The prosecution alleged that the victim had consensual sexual intercourse with the defendant's daughter, who then conspired with her father (the defendant) to demand money from the victim or else accuse him of rape.[787]

At trial, the defendant unsuccessfully sought to have one Jamie Pickering testify that Jennifer (the defendant's daughter) would have "her boyfriends call people, impersonate defendant, and request money for a brain surgery for Jennifer that she was not getting."[788] A per curiam panel of Judges William C. Whitbeck, E. Thomas Fitzgerald, and Jane M. Beckering[789] found no error in the trial court's exclusion of Pickering's testimony to impeach the defendant's daughter, as "Jennifer did not testify regarding her boyfriends impersonating defendant on occasions outside this case; she only testified that she never had her boyfriends impersonate defendant when attempting to obtain money from *the victim in this case*."[790] The panel, however, reversed the trial court's judgment of conviction, as the judge failed to administer an oath to the jury, and remanded the matter to the trial court.[791]

2. *Effect on the Listener*

Testimony "introduced to show the effect of the statement on the hearer . . . does not constitute hearsay."[792] As the below chart illustrates:

---

785. *Howard*, 296 Mich. App. at 664, 677-78 (quoting JOHN W. STRONG ET AL., MCCORMICK, EVIDENCE ON EVIDENCE § 34, ¶¶ 151-152 (6th ed. 2007)). Be aware, however, that under Rule 613, "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless 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, or the interests of justice otherwise require." MICH. R. EVID. 613. In other words, before calling in outside help to establish that the witness has given different accounts, one must ask the witness if he or she made the inconsistent statement.

786. People v. Allan, 299 Mich. App. 205, 208; 829 N.W.2d 319 (2013).

787. *Id.*

788. *Id.* at 219-20.

789. *Id.* at 206.

790. *Id.* at 220 (emphasis in original).

791. *Id.* at 221.

792. People v. Eggleston, 148 Mich. App. 494, 502; 384 N.W.2d 811 (1986) (citing

A testifies, "I told D (Defendant) he was a murderer. He replied, 'So what?'"	A is testifying to two separate utterances: 1) A's accusation 2) D's reply.	Are both utterances admissible?	Consider the statements out of order. No. 2 is not hearsay because "So what?" is not an assertion and lacks any inherent truth or falsity. Even if it was an assertion, the statement is one of a party-opponent and thus is non-hearsay under the rules. Returning to No. 1, this statement is not hearsay because its proponent offers it to establish the context of D's nonchalant response—to show A's statement's *effect* on the listener (D).

In *Robins v. Fortner*, the petitioner, Leon Robins, sought a writ of habeas corpus in federal court after exhausting his appeals in Tennessee state courts following his conviction for first-degree premeditated murder.[793] The district court denied Robins' habeas petition, resulting in the petitioner's appeal to the Sixth Circuit.[794] Trial testimony established that the murder victim, Eugene Simmons, had borrowed $10 from Robins' co-defendant, Tabatha White, to purchase cocaine, but he did not pay back the $10 or produce the drug when Johnson demanded he do so on February 29, 2000.[795]

> When the victim failed to return with either the drugs or the money, White was "mad" and instructed Johnson to be on the lookout for him. On the night of February 29, Johnson, standing in her doorway, spotted the victim and called White on a cell phone. Johnson then called the victim over and put him on the phone with White. The phone cut off and the victim proceeded to leave. She called White back and had her cousin, Gerald Johnson, bring the victim back to the front of her house. Moments later, Robins shot the victim and White said "something to him about her money." Johnson testified that she thought the defendants were "just going to beat him up or something."[796]

People v. Lee, 391 Mich. 618; 218 N.W.2d 655 (1974)). *See also* Gover v. Perry, 698 F.3d 295, 306 (6th Cir. 2012) (recognizing effect-on-the-listener statements as non-hearsay).

793. 698 F.3d 317, 321 (6th Cir. 2012).

794. *Id.*

795. *Id.* at 321-22.

796. *Id.* at 322 (quoting State v. Robins, No. M2001-01862-CCA-R3-CD, 2003 WL 1386835, at *6 (Tenn. Crim. App. 2003)).

Harold Overton, who lived within a few doors of the co-defendant White's apartment, testified that on March 3, 2000 (three days after the murder), he observed Robins, an occasional visitor to White's apartment, in a conversation with a group of other men.[797]

> There was [sic] about three or four guys that were talking, and then one guy walked up and he said Leon, man, . . . they are looking for you . . . . And then he said, like, well, I don't give a fuck, you know, there is more than one Leon . . . and then he said besides that, they don't know my last name[.][798]

A unanimous Sixth Circuit panel of U.S. District Judge Algenon L. Marbley, writing for himself and U.S. Circuit Judges John M. Rogers and Raymond M. Kethledge,[799] rejected the petitioner's argument that his trial counsel was ineffective for failing to object to Overton's testimony.[800] First, Overton's testimony as to Robins' dismissive remark was admissible as a party-opponent admission under Tennessee's equivalent of Rule 801(d)(2).[801] Furthermore, the panel rejected the defendant's contention that the statement was irrelevant, as "the fact that Robins was warned that someone was looking for him, and then that he replied he did not care and that they did not know his last name, has a tendency to make his guilt more probable."[802]

The Sixth Circuit, however, took the position that the state court erred in admitting Overton's testimony of the non-party declarant's statement to Robins that "they [the police] are looking for you."[803] Regardless, the panel concluded that any error was of little consequence, as it was "the admission by Robins [that] was the harmful portion of Overton's testimony."[804] Accordingly, for this and other reasons, the

---

797. *Id.* at 323.

798. *Id.* (alteration in original) (quoting *Robins*, 2003 WL 1386835, at *9) (internal quotation marks omitted).

799. *Robins*, 698 F.3d at 320. Judge Marbley, of the Southern District of Ohio, sat by designation on the Sixth Circuit panel. *Id.*

800. *Id.* at 335-36.

801. *Id.* at 335-36 (citing TENN. R. EVID. 803(1.2)). *See also* FED. R. EVID. 801(d)(2); MICH. R. EVID. 801(d)(2).

802. *Id.* at 334 n.3.

803. *Id.* at 335.

804. *Robins*, 698 F.3d at 335. I dissent in part. The fact that the court recognized that *it was the "admission by Robins [that] was the harmful portion of Overton's testimony" illustrates why neither part of Overton's testimony was hearsay.* The statement that generated Robins' dismissive response was necessary to establish the context of the defendant's inculpatory response—to show the statement's effect on the listener (the defendant). *See* Gover v. Perry, 698 F.3d 295, 306 (6th Cir. 2012). Whether the police

Sixth Circuit affirmed the district court's denial of Robins' habeas petition.[805]

3. Party-Opponents' Statements

Rule 801(d)(2) specifically excludes from the definition of hearsay a party's own out-of-court statement when an adverse party offers the statement against the party-declarant.[806] As I briefly discussed above in Part VIII.A.2, a murder suspect's admission that he was not worried that police were looking for him is one such example of a party-opponent admission.[807]

The party-opponent provision of Rule 801 also incorporates

> (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.[808]

The Michigan and federal rules diverge in Rule 801(d)(2). Before admitting a statement pursuant to Rule 801(C), (D), or (E), federal courts must hear evidence—independent of the statement itself—to "establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation

---

were, in fact, searching for Robins was not probative of his guilt. It was his *response* to learning that police were searching for him that was probative of his guilt. Accordingly, the Sixth Circuit could easily have found no error at all in the trial court's admission of Overton's testimony.

805. *Robins*, 698 F.3d at 341.

806. 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).

807. *Robins*, 698 F.3d at 335-36. *See also* FED. R. EVID. 801(d)(2); MICH. R. EVID. 801(d)(2).

808. MICH. R. EVID. 801(d)(2). *See also* FED. R. EVID. 801(d)(2).

in it under (E)."[809] For the purpose of federal Rule 801(d)(2)(D), the Sixth Circuit has explained that "[o]utside evidence sufficient to satisfy Rule 801(d)(2)(D)'s scope requirement could come from the 'circumstances surrounding the statement, such as the identity of the speaker [or] the context in which the statement was made.'"[810]

Michigan, on the other hand, also requires independent proof of the conspiracy in (E), but, unlike the federal rules, the declarant's statement *itself* may suffice to establish the scope of the representative's authority under (C) or the principal-agent relationship under (D).[811]

Before admitting a declarant's statement under Rule 801(d)(2)		
Nature of the statement	The Michigan rules provide that	The federal rules provide that
C. Admission by a party authorized to make a statement concerning the subject	The statement alone may suffice to establish the representative's authority to make the statement.	There must be independent proof of the declarant's authority to make the statement.
D. Admission by the party's agent or servant concerning a matter within the scope of the agency or employment	The statement alone may suffice to establish the scope of the agency or employment.	There must be independent proof of the scope of the agency or employment.
E. Statement of a party's co-conspirator during the course and in furtherance of the conspiracy	There must be independent proof of the conspiracy	There must be independent proof of both the conspiracy and the declarant's participation in it.

In the diversity action of *Back v. Nestlé USA, Inc.*, plaintiff Robert G. Back sued his former employer, alleging that it terminated him on the basis of his age, thereby violating the Kentucky Civil Rights Act (KCRA).[812]

Under Kentucky law, a party may establish a KCRA violation with direct or circumstantial evidence.[813] In *Back*, however, Sixth Circuit

809. FED. R. EVID. 801(d)(2).

810. Back v. Nestlé USA, Inc., 694 F.3d 571, 578 (6th Cir. 2012) (quoting FED. R. EVID. 801 advisory committee's notes, 1997 Amendment).

811. MICH. R. EVID. 801(d)(2).

812. 694 F.3d at 573 (citing KY. REV. STAT. ANN. §§ 344.010-344.990).

813. *Id.* at 576 (citing Williams v. Wal-Mart Stores, Inc., 184 S.W.3d 492, 495 (Ky.

Judge Jane B. Stranch, writing for herself, Judge Raymond M. Kethledge, and U.S. District Judge James S. Gwin,[814] agreed with the district court that the plaintiff provided insufficient circumstantial evidence of age discrimination to survive the defendant's motion for summary judgment.[815]

To establish direct evidence of age discrimination, the plaintiff offered the affidavit of a colleague, James Hagerman, who wrote that "Tim Shelburne[, director of human resources at the plaintiff's plant,] told me that he had been told by higher management that they were planning to get rid of the three oldest employees and highest paid team leaders."[816] Whether Back had any *direct evidence* of age discrimination turned on whether Hagerman's testimony was admissible at trial.[817]

As Judge Stranch observed, Hagerman's testimony presented potential double-level hearsay: "The first level of hearsay is Hagerman['s] [proposed testimony] that Shelburne (the declarant) *told him* about [his superiors'] plan to [terminate] the three oldest employees. . . . The second level of hearsay is higher management (the declarants) telling Shelburne that they are planning to get rid of the three oldest employees."[818]

Under Rule 805, "[f]or double-hearsay statements to be admissible, each separate statement must either be excluded from the hearsay definition or fall within a hearsay exception."[819]

Witness (Hagerman)	**Level 1 / Declarant 1 (Shelburne)**	**Level 2 / Declarant(s) 2 ("Higher Management")**
Hagerman (presumably) would testify (in court) that Shelburne made a statement…	…that "higher management" officials made a statement…	…that they planned to fire the three oldest employees.

The panel found nothing problematic in the first level, given that Shelburne, as the human resources director, "is responsible for overseeing the human-resource policies, procedures, practices, benefits, and overall employee relations, and his job includes involvement in

2005)).

814. *Id.* at 572. Judge Gwin, of the Northern District of Ohio, sat by designation on the appellate panel.

815. *Id.* at 578-80.

816. *Id.* at 576.

817. *Id.* at 578.

818. *Back*, 694 F.3d at 577-78 (emphasis added).

819. *Id.* at 578 (citing FED. R. EVID. 805).

employee-performance issues generally and termination specifically."[820] Employee termination "plainly concerns a matter within the scope of the Human Resources Director's job."[821]

However, applying the federal version of Rule 801(d)(2)(D), the panel explained that "[t]he crucial question is whether there is evidence that the unidentified declarants [in higher management] were speaking on a matter within the scope of their employment."[822] Again, the federal rules, unlike Michigan's, require independent proof that the declarants were speaking on a matter within the scope of their employment.[823] Having said that, Judge Stranch observed that

> the speaker in the present case is Hagerman [witness] because Shelburne [Declarant 1] himself is a declarant due to the double-hearsay issue. And Hagerman's identity does not grant any greater assurance of trustworthiness because Hagerman was a Maintenance Team Leader just like Back—a position not ordinarily expected to be privy to a plan to terminate other Maintenance Team Leaders. If Back had presented other outside evidence sufficient to satisfy Rule 801(d)(2)(D)'s scope requirement, the statement would be admissible. But because there is no such evidence, the statement is inadmissible hearsay.[824]

Accordingly, the plaintiff having made no showing of either direct or circumstantial evidence of age discrimination, the panel affirmed the district court's dismissal of the case upon the defendant's motion for summary judgment.[825]

Judge Gwin viewed the matter as a straightforward interpretation of the rules of evidence, explaining in his concurrence that "Back failed to offer any evidence on the existence or scope of higher management's agency or employment relationship other than the higher-management statement itself."[826]

---

820. *Id.* at 577.

821. *Id.*

822. *Id.* at 578 (citing FED. R. EVID. 801(d)(2)(D), Ryder v. Westinghouse Elec. Corp., 128 F.3d 128, 134 (3d Cir. 1997), and Carden v. Westinghouse Elec. Corp., 850 F.2d 996, 1002 (3d Cir. 1988)).

823. FED. R. EVID. 801(d)(2).

824. *Back*, 694 F.3d at 578.

825. *Id.* at 578, 580.

826. *Id.* at 581 (Gwin, J., concurring).

B. Hearsay Exceptions: Business Records and Records of Regularly Conducted Activity

"Exceptions to the hearsay rule are justified by the belief that the hearsay statements are both necessary and inherently trustworthy."[827] Determining whether a statement is "inherently trustworthy," the Michigan Supreme Court has explained, refers to "the totality of the circumstances surrounding the actual making of the statement, *not evidence corroborating the statement*."[828]

In Michigan state courts, Rule 803(6) permits the trial court to admit documents and records if they come within the meaning of what most attorneys refer to as a "business record."[829] To admit records via Rule 803(6), the proponent must establish that the information, data, or occurrences were "[1] made at or near the time by, or from information transmitted by, [2] a person with knowledge, [3] if kept in the course of a regularly conducted business activity, [4] and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation."[830] The federal rule contains virtually identical language but adds a requirement that "[5] neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness."[831]

For the intersection between business records, past recollection recorded, and writing used to refresh memory, see the preceding *Survey* article on evidence.[832]

The Tenth Circuit once had occasion to explain that "[t]he business records exception is based on a presumption of accuracy, accorded because the information is part of a regularly conducted activity, kept by those trained in the habits of precision, and customarily checked for correctness, and because of the accuracy demanded in the conduct of the nation's business."[833] This theory is not unlike the theory supporting the hearsay exception for statements for the purpose of medical diagnosis or treatment,[834] which is that "the declarant ha[s] a self-interested

827. 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)).

828. *Id.* at 323 n.17 (emphasis added) (citing State v. Larson, 472 N.W.2d 120, 125 (Minn. 1991)).

829. MICH. R. EVID. 803(6); FED. R. EVID. 803(6).

830. MICH. R. EVID. 803(6).

831. FED. R. EVID. 803(6).

832. Meizlish, *supra* note 3, at 864-67.

833. United States v. Snyder, 787 F.2d 1429, 1433-34 (10th Cir. 1986) (citing United States v. Baker, 693 F.2d 183, 188 (D.C. Cir. 1982)).

834. MICH. R. EVID. 803(4); FED. R. EVID. 803(4).

motivation to be truthful in order to receive proper medical care."[835] In other words, a business that keeps sloppy records is doomed, just like a patient who conceals symptoms of disease from his physician. The courts accordingly expect that statements in certain contexts, such as in business records and between patients and their doctors, are "inherently trustworthy" and provide for their admissibility as hearsay exceptions.

As the Sixth Circuit recently observed in *United States v. Nixon*, which I first discussed in Part VII.B.4, "[t]he expression 'data compilation' is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage."[836]

The scope of Rule 803(6) became relevant for Ronda Nixon when she went on trial for the federal offenses of wire fraud, bank fraud, aggravated identity theft, and using an unauthorized access device.[837] A jury in the Eastern District of Kentucky convicted Nixon of all counts, and the defendant appealed.[838]

At trial, pursuant to the business-record exception of Rule 803(6), the court admitted into evidence a ProPay spreadsheet that listed each of the transactions on Nixon's account, including "the date and time of each transaction, descriptions of those transactions, the amounts of those transactions, and the balance of the account following each transaction."[839]

On appeal, the defendant claimed that the spreadsheet was inadmissible under the business-record exception, and the government conceded the issue, although it argued that the record was admissible pursuant to Rule 1006, "which provides that a party 'may use a summary' of 'voluminous writings . . . that cannot be conveniently examined in court.'"[840]

Despite the government's concession, the Sixth Circuit saw no error in the trial court's admission of the spreadsheet pursuant to the business-records exception.[841] The defendant contended that because ProPay had prepared the spreadsheet in response to a government subpoena (in contemplation of litigation), the spreadsheet was untrustworthy within the meaning of the fifth prong of Rule 803(6), which requires that

835. People v. Mahone, 294 Mich. App. 208, 215; 816 N.W.2d 436 (2011).

836. 694 F.3d 623, 634 (6th Cir. 2012) (quoting FED. R. EVID. 803 advisory committee's note).

837. *Id.* at 625.

838. *Id.*

839. *Id.* at 633 (citing FED. R. EVID. 803(6)).

840. *Id.* at 634 (citing FED. R. EVID. 1006).

841. *Id.*

"neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness."[842]

A unanimous panel of Judge Ronald Lee Gilman, writing for himself and Judges Danny J. Boggs and Bernice B. Donald,[843] however, explained that

> all the information on Exhibit 19 was kept in ProPay's electronic database. England had to print out the records pertaining to Nixon in order to produce them for the subpoena, but the electronic version of those records were created and kept in the regular course and practice of ProPay's business operations.[844]

The panel then looked to the 1973 case of *United States v. Russo*, in which a trial court admitted statistical information in the possession of a larger insurer and held that "'once the reliability and trustworthiness of the information put into the computer has been established, *the computer printouts should be received as evidence of the transactions covered by the input*.'"[845]

In *Russo*,

> [t]he testimony at trial showed that the survey was regularly kept and maintained in electronic form and "the computer printout is just a presentation in structured and comprehensible form of a mass of individual items." This court held that "it is immaterial that the printout itself was not prepared until 11 months after the close of the year 1967."[846]

Likewise, in Nixon's case, a ProPay representative

> testified that the electronic records pertaining to Nixon, like those in *Moon*[847] and *Russo*, were kept in the regular course of business and maintained in a reliable and secure computer database. Had they been produced in their electronic form, they would clearly be admissible under the business-record exception. *Moon* and *Russo* hold that the simple act of printing out the electronically stored records does not change their status for

842. *Nixon*, 694 F.3d at 634; FED. R. EVID. 803(6).
843. *Nixon*, 694 F.3d at 624.
844. *Id.* at 634.
845. *Id.* at 635 (emphasis added) (quoting United States v. Russo, 480 F.2d 1228, 1240 (6th Cir. 1973)).
846. *Id.* (citation omitted) (quoting *Russo*, 480 F.2d at 1240).
847. United States v. Moon, 513 F.3d 527 (6th Cir. 2008).

> admissibility. The district court, therefore, did not err in admitting Exhibit 19.[848]

Accordingly, the Sixth Circuit affirmed Nixon's conviction for all but one of the seventeen counts, reversing the judgment on count seventeen (using an unauthorized access device) for unrelated reasons.[849]

C. Hearsay Within Hearsay

As I explained in Part VIII.A.3 of this article, Rule 805 provides that, before a court admits hearsay within hearsay, "each separate statement must either be excluded from the hearsay definition or fall within a hearsay exception."[850]

D. Hearsay in Motions for Summary Judgment or Summary Disposition

As the plaintiff in *Back* learned, and as I discussed in Part VIII.A.3, in federal cases, "hearsay evidence cannot be considered on summary judgment."[851] Michigan agrees, holding that "[i]nadmissible hearsay does not create a genuine issue of fact.[852]

E. Hearsay Issues Implicating the Confrontation Clause ("Crawford Issues") in Criminal Cases

Even if a statement is admissible pursuant to federal or state hearsay exceptions, the confrontation clauses of the Sixth Amendment and the Michigan Constitution still may render it inadmissible.[853] In the 2004

---

848. *Nixon*, 694 F.3d at 635.

849. *Id.* at 638-39.

850. Back v. Nestlé USA, Inc., 694 F.3d 571, 578 (6th Cir. 2012) (citing FED. R. EVID. 805). *See also* MICH. R. EVID. 805.

851. *Back*, 694 F.3d at 580 (citing Carter v. Univ. of Toledo, 349 F.3d 269, 274 (6th Cir. 2003)).

852. McCallum v. Dep't of Corrs., 197 Mich. App. 589, 603; 496 N.W.2d 361 (1992) (citing Amorello v. Monsanto Corp., 186 Mich. App. 324, 329; 463 N.W.2d 487 (1990), and Pauley v. Hall, 124 Mich. App. 255, 262; 355 N.W.2d 197 (1983)).

853. 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,

case of *Crawford v. Washington*,[854] the U.S. Supreme Court discarded years of precedent[855] and held that "*testimonial* 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."[856]

It necessarily follows that the limitation only applies to "testimonial statements."[857] In the next major Confrontation Clause case, *Davis v. Washington*, Justice Antonin G. Scalia then explained the difference between testimonial and nontestimonial 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.[858]

> 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.

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 2014) (emphasis added).

854. 541 U.S. 36 (2004).

855. Prior to *Crawford*, the Supreme Court held that the Confrontation Clause 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.'" *Id.* at 40 (quoting Ohio v. Roberts, 448 U.S. 56, 66 (1980)).

856. *Id.* at 59 (emphasis added).

857. Davis v. Washington, 547 U.S. 813, 821 (2006) (quoting *Crawford*, 541 U.S. at 53-54).

858. *Id.* at 822.

Does the Confrontation Clause apply? (Criminal Cases Only)		
1. Is the statement's proponent offering it for its truth?	2. Is the statement testimonial?	3. Did the defendant waive any objection (such as by stipulating to the evidence)[859] or forfeit the objection (by wrongdoing)?[860]
If not, STOP. (The Confrontation Clause does not bar statements whose evidentiary value is not to establish their truth.). If so, CONTINUE to No. 2 (you might have a problem)	If not, STOP. (The Confrontation Clause does not apply to nontestimonial statements.) If so, CONTINUE to No. 3 (the problem continues)	If not, the Sixth Amendment bars the court from admitting the statement.

1. Effect on the Listener

As I discussed in Part VIII.A.2, a statement is not hearsay if a party does not offer it for its truth but to show its effect on the hearer, given 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."[861] 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*."[862] In other words, a proponent of certain testimony only has a confrontation problem if testimony constitutes hearsay, because testimonial *non*-hearsay does not trigger a confrontation problem.[863]

A federal jury in the Western District of Kentucky convicted Rodrigo Macias-Ferras of two counts of drug trafficking at the

859. People v. Buie, 491 Mich. 294, 306-07; 817 N.W.2d 33 (2012).

860. Giles v. California, 554 U.S. 353, 359-60 (2008) ("[T]he [forfeiture] exception applie[s] only when the defendant engaged in conduct *designed* to prevent the witness from testifying.")

861. FED. R. EVID. 801(c) advisory committee's note (emphasis added).

862. *Crawford*, 541 U.S. at 59 n.9 (emphasis added) (citing Tennessee v. Street, 471 U.S. 409, 414 (1985)).

863. *Id.* Note, however, that an objection on hearsay grounds generally will not preserve for appellate purposes an objection on Confrontation Clause grounds. *See, e.g.*, United States v. Dukagjini, 326 F.3d 45, 60 (2d Cir. 2002); Greer v. Mitchell, 264 F.3d 663, 689 (6th Cir. 2001).

conclusion of a trial, leading to the defendant's appeal to the Sixth Circuit.[864]

On February 10, 2010, U.S. Drug Enforcement Administration agents stopped a truck near Memphis, Tenn., which they discovered to contain about 1,600 pounds of marijuana.[865] The driver agreed to cooperate with the agents in making a controlled delivery and expressed his understanding that he was to deliver the truck's contents to somewhere in Louisville, Kentucky.[866] The driver's contacts told him to park the truck

> on a sparsely populated street in Shepherdsville, Kentucky. The agents set up surveillance of the truck and observed a blue Toyota minivan registered to Macias-Farias and another car registered to Rafael Lara-Gascon enter and exit the area. Despite the fact that the agents claimed to have maintained visual surveillance of the truck all night, when it was stopped the next day, they discovered that the "cargo of approximately 1,600 pounds of suspected marijuana had been surreptitiously off-loaded from the truck."[867]

The agents coopted another person, Sean Lacefield, whom they observed speaking with the defendant and Lara-Gascon near the truck.[868] Lacefield scheduled a meeting with the defendant at a Shepherdsville-area restaurant, and Amber Babor, whose name was important to the appeal in the context of the defendant's *Crawford* claim, joined Lacefield and the defendant at the meeting.[869] The Sixth Circuit further developed the facts of the case:

> On February 18, Lacefield contacted the DEA and told agents that Macias-Farias and Lara-Gascon were meeting at a Louisville Rite Aid pharmacy to arrange a drug transfer of approximately 100 pounds of marijuana. Lacefield testified at trial that he went to the Rite Aid with Macias-Farias to meet Babor and that Babor got into Macias-Farias's van with them, leaving her car parked in the Rite Aid parking lot. Lacefield also said that another individual got in Babor's car, drove it away,

---

864. United States v. Macias-Farias, 706 F.3d 775, 777 (6th Cir. 2013).
865. *Id.* at 777-78.
866. *Id.* 778.
867. *Id.*
868. *Id.*
869. *Id.*

> and then returned with it several minutes later. The DEA was unable to observe the events at the Rite Aid, due to some confusion regarding the location, but agents used information provided by Lacefield to put out an alert on Babor's car. She was apprehended later that day, and officers recovered approximately 100 pounds of marijuana from the trunk of her car.
>
> On February 23, Lacefield alerted the DEA that a large amount of marijuana from Texas was expected to arrive in the Louisville area in the next few days. Early on February 25, DEA agents observed Macias-Farias and Lara-Gascon leave Macias-Farias's residence in a black Tacoma truck. Lacefield had told the DEA that the co-conspirators were planning to meet the arriving truck, and agents confirmed that the Tacoma was being driven in tandem with a red semi-trailer truck. When the semi-trailer truck got stuck in a ditch, Macias-Farias and others drove to a nearby gas station, where they were arrested without incident. Agents searched the truck and discovered approximately 3,766 pounds of marijuana.[870]

At trial, the defendant's theory of the case was that Lara-Gascon, his brother-in-law, was the true drug trafficker, not he, and that "Lara-Gascon would contact him after the drugs had been unloaded from the trucks to see if Macias-Farias was interested in selling any of the non-drug products that the trucks also transported, such as fruit and vegetables and toys."[871] To that end, his trial counsel cross-examined one of the DEA agents regarding the fact that the agents had not observed the February 18th Rite Aid transaction and, generally, the lack of evidence corroborating the defendant's involvement in the transaction:

> Q. So again, the only information you have regarding that February 18th deal to relate Mr. Macias to it is Sean's words?
>
> A. No, sir.
>
> Q. Okay. And the minivan, you say?
>
> A. No.
>
> Q. More?

870. *Macias-Farias*, 706 F.3d at 778.
871. *Id.*

A. Yes.

Q. What is more?

A. Amber Babor for one.

Q. Well, Amber Babor is not here, right?

A. You asked who else could provide information about that, and she did.

Q. Oh, she did provide you information on that?

A. Yes.

Q. Okay. Did you write a report about it?

A. Yes, I did.

Q. You did?

A. Yes, I did.[872]

The defendant moved for a mistrial, arguing, among several claims, that the agent's testimony violated his client's rights under the Confrontation Clause.[873] The district court denied the motion but instructed the jury that "'[y]ou cannot consider references by witnesses to the alleged statements of Amber Bab[o]r because she did not testify.'"[874]

On appeal, a unanimous panel of Judge Martha Craig Daughtrey, writing for herself and Judges Raymond M. Kethledge and Bernice B. Donald,[875] agreed that the testimony was not hearsay.[876] Judge Daughtrey explained that "Agent [Jason] Moore testified only that he had obtained information from Amber Babor. He did not repeat the information itself, which might well have amounted to hearsay testimony if it had been offered to establish the truth of the statement by the declarant, Babor."[877] The panel conceded that a jury might have inferred the contents of the

872. *Id.* at 779.
873. *Id.* at 780.
874. *Id.*
875. *Id.* at 776-77.
876. *Macias-Farias*, 706 F.3d at 781.
877. *Id.*

statement from the context of the agent's testimony, but "it [was] unclear from the record what portion of Lacefield's information she corroborated, much less what she actually told Moore."[878] Accordingly, the appellate panel concluded that the testimony was not hearsay and thus was not a violation of the Confrontation Clause because "'[t]he hearsay rule does not apply to statements offered merely to show that they were made or had some effect on the hearer.'"[879] The court affirmed the defendant's conviction for this and other reasons, but it remanded the matter to the district court for sentencing for unrelated reasons.[880]

2. Business Records and Public Records

Under Michigan law, to prove the misdemeanor charge that a defendant drove on a suspended license, the prosecutor must establish

---

878. *Id.*

879. *Id.* (quoting United States v. Martin, 897 F.2d 1368, 1371 (6th Cir. 1990)). Importantly, the agent's testimony was part of the *defense*, not government evidence. The defendant's attorney specifically asked Agent Moore about "information" he had (the *defense* question called for hearsay) and asked an argumentative question that suggested that Agent Moore lacked information tying the defendant to the drug transaction:

> Q. So again, the only information you have regarding that February 18th deal to relate Mr. Macias to it is Sean's words?
>
> . . . .
>
> Q. Oh, did [Amber Nabor] provide you information on that?

Id. at 779.

Defense counsel's questioning the agent about "information" Nabor related to him *thus clearly referred to out-of-court (hearsay)* statements that Nabor either made or related to the agent. In lieu of properly arguing, during closing statements, that because Nabor did not testify, the government failed to present necessary evidence corroborating the defendant's involvement in the drug transaction, trial counsel sought to emphasize this point with an argumentative question during testimony ("Well, Amber Babor is not here, right?"). *Id.*

Trial counsel may well have burned his client with this question because it necessarily explored an issue that was (a) unhelpful to the defendant's case, and (b) one that the *prosecution* could not offer without treading especially close, if not crossing, the line of a *Crawford* violation.

Thus, because it was a *defense* question the agent answered, and one that he answered responsively to the defense's questioning, the trial court need not have addressed the Confrontation Clause claim, as the government had correctly observed that, even if the court's admission of the testimony was error, "the error was invited." *Macias-Farias*, 706 F.3d at 780. *See* United States v. Sharpe, 996 F.2d 125, 129 (6th Cir. 1993) (quoting Harvis v. Roadway Express, Inc., 923 F.2d 59, 60 (6th Cir. 1991)) ("'The doctrine of "invited error" refers to the principle that a party may not complain on appeal of errors that he himself invited or provoked the court or the opposite party to commit.'").

880. *Macias-Farias*, 706 F.3d at 783.

that (1) the defendant drove while his license was in suspension, and (2) that the state notified him of his new (unfortunate) status.[881]

When the Department of State[882] 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.[883] 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,"[884] 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.[885] A two-member majority—Judges Pat M. Donofrio and Kathleen Jansen—of Michigan's intermediate appellate court had reached the opposite conclusion of Michigan's highest 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.'"[886] 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.'"[887]

All of Michigan's justices—with the exception of Justice Hathaway, who concurred in the result only—joined Justice Brian K. Zahra's opinion holding to the contrary.[888] The court did not dispute that the

881. People v. Nunley, 491 Mich. 686, 691; 821 N.W.2d 642 (2012), *cert. denied*, 133 S. Ct. 667 (2012). *See also* MICH. COMP. LAWS ANN. § 257.904(1) (West 2014). "DWLS" is a 93-day misdemeanor for first-time offenders, MICH. COMP. LAWS ANN. § 257.904(3)(a), and a one-year misdemeanor for second and subsequent offenders, MICH. COMP. LAWS ANN. § 257.904(3)(b). I discussed this case in last year's *Survey* article, although the court released the opinion during *this Survey* period. *See* Meizlish, *supra* note 3, at 891-94. The text that follows is virtually identical to the corresponding section of the last *Survey* article.

882. I use the terms "Department of State," "secretary of state," and "secretary of state's office" interchangeably.

883. *Nunley*, 491 Mich. at 690-91.

884. Davis v. Washington, 547 U.S. 813, 822 (2006).

885. *Nunley,* 491 Mich. at 707.

886. People v. Nunley, 294 Mich. App. 274, 285; 819 N.W.2d 8 (2011) (citations omitted), *rev'd*, 491 Mich. at 686.

887. *Id.* at 286-87, 291 (citations omitted).

888. *Nunley,* 491 Mich. at 715-16.

affidavit "certifies a fact in question," but it held that "this fact alone does not render the certificate a formal affidavit that is necessarily testimonial for purposes of the Confrontation Clause."[889] 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.[890]

The justices identified "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" as the "most significant" factor in their analysis.[891] 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.[892]

3. Admission of Expert Reports/Results Whose Authors/Creators Do Not Testify

(Before reading this section, review Part VII.B.5, which concerns the new Michigan court rule pertaining to forensic laboratory reports.)

---

889. *Id.* at 706.
890. *Id.* at 706-07.
891. *Id.* at 707.
892. *Id.* at 715.

In *Melendez-Diaz v. Massachusetts*,[893] five years after *Crawford*, in which a newly divided[894] U.S. Supreme Court ruled in 2009 that forensic laboratory reports (e.g., those pertaining to the presence of alcohol or drugs in a person's blood) are testimonial in nature and thus trigger a defendant's right to confront the forensic scientist who prepared the report.[895] Then, two years after *Melendez-Diaz* came *Bullcoming v. New Mexico*,[896] in which the high court considered a slightly more complicated question.

In *Bullcoming*, the 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.[897] The operator, the state argued, is not a testimonial witness because he "'was a mere scrivener,' who 'simply transcribed the results generated by the gas chromatograph machine.'"[898] The high court held that *Crawford* and *Melendez-Diaz* applied, rendering the report testimonial and thus requiring the state to put the forensic scientist on the witness stand.[899] The justices explained that "surrogate testimony . . . could not convey what [the operator] 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."[900]

In *Williams v. Illinois*,[901] the high court held that (1) a testifying expert witness may discuss hearsay statements without triggering a defendant's confrontation rights,[902] and (2) forensic laboratory analysis

893. Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009).

894. The majority opinion's author again was Justice Antonin G. 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—himself, Chief Justice John G. Roberts Jr., Justices Stephen G. Breyer, and Samuel A. Alito Jr. *Id.*

895. *Id.* at 324.

896. 131 S. Ct. 2705 (2011).

897. *Id.* at 2709-10, 2713.

898. *Id.* at 2713 (quoting State v. Bullcoming, 226 P.3d 1, 8-9 (N.M. 2010), *rev'd*, 131 S. Ct. at 2705). The New Mexico Supreme Court had sided with the prosecution. *Bullcoming,* 226 P.3d at 9.

899. *Bullcoming*, 131 S. Ct. at 2713.

900. *Id.* at 2715 (footnotes omitted).

901. 132 S. Ct. 2221 (2012). I discussed this case in the previous *Survey* issue, as it was issued just a few weeks into this *Survey* period. This portion of the article is virtually identical to the corresponding portion in last year's *Survey* issue. *See* Meizlish, *supra* note 3, at 877-90.

902. *Williams*, 132 S. Ct. at 2233-37.

to meet an ongoing emergency (to find a culprit a large), rather than to confirm the guilt of a known suspect,[903] is nontestimonial and also does not trigger a defendant's confrontation rights.

Illinois state prosecutors charged Sandy Williams with rape.[904] During the course of the police investigation, a vaginal swab of the victim found semen.[905] Using a sample of this biological material, an outside firm, Cellmark, produced a DNA profile of the culprit.[906] 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.[907]

Justice Alito, writing a plurality opinion for himself, Chief Justice Roberts, and Justices Kennedy and Breyer,[908] 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."[909]

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.[910] 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

903. *Id.* at 2243-44.
904. *Id.* at 2227.
905. *Id.*
906. *Id.*
907. *Id.*
908. *Williams*, 132 S. Ct. at 2222.
909. *Id.* at 2233 (emphasis added) (quoting *Bullcoming*, 131 S. Ct. at 2722 (Sotomayor, J., concurring)).
910. *Id.* at 2235 (citing Crawford v. Washington, 541 U.S. 36, 59-60 n.9 (2004)).

> 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.[911]

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."[912] Thus, her testimony as to the match was not hearsay, and the Confrontation Clause did not bar the court's admission of the same.[913]

Justice Alito noted that, in this case, the trial was by bench, and he suggested that had it been by jury, the testimony could have been problematic given a danger that the jury would consider the testimony not to assess the weight or reliability of the expert's testimony, but *for its truth* (that there was a match).[914] The plurality said it rejected the notion "that the wording of Lambatos' testimony confused the trial judge."[915]

There was a merely 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."[916] 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."[917]

Unlike *Bullcoming* and *Melendez-Diaz*, the plurality in *Williams* emphasized, the "expert [in Williams] referred to the report *not to prove*

---

911. *Id.* (citations omitted).

912. *Id.* at 2236.

913. *Id.* at 2236-37.

914. *Williams*, 132 S. Ct. at 2236. In other words, if testimony has an admissible non-hearsay purpose, but a danger exists that the jury will consider it for an inadmissible hearsay purpose, a court must consider excluding the testimony under Rule 403 balancing. *See* FED. R. EVID. 403; MICH. R. EVID. 403. The court can also instruct the jury to consider the evidence solely for its proper purpose. *See* FED. R. EVID. 405; MICH. R. EVID. 405.

915. *Williams*, 132 S. Ct. at 2237.

916. *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.

917. *Id.* at 2238.

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."[918]

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.'"[919] 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 for use against petitioner, who was neither in custody nor under suspicion at that time."[920] Having concluded that the testimony did not violate Williams' Confrontation Clause rights, the court affirmed the conviction.[921]

---

918. *Id.* at 2240 (emphasis added).
919. *Id.* at 2243 (quoting Davis v. Washington, 547 U.S. 813, 822 (2006)).
920. *Williams*, 132 S. Ct. at 2243 (emphasis added).
921. *Id.* at 2244.

The Confrontation Clause and Forensic Science Evidence After *Crawford/Davis*, *Melendez-Diaz*, *Bullcoming*, and *Williams* *Crawford* (2004) and *Davis* (2006)	*Melendez-Diaz* (2009)	*Bullcoming* (2012)	*Williams* (2012) (plurality opinion)
Only testimonial statements trigger the right to confrontation.[922]			
If … 1) there is no ongoing emergency,[923] and 2) the primary purpose of the statement "is to establish or prove past events potentially relevant to later criminal prosecution[,]" and 3) the statement is testimonial.[924]	Forensic laboratory reports are testimonial in nature.[925]	The output of a forensic laboratory instrument is testimonial and requires the testimony of the instrument's operator.[926]	1) If the primary purpose of generating the information is to meet an ongoing emergency (e.g., to catch a dangerous person still at large), the report is nontestimonial.[927] 2) If the prosecution offers the laboratory result not for its truth, but to establish the basis for the opinion of an witness who renders an opinion utilizing that evidence, the result or report is nontestimonial.[928]

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*."[929]

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*

922. *Davis*, 547 U.S. at 821 (quoting Crawford v. Washington, 541 U.S. 36, 51 (2004)).

923. *Id.* at 822.

924. *Id.*

925. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 324 (2009).

926. Bullcoming v. New Mexico, 131 S. Ct. 2705, 2715 (2011) (footnotes omitted).

927. *Williams*, 132 S. Ct. at 2243-44.

928. *Id.* at 2238-39.

929. *Id.* at 2244-45 (Breyer, J., concurring) (citations omitted).

vaginal swab sample was in fact correctly derived from that sample."[930] 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."[931] 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.[932]

Justice Breyer then noted various proposals that would answer these questions in whole or in part,[933] 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 accordingly."[934] The Justice had urged the Court to order reargument, but explained that, absent reargument, he concluded that the Cellmark report was nontestimonial, consistent with the *Melendez-Diaz* and *Bullcoming* dissents.[935] 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."[936]

Justice Thomas provided the fifth vote for the result—that Labatos' report was nontestimonial, but he reached this result by vastly different means.[937] In Justice Thomas' formalistic view of the Confrontation

930. *Id.* at 2245 (emphasis added).
931. *Id.* at 2246.
932. *Id.* at 2247.
933. *Williams,* 132 S. Ct. at 2247 (Breyer, J., concurring).
934. *Id.* at 2448.
935. *Id.*
936. *Id.* at 2252.
937. *Id.* at 2255 (Thomas, J., concurring).

Clause,[938] 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."[939] Solemnized statements "are functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination."[940]

However, Justice Thomas opined that "[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."[941] Furthermore, he wrote,

> [t]o 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.[942]

Justice Thomas agreed with the four dissenters when he wrote that "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."[943] 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."[944] Accordingly, in Justice Thomas' view, the Cellmark statements were hearsay because they "were introduced for their truth."[945]

---

938. *See, e.g.*, Davis v. Washington, 547 U.S. 813, 834-42 (2006) (Thomas, J., concurring in part and dissenting in part).

939. *Williams*, 132 S. Ct. at 2260 (Thomas, J., concurring) (emphasis added).

940. *Id.* at 2261 (quoting Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-11 (2009)).

941. *Id.* at 2257.

942. *Id.* (emphasis added) (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).

943. *Id.* at 2257 n.1.

944. *Id.* at 2258.

945. *Williams,* 132 S. Ct. at 2258-59.

Justice Kagan, writing for the four dissenters—herself and Justices Scalia, Ginsburg, and Sotomayor[946]—sought to stress, in blunt 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.[947]

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.[948] "Lambatos's testimony," Justice Kagan complained, "is functionally identical to the 'surrogate testimony' that New Mexico proffered in *Bullcoming*."[949] 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.'"[950]

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.[951] Echoing Justice Thomas somewhat,

---

946. *Id.* at 2264 (Kagan, J., dissenting).
947. *Id.* (citation omitted).
948. *Id.* at 2267.
949. *Id.*
950. *Id.* (quoting Bullcoming v. New Mexico, 131 S. Ct. 2705, 2715 (2011)).
951. *Williams*, 132 S. Ct. at 2268 ("'The Clause . . . does not bar the use of testimonial

she explained that, when an expert renders an opinion premised on inadmissible evidence,

> to 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."[952]

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."[953] 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."[954] 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."[955]

IX. RULES 901-03: AUTHENTICATION AND IDENTIFICATION

Before the trial court will admit an item of evidence, Rule 901 requires that the evidence's proponent establish its authenticity, a process that "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."[956]

Michigan courts have crafted a more specific rule of law when a party seeks to introduce a transcript of an audio recording. The court's "aim is to utilize procedures that ensure the reliability of the transcript."[957] The easiest course of action is to have the parties stipulate

---

statements for purposes other than establishing the truth of the matter asserted.'" (quoting Crawford v. Washington, 541 U.S. 36, 59 n.9 (2004))).

952. *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)).

953. *Id.* at 2269.

954. *Id.* at 2270.

955. *Id.* at 2272.

956. MICH. R. EVID. 901(a); FED. R. EVID. 901(a).

957. 298 Mich. App. 647; 828 N.W.2d 67 (2012) (citing People v. Lester, 172 Mich.

that the transcript is accurate,[958] but if that is not possible, "the trial court may verify the transcript's accuracy by relying on the verification of the transcriber or by conducting an independent determination by comparing the transcript with that of the audio recording."[959] Alternatively, "under certain situations the trial court may find that the best course of action is to allow the jury to determine the contents of the audio recording itself and decline to admit a prepared transcript."[960]

During the trial in *People v. Kodlowski* (a case whose facts I discuss in Part IV.A.4 of this article), the defense sought to have the jury read and/or hear a transcript of recorded audio from the incident, but the prosecution objected on the ground that the transcript was inaccurate.[961] The district court agreed with the prosecution, leaving it to the jury to determine the contents of the recording without the transcript.[962]

Given the circumstances, the Michigan Court of Appeals agreed, holding that "the trial court was acting well within its discretion by concluding that it would be best for the jury to determine the content of the audio recording at trial."[963] The panel observed that, "[i]nterestingly, during trial one of the witnesses testified that the transcript contained inaccuracies, and the clarity of the audio recording itself is not such that would lead to a stipulation as to its accuracy."[964]

A two-person majority of Judge Christopher M. Murray, writing for himself and Judge Jane E. Markey,[965] affirmed the defendant's conviction for this and other reasons. Judge Douglas B. Shapiro dissented on other grounds.[966]

X. RULES 1001-08: "BEST EVIDENCE" AND "DUPLICATES"

The "best evidence" rule provides that "[t]o prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute."[967] Having said that, the rules "otherwise provide" that "[a]

App. 769, 775-76; 432 N.W.2d 433 (1988)), *rev'd in part*, 495 Mich. 871; 837 N.W.2d 285 (2013).

958. *Id.* at 665-66 (citing *Lester*, 172 Mich. App. at 775).

959. *Id.* at 666 (citing *Lester*, 172 Mich. App. at 776).

960. *Id.*

961. *Id.* at 656-57.

962. *Id.*

963. *Kodlowski*, 298 Mich. App. at 666.

964. *Id.* at 666 n.9.

965. *Id.* at 651.

966. *Id.* at 673-77 (Shapiro, J., dissenting).

967. MICH. R. EVID. 1002. The federal rule is virtually identical. *See* FED. R. EVID. 1002.

duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original."[968]

In *United States v. Ross*, a federal court in Detroit convicted defendant Bryan Ross of orchestrating a counterfeit-check operation in which Robert Burston was a co-conspirator.[969] In addressing Burston's argument that there was insufficient evidence to support a conviction, the Sixth Circuit observed,

> [T]here was ample evidence in the form of testimony by several accomplices that Burston participated in the conspiracy by relaying information about the checks and assisting with the sale and resale of multiple vehicles. In particular, a check bearing Burston's fingerprint and the testimony of Dennis Goode established that Burston personally cashed a check from a car dealer obtained by Ross upon reselling one of the vehicles.[970]

On appeal, Burston argued that the trial court erred when it admitted a photocopy of a check he allegedly cashed.[971] Citing Rule 1003, Burston said the circumstances rendered the duplicate unfair because "'destruction of the original prevented Burston from having the check analyzed to determine whether he had personally handled the check, thereby leaving latent fingerprints on it.'"[972]

The panel rejected the "unfairness" argument, explaining that "[e]ven if Burston's latent fingerprints were somehow not on the original check (or if someone else's were), he makes no showing that the inked fingerprint was fraudulent or could not have been fairly matched to him."[973] Furthermore, an accomplice "testified that he saw Burston obtain the check and then submit the inked fingerprint before attempting to cash it."[974] Accordingly, the panel of Judge Jane B. Stranch, writing

968. MICH. R. EVID. 1003. The federal rule is virtually identical. *See* FED. R. EVID. 1003.
969. 703 F.3d 856, 865 (6th Cir. 2012).
970. *Id.* at 883.
971. *Id.* at 885.
972. *Id.*
973. *Id.*
974. *Id.*

for herself, Judge Danny J. Boggs, and U.S. District Judge James Carr,[975] affirmed Burston's conviction for this and other reasons.[976]

XI. RULES 1101-03: APPLICABILITY OF THE RULES OF EVIDENCE

Both the Michigan and federal rules provide that they do not apply at various non-trial proceedings, including sentencing.[977] In *United States v. Ogden*, a case I discussed in Part IV.C.7 regarding the rape-shield rule, the defendant argued on appeal that the district court erred at the restitution hearing (at which it ordered the defendant to pay the victim's psychotherapy expenses) by excluding the chat logs in which the victim referenced sending explicit pictures to men other than the defendant.[978] The court observed that the defendant failed to perfect the record at the restitution hearing, and, furthermore, even if he had done so, "[t]he rules of evidence do not apply during sentencing proceedings."[979]

Accordingly, a unanimous panel of the Sixth Circuit—Judge Raymond M. Kethledge, writing for himself, Judge Richard A. Griffin, and U.S. District Judge Amul R. Thapar[980]—saw no reason to disturb the defendant's restitution order.[981]

XII. CRIMINAL PROSECUTORS' DUTY TO DISCLOSE EVIDENCE IN CRIMINAL CASES

In the 1963 case of *Brady v. Maryland*, the U.S. Supreme Court held that the Due Process Clauses of the Fifth and Fourteenth Amendments

---

975. *Ross*, 703 F.3d at 864. Judge Carr of the Northern District of Ohio sat by designation on the Sixth Circuit panel. *Id.*

976. *Id.* at 886. Judge Boggs concurred in part and dissented with an unrelated portion of the panel's opinion relating to Ross. *Id.* at 886-87 (Boggs, J., concurring in part and dissenting in part).

977. FED. R. EVID. 1101(d)(3); MICH. R. EVID. 1101(b)(3). Michigan case law specifically recognizes that courts may look to hearsay information, such as that existing in a presentence investigation report, to illuminate their determinations as to scoring of sentencing-guideline variables. People v. Nix, 301 Mich. App. 195, 205 n.3; 836 N.W.2d 224 (2013) (citing People v. Ratkov, 201 Mich. App. 123, 125; 505 N.W.2d 886 (1993)).

978. 685 F.3d 600, 606 (6th Cir. 2013).

979. *Id.* (citing FED. R. EVID. 1101(d)). Since the rules of evidence do not apply, presumably, the rape-shield rule in FRE 412 also does not apply at sentencing proceedings, which means that the chat logs *might* have been admissible. Perhaps a better explanation from the panel would have been that the defendant made no showing of an abuse of discretion by the district court in not considering the chat logs as having any relevance to the restitution that the defendant owes the victim.

980. *Id.* at 602. Judge Thapar of the Eastern District of Kentucky sat by designation on the Sixth Circuit panel. *Id.*

981. *Id.* at 606.

prohibit "the suppression by the prosecution of evidence favorable to an accused upon request . . . where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[982] Thus, to establish a *Brady* violation, a defendant must establish the three elements of his or her claim: (1) the government suppressed the evidence, (2) the evidence was favorable to the defendant, and (3) the evidence was material.[983] To be "favorable," the evidence must be exculpatory or have the effect of impeaching a witness.[984] With respect to the third element, "[e]vidence is 'material' when 'there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different.'"[985] Relatedly, the Jencks Act "directs the government to produce statements or reports made or used by government witnesses at trial."[986]

Possible Jencks and *Brady* issues arose in *United States v. Macias-Ferras*, a criminal case involving drug trafficking that I first discussed in Part VIII.E of this article.

At trial, the defendant's attorney had the following exchange with a government agent:

> Q. So again, the only information you have regarding that February 18th deal to relate Mr. Macias to it is Sean's words?
>
> A. No, sir.
>
> Q. Okay. And the minivan, you say?
>
> A. No.
>
> Q. More?
>
> A. Yes.
>
> Q. What is more?
>
> A. Amber Babor for one.
>
> Q. Well, Amber Babor is not here, right?

---

982. 373 U.S. 83, 87 (1963).
983. United States v. Macias-Farias, 706 F.3d 775, 780 (6th Cir. 2013).
984. *Id.* (quoting United States v. Douglas, 634 F.3d 852, 860 (6th Cir. 2011)).
985. *Id.* (quoting Smith v. Cain, 132 S. Ct. 627, 630, (2012)).
986. *Id.* (citing 18 U.S.C. § 3500).

> A. You asked who else could provide information about that, and she did.
>
> Q. Oh, she did provide you information on that?
>
> A. Yes.
>
> Q. Okay. Did you write a report about it?
>
> A. Yes, I did.
>
> Q. You did?
>
> A. Yes, I did.[987]

The defense attorney then objected that he had never received a report relating Babor's statements, whereas the prosecutor responded that the government did not question the agent concerning Babor nor did it intend to call her as a witness.[988] The district court nevertheless ordered the prosecutor to disclose the agent's report referencing Babor.[989] The defense continued cross-examination of the agent with the report, but it then moved to strike the agent's testimony or order a mistrial, citing *Brady* and the Jencks Act.[990]

The Sixth Circuit commenced its *Brady* analysis by, first, concluding that the evidence was inculpatory, not exculpatory, as "[t]he relevant portion of Moore's report was Babor's statement to him that Macias-Farias was present during the February 18 drug transfer at the Louisville pharmacy."[991] Second, "[i]t [was] also clear that the prosecution was not guilty of improper suppression of the report but, instead, considered it irrelevant to the government's case."[992] Turning to the third of the *Brady* prongs, the court said the defendant did not make a showing of a reasonable probability that production of the report would have produced a different outcome:

> Macias-Farias has not established that there is any evidence in the DEA report that would have affected the outcome of the trial in any way, much less undermined confidence in the result. This

987. *Id.* at 779.
988. *Id.*
989. *Macias-Farias*, 706 F.3d at 779.
990. *Id.*
991. *Id.*
992. *Id.*

> conclusion is particularly true in light of all the other evidence presented at trial that supported Macias-Farias's conviction.[993]

Accordingly, a unanimous panel of Judge Martha Craig Daughtrey, writing for herself and Judges Raymond M. Kethledge and Bernice B. Donald,[994] affirmed Macias-Farias' convictions for this and other reasons, but it remanded the case to the district court for resentencing on unrelated grounds.[995]

Also, in *United States v. Ogden*, a case I first discussed in Part IV.C.7, the government disclosed to the defense a day before trial certain chat logs of the victim in which she referenced "sending explicit images of herself to the other men."[996] However, the Sixth Circuit concluded that because the rape-shield rule in FRE 412 operated to exclude evidence of the victim's sexual behavior, such logs were inadmissible, and *Brady* "applies only to evidence that is 'admissible at trial' or that would lead directly to admissible evidence."[997] Accordingly, a unanimous panel of the Sixth Circuit — Judge Raymond M. Kethledge, writing for himself, Judge Richard A. Griffin, and U.S. District Judge Amul R. Thapar[998]— affirmed the defendant's conviction and sentences for this and other reasons.[999]

XIII. CONCLUSION

The *Survey* period saw two personnel changes on Michigan's highest court—the arrivals of Democrat Bridget M. McCormack[1000] and Republican David F. Viviano,[1001] the former in January 2013 (replacing Democrat Marilyn J. Kelly, who could not seek reelection due to her age[1002]) and the latter in February 2013 (replacing Democrat Diane M.

---

993. *Id.* at 779.

994. *Id.* at 776.

995. *Macias-Farias*, 706 F.3d at 783.

996. 685 F.3d 600, 604 (6th Cir. 2012).

997. *Id.* at 605 (quoting United States v. Phillip, 948 F.2d 241, 249-50 (6th Cir. 1991)).

998. *Id.* at 601-02. Judge Thapar of the Eastern District of Kentucky sat by designation on the Sixth Circuit panel. *Id.*

999. *Id.* at 606.

1000. Ed Wesoloski, *McCormack Sworn in as MSC's Newest Justice*, MILW BLOG (Jan. 24, 2013), http://milawyersweekly.com/milwblog/2013/01/24/mccormack-sworn-in-as-mscs-newest-justice/.

1001. Jonathan Oosting, *Gov. Rick Snyder Appoints Judge David Viviano to Michigan Supreme Court*, MLIVE (Feb. 27, 2013, 9:59 PM), http://www.mlive.com/politics/index.ssf/2013/02/gov_rick_snyder_appoints_judge.html.

1002. Ed White, *Forced out by Age, Justice Marilyn Kelly Retiring from Michigan Supreme Court*, DETROIT FREE PRESS (Dec. 31, 2012, 11:01 AM),

Hathaway, who resigned prior to pleading guilty in federal court to bank fraud[1003]).

While neither of these changes caused any noticeable shifts in the court's evidence jurisprudence (and there were no seismic shifts in the Sixth Circuit or at the U.S. Supreme Court either), it is clear from this *Survey* period's cases that certain areas of the law are in flux and may require further exploration by the appellate courts, namely:

- The circumstances, if any, in which expert testimony about false confessions and newer lie-detector technology/procedures will be admissible within the Sixth Circuit and in Michigan state courts.

- The extent to which Rule 403 in Michigan permits a trial court to exclude character/propensity evidence in cases involving molestation of minors and/or domestic violence (otherwise admissible pursuant to statute).

- The extent to which a court will deem a forensic laboratory report as nontestimonial (for Confrontation Clause purposes) due to an ongoing emergency.

- The Sixth Circuit's standard for reviewing district courts' admission or exclusion of evidence pursuant to Rule 404(b).

Having said that, I thank you very much for taking the time to peruse this article. It is my sincere hope that you found the article useful in your practice. Please do not hesitate to write me with comments, suggestions, and statements of vehement agreement (or disagreement).[1004]

---

http://www.freep.com/article/20121231/NEWS15/121231022/.

1003. Chad Livengood, *Former Michigan Justice Hathaway Admits Fraud, May Face Jail Time*, DETROIT NEWS (Jan. 30, 2013, 11:10 AM), http://www.detroitnews.com/article/20130130/POLITICS02/301300347.

1004. meizlish@umich.edu is my e-mail address.