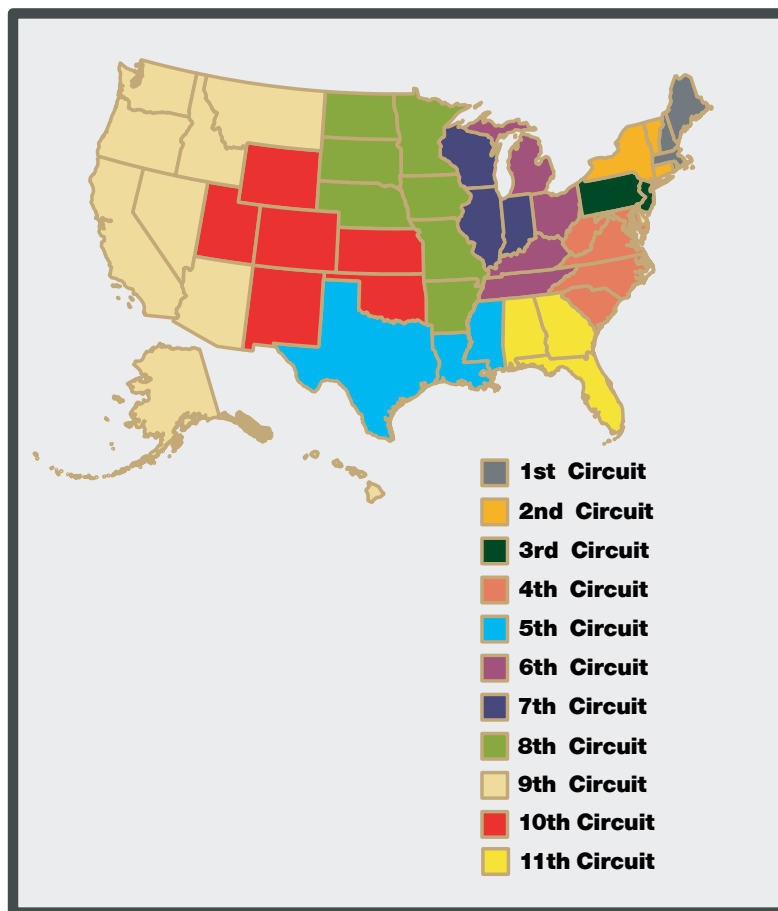
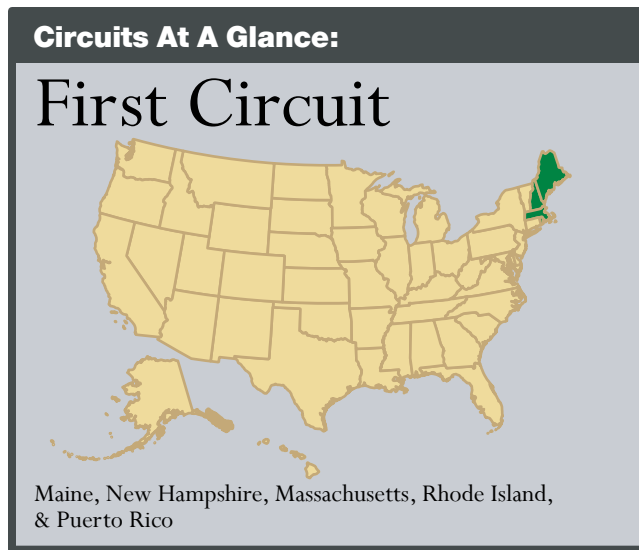


Introduction to Circuits At A Glance

Circuits At A Glance presents the published cases decided during the prior month by each circuit. Under each case entry, all of the evidence issues noted in the case are summarized, based upon the summaries noted in the *Evidence Case Docket*. A typical case entry (identified on p. 1076) includes the applicable rule and evidence principle, name of the case, citation, docket number and panel deciding the case, a link to a PDF file for the case (as issued by the circuit) and a link to any Federal Evidence Blog post concerning the case.





United States v. Villar

United States v. Villar, 586 F.3d 76 (1st Cir. Nov. 10, 2009) (No. 08-1154) (Torruella, Boudin, Saris (DJ))

Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Villar.pdf

Blog Post: <http://federalevidence.com/node/566>

Case Result: Reversing denial of defense motion for inquiry into the validity of conviction based on post-conviction e-mail from juror to defense counsel reporting that another juror stated during deliberations: “I guess we’re [race] profiling but they [defendant’s ethnic group] cause all the trouble”

After defendant was convicted of bank robbery, although FRE 606(b) prohibits the trial court from taking juror testimony about ethnically biased and prejudiced comments during the course of their deliberations, the court has discretion to conduct an inquiry to protect the defendant’s Fifth (Due Process) and Sixth (Impartial Jury) Amendment rights

✓ *Circuit Consensus on FRE 606(b):* Agreeing that “courts ... have held that Rule 606(b), by its express terms, precludes any inquiry into the validity of the verdict based on juror testimony regarding racial or ethnic

comments made ‘during the course of deliberations.’” (citing *United States v. Benally*, 546 F.3d 1230, 1236-38 (10th Cir. 2008); *Shillcutt v. Gagnon*, 827 F.2d 1155, 1159 (7th Cir. 1987); *Martinez v. Food City, Inc.*, 658 F.2d 369, 373 (5th Cir. Unit A Oct. 1981); *United States v. Henley*, 238 F.3d 1111, 1119-20 (9th Cir. 2001))

✓ *Primacy Of Constitutional Claims Over FRE 606(b):* Circuit notes: “While the issue is difficult and close, we believe that the rule against juror impeachment cannot be applied so inflexibly as to bar juror testimony in those rare and grave cases where claims of racial or ethnic bias during jury deliberations implicate a defendant’s right to due process and an impartial jury”

✓ *Factors To Consider:* FRE 606(b) may be displaced where “the four protections relied on by the Tanner Court do not provide adequate safeguards in the context of racially and ethnically biased comments made during deliberations [e.g., the voir dire process, the ability of the court and counsel to observe jurors during the trial, the ability of jurors to make pre-verdict reports of misconduct, and the availability of post-verdict impeachment through non-juror evidence of misconduct.]”

✓ *Trial Court Discretion:* While “that there is a constitutional outer limit, we stress that the policies embodied in Rule 606(b) ... are extremely important; the rule itself is rooted in a long-standing concern about intruding into jury deliberations and the problems that would be caused if jury verdicts could be easily undermined by post-judgment comments volunteered by ... jurors with second thoughts. In this case, we do not say that we would necessarily have pressed for further inquiry based on the somewhat terse and perhaps ambiguous report of a single juror if the district judge had not indicated his interest in doing so but for the bar of Rule 606(b), which he deemed absolute. But, as we have said, the district judge is in the best position to make the initial judgment. If in this case he thinks further inquiry appropriate, he is free to proceed; if he thinks the passage of time alters that initial disposition, that too is within his province.”

United States v. Pena

United States v. Pena, 586 F.3d 105 (1st Cir. Nov. 17, 2009) (No. 08-1407) (Boudin, Stahl, Lipez)

Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Pena.pdf

Blog Post: <http://federalevidence.com/node/571>

Case Result: Affirming conviction

FRE 702 (Testimony by Experts): In trial for possession of cocaine base with intent to distribute and carrying a firearm during and in relation to a drug trafficking crime, admitting fingerprint expert evidence without a *Daubert* reliability hearing on “ACE-V method used ... in matching the partial latent fingerprint recovered from the [charged] firearm” to the defendant’s inked fingerprint

✓ *Pre-Trial Daubert Hearing Was Not Required:* No error in denying pre-trial *Daubert* hearing but admitting expert evidence under *Daubert* standard after receiving “extensive testimony about the ACE-V method,” the expert’s “training and experience using the method for fingerprint identification, how he used the method” and where the expert’s conclusions were independently verified (by two other analysts who also testified at trial) was a sufficient showing of reliability

✓ *Burden Of Daubert Hearing:* Requiring defendant to “produce data and experts to demonstrate why” purported expert evidence should not be admitted before conducting a *Daubert* hearing did not improperly shift the burden of showing admissibility; a *Daubert* hearing may be dispensed with “if no novel challenge is raised” such as “no new favorable case law or expert testimony to challenge”; production of “a single 2002 student note from the *FORDHAM LAW REVIEW*” was insufficient

✓ *Opponent’s Challenge:* Opponent of expert evidence did not show unreliability as to trigger a *Daubert* hearing by showing only a “lack of uniform standards” and “proficiency rates ... [and] error rates ... basically determined without a controlled group” and lack of testing of the basic assumptions of the alleged science, where the case law is overwhelmingly in favor of admitting the evidence “under virtually any circumstance”

✓ *Circuit Consensus On Fingerprint Expert Evidence:* Noting that “numerous courts have found expert testimony on fingerprint identification based on the ACE-V method to be sufficiently reliable under *Daubert*” (citing *United States v. Baines*, 573 F.3d 979, 992 (10th Cir.

2009); *United States v. Mitchell*, 365 F.3d 215, 246 (3d Cir. 2004)) and that “it is difficult to discern any abuse of discretion” in admitting expert testimony that relies on the ACE-V method.” (citing *United States v. Mahone*, 453 F.3d 68, 71 (1st Cir. 2006))

United States v. McElroy

United States v. McElroy, 587 F.3d 73 (1st Cir. Nov. 20, 2009) (Nos. 08-2088, 08-2471) (Torruella, *Ripple* (7th), Boudin)

Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_McElroy.pdf

Case Result: Affirming conviction

In tax and fraud trial involving the operation of temporary employment agencies:

FRE 103(a) (Effect Of Erroneous Ruling - Harmless Error): Even if the court erred in admitting hearsay statement identifying that the defendant was present near witness’s office (“That’s Aimee King” with another person), the error was harmless because it played a minor role in the prosecution and in light of the other evidence of conspiracy

FRE 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time): Admitting Charts and testimony of an IRS agent as a summary witness (based on examining defendant’s companies’ business records to calculate nearly \$10 million due in employment taxes)

✓ *Admitting Summary Testimony* by an insurance fraud investigator (using reported payroll to determine lost workers comp premiums of about \$6.5 million due):

✓ *Not Unfairly Prejudicial:* The summary evidence was not excludable under FRE 403 because it “was probative of the defendants’ knowledge of their tax and insurance obligations and their intent to commit fraud” and its “alleged prejudice” in relying “on the contested testimony of” another witness “was minimal because the defendants had an opportunity to cross-examine

both” the summary witness and the witness on which the summary was based

FRE 611(a) (Mode and Order of Interrogation and Presentation - Control by Court): Admitting (1) summary charts and summary witness testimony of an IRS agent (based on examining defendant’s companies’ business records to calculate nearly \$10 million due in employment taxes) and (2) summary testimony by an insurance fraud investigator (using reported payroll to determine lost workers comp premiums of about \$6.5 million due):

✓ *Summary Testimony And Charts:* The summary testimony and exhibits “fell within the permissible uses of Rules 1006 and 611(a) evidence” since the testimony did “no more than [1] analyze facts [2] already introduced into evidence and [3] spell out the ... consequences that [4] necessarily flow from those facts” (quoting *United States v. Milkiewicz*, 470 F.3d 390, 397 (1st Cir. 2006); citing *United States v. Stierhoff*, 549 F.3d 19, 27 (1st Cir. 2008))

✓ *Not Unfairly Prejudicial:* The summary evidence was not excludable under FRE 403 because it “was probative of the defendants’ knowledge of their tax and insurance obligations and their intent to commit fraud” and its “alleged prejudice” in relying “on the contested testimony of” another witness “was minimal because the defendants had an opportunity to cross-examine both” the summary witness and the witness on which the summary was based

✓ *Summary Evidence In Complex Cases:* In tax evasion cases a summary witness may be presented to summarize and analyze the facts of record as long as the witness does not directly address the ultimate question of the defendant’s intent to evade taxes (consistent with “other circuit’s treatment of summary witness evidence offered in complex cases”)

✓ *Limited Situations When Summary Is Appropriate:* As a general matter, there is a “need for caution when summary witness testimony and exhibits are offered” because “they are allowed only in limited situations”; distinguishing admission of summary evidence as substantive evidence in contrast to admission as a peda-

gogical device for clarifying and simplifying “complex testimony or other information” and to “help counsel present its argument to the jury”

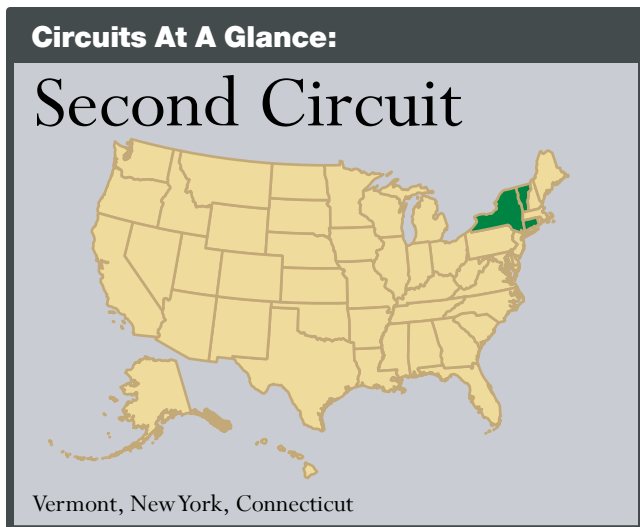
FRE 803(1) (Present Sense Impression): Admitting hearsay statement identifying that the defendant was present near the witness’s office:

✓ *Present Sense Impression:* Hearsay testimony that worker in office pointed out defendant in car outside the office building (“That’s Aimee King” with another person) was admissible as a present sense impression “because the circumstances under which it was given -- immediately after an observation -- diminish substantially the opportunity for fabrication” and the statement was corroborated by the witness who heard the declarant who “also experienced, at least to some degree, the situation under which the statement was made”

✓ *No Necessity Of Corroboration:* While present in this case, generally a FRE 803(1) statement “does not include, explicitly, a requirement for corroboration”

✓ *FRE 803(1) Foundational Elements:* A hearsay statement admitted under FRE 803(1) must [1] describe or explain the event or condition perceived and [2] must be made either while the event is taking place or immediately thereafter

✓ *Harmless Error:* Even if the court erred in admitting hearsay testimony that the defendant was present at the witness’s office, the error was harmless because it played a minor role in the prosecution and in light of the other evidence of conspiracy



United States v. Stewart

United States v. Stewart, ___ F.3d ___ (2d Cir. Nov. 17, 2009) (Nos. 06-5015-cr (L), 06-5031-cr (con), 06-5093-cr (con), 06-5131-cr (con), 06-5135-cr (con), 06-5143-cr (con)) (Walker (concurring and dissenting in part), Calabresi (concurring), Sack)

Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Stewart.pdf

Case Result: Affirming convictions, but remanding for resentencing

In prosecution of defendant attorney for aiding her client (a seditious conspiracy convict), circumvent Special Administrative Measures designed to prevent the client's communications with terrorist organizations:

FRE 501 (Privileges - State Secrets): Defendant was not entitled to disclosure of classified information regarding whether she or other co-defendants were surveilled by the National Security Agency (NSA), in light of the government's invocation of the state-secrets privilege in that "details of the NSA's operations...implicate national security and are among 'the nation's most guarded secrets'"

✓ *State-Secrets Privilege In Criminal Cases:* The secrets privilege "applies to criminal cases" but trial court can

assess it "give[s] way under some circumstances to a criminal defendant's right to present a meaningful defense"

✓ *Three-Part Test:* District court properly considers whether the criminal defendant's right to present a defense prevails over the government's privilege by 1) determining in camera and ex parte whether the information sought is relevant, and 2) if relevant, whether the assertion of the state-secrets privilege is colorable, and if colorable, 3) whether the information sought to be disclosed is material to the defense (citing *United States v. Aref*, 533 F.3d 72, 78 (2d Cir. 2008); *United States v. Yunis*, 867 F.2d 617, 622-25 (D.C.Cir. 1989))

✓ *Claimant Of State-Secrets Privilege:* Notes that generally the state-secrets privilege claim must be "lodged by the head of the department which has control over the matter, after actual personal consideration by that officer" and that "we will not need to address this issue in appeals from future prosecutions in which the state-secrets privilege is invoked as the government is now well-informed of this obligation" to present a claim lodged by the head of a department; this requirement is dispensed with in defendant's case because "[i]t would 'be of little or no benefit' for us to remand for the purpose of having the department head agree that disclosure of the classified information would pose a risk to national security here" (citing *United States v. Aref*, 533 F.3d 72, 80 (2d Cir. 2008))

FRE 403 (Exclusion of Relevant Evidence on Ground of Prejudice, Confusion, or Waste of Time): No error in admitting book by foreign terrorists because the book was relevant to the terrorist's intent to murder or kidnap, an element in the charge against the defendant of having aided such a scheme; no error in excluding news footage "purporting to depict Israeli violence against Palestinian demonstrators" because it was of minimal relevance and highly prejudicial and confusing

S.E.C. v. DiBella

S.E.C. v. DiBella, 587 F.3d 553 (2d Cir. Nov. 25, 2009) (Nos. 08-1673-CV (L), 08-3797-CV (CON)) (Miner, Wesley, Stanceu (Ct of Int. Trade))

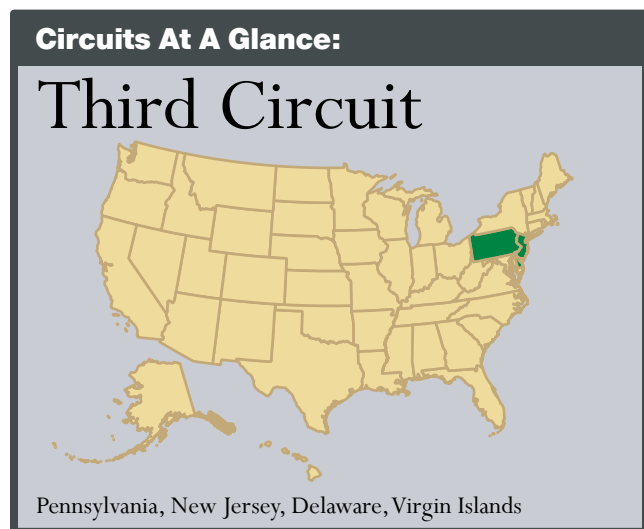
Case Link: http://federalevidence.com/pdf/2009/11-Nov/SEC_v_DiBella.pdf

Case Result: Civil penalties and disgorgement remedy

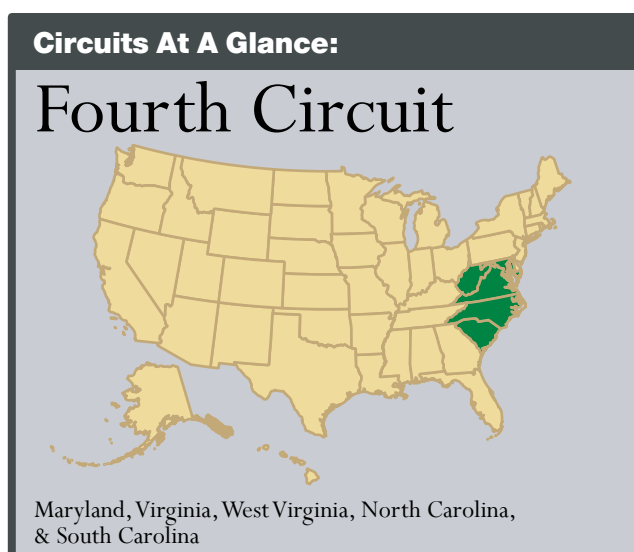
In SEC enforcement action seeking civil penalties for securities fraud in a scheme for investments by a state pension fund, admission of evidence of prior bad acts by the manager of the state fund was admissible:

FRE 404(b) (Other Crimes, Wrongs, or Acts): Because it demonstrated the manager's knowledge or absence of mistake and that he knew how to illegally take advantage of his position for personal gain

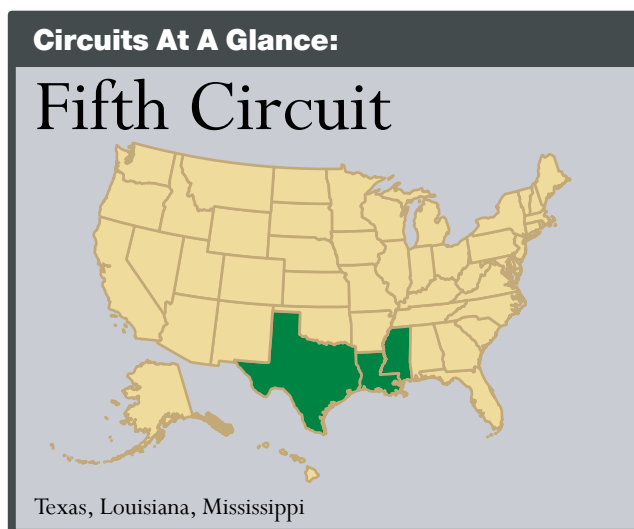
FRE 103(a) (Harmless Error): But even if admission of the prior act evidence was in error, it was harmless because there was other substantial evidence of the defendant's violations and the court "instructed the jury three times" at different trial stages not to "impute" the witness's previous wrongdoing" on to the defendant



No cases reported this month



No cases reported this month



United States v. Mendoza

United States v. Mendoza, 587 F.3d 682 (5th Cir. Nov. 6, 2009) (No. 08-41052) (Jones, Smith, DeMoss)

Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Mendoza.pdf

Case Result: Affirming conviction

FRE 404(b) (Other Crimes, Wrongs Or Acts): In

conspiracy to possess with intent to manufacture and distribute methamphetamine trial, admitting evidence of defendant's purchase of ten kilograms of cocaine five years earlier under FRE 404(b) as relevant to show intent, which the defendant's not guilty plea put in issue, and its "probative value ... outweighed the possible prejudice"

✓ *Application Of FRE 403 Factors*: Here the other act evidence was relevant to the charge of conspiracy (requiring proof of defendant's intent) and the prior act evidence (conspiracy to sell a controlled substance) was similar to the charged crime, and because it occurred five years before the charged offense, was sufficiently close in time

✓ *Limiting Instructions & Prejudice*: Trial court's limiting instruction greatly minimized any risk of undue prejudice from admitting the other act evidence

✓ *FRE 404(b) Foundation*: Other act evidence is admissible if it "[1] is relevant to an issue other than [defendant's] character and ...[2] its probative value is not substantially outweighed by the danger of unfair prejudice," (citing *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (*en banc*))

✓ *Assessing 403 Balance*: In assessing if the other act evidence's probative value is outweighed by its possible prejudice, the circuit considers "[1] the extent to which unlawful intent was established by other evidence, [2] the similarity between the extrinsic and charged offenses, and [3] the amount of time separating the other act and the charged offense"

United States v. Cockrell

United States v. Cockrell, 587 F.3d 674 (5th Cir. Nov. 6, 2009) (No. 08-41008) (King, Garza, Haynes)

Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Cockrell.pdf

Case Result: Affirming conviction

In conspiracy to possess with intent to distribute heroin resulting in serious bodily injury trial, admitting evidence of a prior heroin conviction, prior methamphetamine arrest and arrest after officers observed defendant conducting cell phone heroin transaction while in police custody

✓ *Prior Conviction*: The defendant's plea of not guilty raised the issue of his intent and the other crimes evidence was relevant to show intent since it was similar to the charged crime; the prior conviction occurred seven years before the current charges, the prior crime evidence was not "heinous" in nature as would incite the jury to an irrational decision; the trial judge provided limiting instructions regarding the other act evidence which mitigated prejudice

✓ *Prior Arrest*: The phone cell arrest was admissible to show intent as the defendant's plea of not guilty raised the issue of his intent; the arrest was contemporaneous with the charged heroin conspiracy and the prosecutor needed corroborative evidence of testimony by indicted and unindicted co-conspirators who purchased or received drugs from the defendant; the trial judge provided limiting instructions minimizing any prejudice

✓ *FRE 103(a) Harmless Error*: Even if admitting the cell phone arrest evidence was "duplicative and unnecessary," under FRE 403, the defendant was "entitled to no relief because he has made absolutely no showing of prejudice"

✓ *FRE 404(b) Foundational Elements*: The Fifth Circuit "applies a two-pronged analysis.... First, the evidence of 'other crimes, wrongs, or acts' must be relevant to an issue other than the defendant's character... [with] [t]he standard of relevancy under Rule 401 applie[d]," so that relevance "is a function of its similarity to the offense charged."; "Second, the evidence must possess probative value that is not substantially outweighed by its undue prejudice" under FRE 403, examining the "extent to which the defendant's unlawful intent is established by other evidence..." and by "[o]ther factors ... [which] include 'the overall similarity of the extrinsic and charged offenses, and the amount of time that separates the extrinsic and charged offenses' as well as any limiting instructions." (citations omitted)

United States v. Rose

United States v. Rose, 587 F.3d 695 (5th Cir. Nov. 6, 2009) (No. 08-10813) (King, Davis, Benavides) (*per curiam*)

Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Rose.pdf

Blog Post: <http://federalevidence.com/node/567>

Case Result: Affirming convictions

In bench trial of possession of cocaine with intent to distribute and related firearms offenses:

✓ *Confrontation Clause:* Admission of drug lab report without the testimony of the authoring analyst violated the Confrontation Clause because even “sworn certificates of analysis detailing the results of forensic analyses on suspected drugs are testimonial statements for purposes of the Confrontation Clause” (citing *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2532 (2009) and *Crawford v. Washington*, 541 U.S. 36, 59 (2004) (testimonial statements by a non-testifying witness inadmissible unless the witness is unavailable and was previously subject to cross-examination by the defendant))

✓ *Any Error Not Plain:* Any error from the admission of a drug lab test that reported the presence of cocaine was not plain error despite failure of the reporting analyst to testify at trial because the lab supervisor who reviewed and signed the report did testify, was subject to cross-examination, and the defendant failed to object to supervisor’s testimony or to the report (despite ambiguity as to whether the supervisor had personal knowledge of tests performed)

✓ *Rose Limited To Its Facts:* The circuit noted the result was limited to the facts of the case including that the lab tests were ambiguous and that the *Melendez-Diaz* Court “wrote of the non-testifying analysts in terms of whose names appeared on the reports” and they “expressly rejected the notion ‘that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case.’” (citing *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2532 n.1 (2009)); however the circuit clarified “that we do not hold that the prosecution may avoid confrontation issues through the in-court testimony of any witness who signed a lab report without regard to that witness’s role in conducting tests or preparing the report. Instead, we refer to the above language from *Melendez-Diaz* to illustrate that any error that may have arisen from the facts of this case ... was not plain as required by our standard of review”

United States v. Carey

United States v. Carey, __ F.3d __ (5th Cir. Nov. 25, 2009) (No. 08-60961) (Wiener, Garza, Elrod*)

Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Carey.pdf

Case Result: Affirming conviction

Cross-Reference: FRE 103(a), FRE 611(c), FRE 612, FRE 701,

In aggravated sexual abuse of a minor case, no error in admitting:

FRE 612 (Writing Used to Refresh Memory): Child victim’s testimony after she was given police report to refresh her memory because defendant failed to show that the victim read her testimony from the police report

✓ *Source of the Writing Used to Refresh:* “[A]dmissibility of testimony accompanied by a Rule 612 refreshment does not depend upon the source of the writing, the identity of the writing’s author, or the truth of the writing’s contents” (citing *Esperti v. United States*, 406 F.2d 148, 150 (5th Cir. 1969))

✓ *Foundational Showing:* Circuit notes that foundation for use of a writing to refresh a witness’s recollection requires “(1) the witness requires refreshment, and (2) the writing actually refreshes the witness’s memory” and that the rule does not permit a witness to testify “directly from a writing” (citing *United States v. Horton*, 526 F.2d 884, 888-89 (5th Cir. 1976)

✓ *Circuit Rejects Explicit Declaration Test:* It is not necessary that the witness explicitly “declare that the writing has, in fact, refreshed the witness’s memory” but that “an absence of the customary formalistic wording to show inability to recollect without aid and the refreshing effect of the writing, the context of the specific queries, the witness’ spoken reaction and the trial judge’s opportunity to observe the witness’ demeanor” can be used to assess the effect of the writing (citing *Thompson v. United States*, 342 F.2d 137, 139-40 (5th Cir. 1965))

✓ *Nature Of FRE 612 Writing Used Goes To Weight Not Admissibility*: Whether the writing used under FRE 612 was written by the witness or was “completely accurate” go to “the weight to be accorded by the finder of fact, not the admissibility of” the refreshed testimony (citing *Thompson v. United States*, 342 F.2d 137, 139 (5th Cir. 1965) (“The reliability or truthfulness of the statement was relevant only to the problem of the weight and credibility to be accorded the witness’ testimony.”))

FRE 611(c) (Leading questions): Testimony by child victim that responded to prosecution’s leading questions regarding the sexual abuse she experienced was properly admitted because “our circuit has held that a victim-witness’s youth and nervousness can satisfy Rule 611’s necessity requirement. Here, the indictment concerned a sex crime, the witness was twelve, and the record reveals several times where DJ appeared nervous” (citing *Rotolo v. United States*, 404 F.2d 316, 317 (5th Cir. 1968) (allowing the government to lead a fifteen-year-old witness who appeared “reluctant,” “nervous,” and “upset”))

FRE 701 (Opinion Testimony by Lay Witnesses): Noting open question of whether witness “was entitled to rely upon her long histories of personal experience [with her specialty of child sexual abuse assaults so that she could testify that abuse victims usually give vague initial accounts of the abuse before making a more complete account]

✓ *FRE 702 Not Triggered*: The law witness’s testimony did not need to be assessed under FRE 702 expert requirements because her testimony was invited by the defendant

✓ *Defendant Opened Door*: Because the challenged opinion testimony came only after the defendant pursued an inquiry on cross-examination into the witness’s experience and the meaning of a child victim providing inconsistent accounts of the alleged sexual abuse, the defendant’s decision to pursue these subjects during cross-examination “entitled the government to elicit rebuttal evidence” into the witness’s opinion

United States v. Miller

United States v. Miller, ___ F.3d ___ (5th Cir. Nov. 20, 2009) (No. 08-31168) (Jones, Garza, Stewart)

Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Miller.pdf

Case Result: Affirming tax evasion conviction

Blog Post: <http://federalevidence.com/node/575>

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In tax evasion trial arising from defendant doctor’s alleged embezzling of payments due to his health clinic employer:

FRE 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time):

✓ *Excluding evidence* that defendant and employer negotiated a tentative settlement agreement about their dispute on employment contract payments because its probative value was minimal (as the negotiations dealt solely with disputed employment compensation contract payments and not later-learned evidence of defendant’s embezzlement) and substantially outweighed by its potential to confuse the jury in determining the tax evasion charges

✓ *Admitting defendant’s ex-wife’s testimony* that she believed at the time of their marriage that she had been committing the crime of failing to file income taxes because it indicated her belief that the couple were involved in a joint criminal activity and was highly probative to determining whether the joint crime exception applied to the marital privilege; its probative value was not substantially outweighed by any danger of “guilt by association”

FRE 408 (Compromise and Offers to Compromise): Although FRE 408 applied to criminal cases in the Fifth Circuit, declining to address whether the employment contract negotiations were admissible “because the evidence regarding settlement negotiations is excludable on the grounds of relevance” under FRE 403

✓ *Circuit Split Noted*: Noting that FRE 408 “applies in criminal cases” and a “split in authority in our sister circuits on this issue” (citing *United States v. Bailey*, 327 F.3d 1131, 1144-47 (10th Cir. 2003) (discussing circuit split); *United States v. Hays*, 872 F.2d 582, 588-89 (5th Cir. 1989) (Fifth Circuit position that FRE 408 applies in criminal cases)).

FRE 501 (Privileges - Confidential Marital Communications Privilege): Defendant’s divorced wife could testify as to conversations with the defendant on how to process payments that they allegedly embezzled (even though only the defendant and not the witness was charged with that crime) and not to file taxes after he joined tax denial organization, was admissible because:

✓ *Joint Crime Exception*: It qualified for exclusion from the privilege under the joint criminal activity exception (as [1] conversations [2] between husband and wife [3] about crimes [4] in which they are jointly participating) (citing *United States v. Ramirez*, 145 F.3d 345, 355 (5th Cir. 1998))

✓ *Not A Confidential Communication*: The confidential marital communications privilege did not apply as wife’s testimony was consistent with defendant’s testimony about his good faith belief, based on tax denial organization’s publications, that he did not have to pay taxes

✓ *Inapplicability Of Adverse Testimony Privilege*: Defendant and the witness were divorced, so that the spousal testimony privilege (right of witness to refuse to testify adversely against spouse) did not survive the end of the marriage

✓ *An Act, Not A Communication*: The discussion as to how to process allegedly embezzled payments was an act and not a communication and therefore was not covered by the confidential marital communications privilege

United States v. Cooks

United States v. Cooks, ___ F.3d ___ (5th Cir. Nov. 23, 2009) (No. 07-11151) (Higginbotham, Stewart, Englehardt(DJ))

Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Cooks.pdf

Case Result: Affirming conviction

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In wire and bank fraud case arising from scheme to pocket mortgage payments made on behalf of straw purchasers who qualified for banking on substantially more than the value of the home in transactions based on defendant’s forged and faked documents relating to the appraisal value and the straw purchaser’s financial standing:

FRE 702 (Testimony by Experts): Admission of expert testimony by FDIC agent about mortgage fraud was an abuse of discretion because the witness was not qualified as an expert in that he lacked “formal training and practical experience in mortgage fraud”

FRE 701 (Opinion Testimony by Lay Witnesses): Although FDIC agent should not have qualified as an expert, his testimony that “was merely descriptive and summarized the factual information and documents gathered throughout the investigation” of the defendants was admissible as lay testimony

FRE 103(a) (Harmless Error): To the extent the lay witness testified about the legality of the defendant’s scheme, this required the specialized knowledge of an expert which the witness lacked, however the admission of this testimony was harmless because of the extensive evidence that the transactions were fraudulent; even if the court erred in admitting other act evidence of defendant’s other uncharged fraudulent schemes, it was harmless because the defendant failed to show that the evidence affected their substantial rights

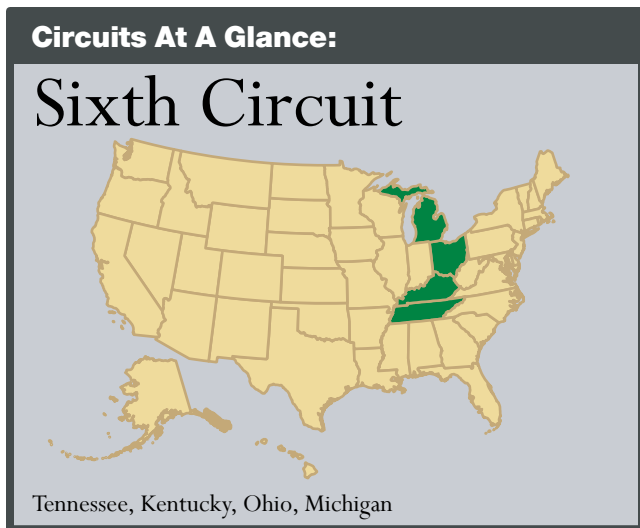
FRE 404(b) (Other Crimes, Wrongs, or Acts): Admitting evidence of uncharged fraudulent transactions that were “materially indistinguishable” from the charged schemes to demonstrate how defendant’s scheme worked because:

✓ *FRE 404(b) Foundational Showing*: Extrinsic act evidence is admitted under FRE 404(b) in the Fifth Circuit using “a two-step inquiry. First, the court must

determine whether the extrinsic evidence is relevant to an issue other than the defendant's character, such as 'motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.' Second, the probative value must not be substantially outweighed by the potential for undue prejudice." (citing *United States v. Beechum*, 582 F.2d 898, 911 (5th Cir. 1978) (*en banc*))

✓ *Relevance Factor*: "In the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor"; in this case it required only that the prosecution show that the defendants knowingly were involved in the other similar fraudulent schemes, not that they personally tendered the fraudulent documents to lenders in the uncharged transactions

✓ *Not Outweighed by Undue Prejudice Factor*: The other act evidence was probative of the defendant's role in the fraudulent scheme and any undue prejudice was minimized by a detailed limiting instruction, prohibiting use of the evidence of the other five uncharged transactions "in deciding if defendant[s] ... committed the acts charged"



Dortch v. Fowler

Dortch v. Fowler, ___ F.3d ___ (6th Cir. Nov. 30, 1009) (No. 08-5476) (O'Connor (US SupCt), Gilman, Gibbons)

Case Link: http://federalevidence.com/pdf/2009/11-Nov/Dortch_v._Fowler.pdf

Case Result: Affirming summary judgment for defendant driver's employer on a negligent-supervision-and-retention claim and jury's finding in favor of the defendant truck driver on the underlying negligence claim

In diversity negligent traffic accident case, trial court:

FRE 401 (Definition of "Relevant" Evidence): Erroneously limited plaintiff's cross-examination of defense expert regarding whether an extensive search by the defendant failed to produce evidence that would refute plaintiff's version of how the accident occurred

✓ *Central Issue Was Cause Of Road Gouge Marks*: The "trial boiled down to whether the accident occurred in Dortch's or Fowler's lane of travel. Central to that inquiry is whether either of the two gouges (one in each lane) was caused by the underlying accident" – the gouge on one side would suggest the defendant caused the accident, the gouge on the opposite side would suggest the plaintiff caused the accident

✓ *"Extremely Liberal" Test of Relevance*: As FRE 401 defines relevant evidence as that having "any tendency" to make the existence of a fact of consequence more or less probable, proof of the absence of evidence is admissible under FRE 401 because "a piece of evidence does not need to carry a party's evidentiary burden in order to be relevant; it simply has to advance the ball"

✓ *Same Fact Of No Record Would Be Irrelevant If Nobody Asked*: Distinguish were a record was searched for and not found - which would be relevant, in light of "extensive" records of accident - from situation in which nobody searched for a record and so nothing was found – which would be irrelevant

✓ *FRE 103(a) (Harmless Error)*: Exclusion of plaintiff's inquiry into absence of record that would support the defendant's contention as to cause of accident was harmless because evidence of no record is of little probative value and was "not ... very strong evidence"

FRE 803(8) (Public Record): Admission of the police report on the accident did not violate FRE 803(8)(B) because the factors used to assess trustworthiness of

public reports weighed in favor if its admissibility

✓ *ACN Factors Of Trustworthiness*: Using the nonexhaustive list of factors in the Advisory Committee Notes to FRE 803(8), the court should assess “(1) the timeliness of the investigation, (2) the special skill or experience of the official, (3) whether a hearing was held and the level at which [it was] conducted, [and] (4) possible motivation problems”

✓ *ACN Factors Weight For Admissibility 3 to 1*: As trial judge concluded that three of these four factors (all but whether a hearing was held) weighed in favor of the report’s trustworthiness, and that any discrepancies could be addressed through the cross-examination by the officer who made the report

✓ *No Abuse of Discretion*: The trial judge did not abuse his discretion in determining the police report was trustworthy given the officer’s “extensive background in accident reconstruction, [that he] was on the scene shortly after the accident, was unbiased, and his report was primarily based on his team’s personal observations. Given these facts, the district court did not err in admitting the report as evidence and permitting plaintiff to raise any issues with the report or the officer’s conduct via cross-examination of the officer

United States v. Hardy

United States v. Hardy, 586 F.3d 1040 (6th Cir. Nov. 20, 2009) (No. 08-5421) (Kennedy, Rogers, Hood)

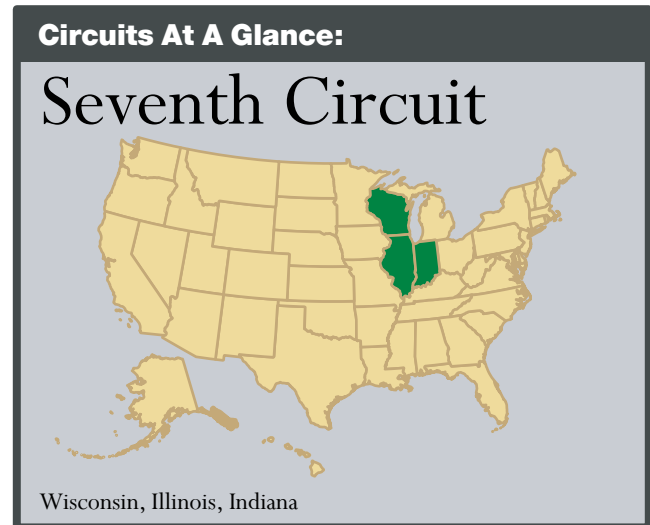
Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Hardy.pdf

Case Result: Affirming convictions

FRE 1101 (Applicability of Rules): In trial for bank fraud and tax evasion, excluding as a sanction for discovery abuse defense evidence (check stubs that defendant claimed showed she took money from her employer to repay herself for prior loans she made to company) because even if this evidence would not be admissible at trial as it might be deemed inadmissible copies under

FRE 1001, criminal discovery “under Rule 16 does not depend on the admissibility of the evidence at trial”

✓ *Reason For Inapplicability Of FRE*: Because the court and not the parties determine whether to admit evidence at trial, “so the parties would not be able to accurately determine prior to trial whether certain evidence would be admissible without a ruling from the court” and so must proffer evidence required by Fed. R. Crim. P. 16 even if it might be excluded under the FRE at trial



Schrock v. Learning Curve Intern., Inc.,

Schrock v. Learning Curve Intern., Inc., 586 F.3d 513 (7th Cir. Nov. 5, 2009) (No. 08-1296) (Flaum, Williams, Sykes)

Case Link: http://federalevidence.com/pdf/2009/11-Nov/Schrock_v_Learning_Curve.pdf

FRE 1002 (Requirement of Original): Reversing and remanding summary judgment that defendant did not infringe plaintiff’s copyright in photos where the party’s copyrights might have been altered by a licensing agreement and its text was “not in the [trial court’s] record” and other evidence consisted of an affidavit of a party describing the agreement, because “the best evidence of the terms of an agreement is, of course, the agreement itself” under FRE 1002

United States v. Rogers

United States v. Rogers, 587 F.3d 816 (7th Cir. Nov. 18, 2009) (No. 08-1516) (Cudahy, Flaum, Wood)

Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Rogers.pdf

Case Result: In interlocutory appeal by government, reversing and remanding exclusion order

In trial for attempt to entice a minor to engage in sexual activity and transferring obscene material to minor, evidence of defendant's prior conviction for soliciting a minor and of his prior conduct of engaging in sexually explicit conversations with a minor was erroneously excluded because:

FRE 413 (Similar Crimes – Sexual Assault Cases):

Evidence of defendant's 2005 Internet interactions with a 14-year old girl that "included concrete attempts to meet the minor for purposes of sexual intercourse" was admissible under FRE 413 as an "offense of sexual assault," despite the victim's apparently willing participation in the sexual Internet conversations, because "[m]inors lack the capacity to consent, and so sexual contact [even if through communications on the Internet] with a minor is always 'without consent'"

✓ *Role Of FRE 403 Balancing:* A trial judge's decision to exclude FRE 413 evidence "based on the prejudicial effect of the propensity inference" is "problematic" as the court in conducting a FRE 403 balance must "acknowledge the probative value of the propensity inference" as well as "explain what about [defendant's] particular prior sexual offenses made them more prejudicial than probative"

✓ *Rejecting List Of Standard FRE 413 Factors:* The Seventh Circuit rejects the Ninth Circuit's approach to determining if FRE 413 evidence is unduly prejudicial under FRE 403, "unlike our colleagues in the Ninth Circuit, we believe that lists [of factors] are unhelpful in the end for this inquiry" (citing *United States v. LeMay*, 260 F.3d 1018 (9th Cir. 2001) (requiring district courts

to consider five enumerated factors)

FRE 402 (Relevant Evidence Generally Admissible):

Defendant's previous conviction for sexual solicitation of a minor as well as his prior conduct of engaging in sexually explicit Internet conversations with a 14-year-old girl were relevant in defendant's trial because this evidence would help prove the defendant intended to send the charged obscene picture that the minor received and that the defendant intended to persuade the minor to engage in sexual acts; the prior crime or act evidence would establish a motive (to satisfy his desire for engaging in sexual activity with a minor or having done it before, was more likely to do so again)

FRE 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time):

FRE 413 "affects the Rule 403 analysis of past sexual offenses introduced in sexual assault cases"; FRE 413 serves as "an exception" to FRE 404(b) which identifies propensity inferences as improper"; "Because Rule 413 identifies this propensity inference as proper, the chance that the jury will rely on that inference can no longer be labeled as 'unfair' for purposes of the Rule 403 analysis."

✓ *Differential Analysis:* "a court's Rule 403 analysis of prior conduct differs if the evidence falls under Rule 404(b) versus Rule 413; in the former analysis, the rule has decreed that the propensity inference is too dangerous, while in the latter, the propensity inference is permitted for what it is worth."

✓ *Application Of FRE 403 To FRE 413 Evidence:* FRE 413 prior act evidence is not per se non-prejudicial under FRE 403; where FRE 413 evidence "risk[s] a decision on the basis of something like passion or bias-that is, an improper basis" it is excludable under FRE 403 since all FRE 413 does is make a "propensity inference permissible" under FRE 403; thus where FRE 413 evidence risks a jury decision on the basis that "it is appalled by a prior crime the defendant committed rather than persuaded that he committed the crime charged," it is properly excluded under FRE 403 as unduly prejudicial

United States v. Harris

United States v. Harris, ___ F.3d ___ (7th Cir. Nov. 25, 2009) (No. 07-4017)(Easterbrook, Williams, Sykes)

Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Harris_7th.pdf

Case Result: Affirming conviction

Cross-Reference: FRE 103(a); FRE 404(b); FRE 403

Evidence Principle No.:

Circuits At A Glance: p. **

In possession of crack and illegal possession of a firearm case, admission of testimony by:

FRE 404(b) (Other Crimes, Wrongs or Acts): Defendant's girlfriend about seeing defendant's previous drug sales was admitted as relevant to his intent to distribute crack cocaine as charged

✓ *FRE 404(b) Foundation Satisfied:* Other Act evidence was [1] relevant as defendant claimed the seized drugs he was only holding for another person, [2] sufficiently similar as the prior drug sales involved a form of cocaine [3] close in time to the current charge against the defendant, as the prior sales occurred within two-years of his arrest; and [4] its probative value outweighed the danger of unfair prejudice, particularly in light of the court's limiting jury instruction

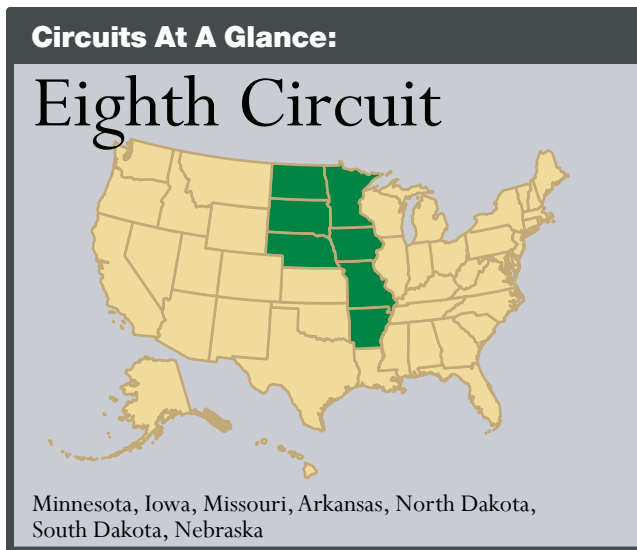
✓ *Circuit Notes Standard Approach:* The circuit noted that "[w]e long ago rejected the proposition that a drug conviction is always admissible in a later, different drug prosecution" in order to prove defendant's intent, but that such prior act evidence is "most obvious justifiable" in drug prosecutions on the issue of intent when the defendant, "while admitting possession" of the drug, "denies the intent to distribute it" as in the defendant's case here

FRE 103(a) (Harmless Error): Defendant's girlfriend that although she never seen defendant with a gun, he "brag[ged] about ... the weapons he had" even if erroneously admitted prior act evidence was harmless as evidence of his possession "was very strong" since the defendant himself told officers he stored guns in his girlfriend's bedroom and personally directed officers to the storage container there where guns were found

FRE 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion or Waste of Time): Police officer that the defendant told him in a post-arrest interview that the defendant "was having a dispute with a group of individuals from approximately 59th and Sangamon ... that that was why he had the firearms...." was not unduly prejudicial gang testimony, as the officer did not directly state the defendant belonged to a gang and the testimony was highly probative as to defendant's motive for having the firearms

✓ *"Toning Down" Gang-Related Testimony:* Because of its inflammatory potential, trial court should "consider carefully" whether to admit evidence of gang membership and gang activity" by, for example, by directing witnesses not to "directly state" that defendant was a gang member, eliminate reference to evidence developed through use of a technique designed to recover gang evidence and allowing the prosecutor to lead the witness during testimony where the witness might mention gangs, so that the witness's testimony is "far less inflammatory than it would have been" had the witness testified to the defendant's "own words" regarding gang activities

✓ *"Toning Down" Gang-Related Testimony Insufficient:* Efforts to tone-down gang-related testimony may be insufficient when there is no link between the gang activity and the charged criminal activity; in defendant's case the gang activity was directly related to his motive to have the illegal weapon, so that introduction of "toned-down" gang testimony was not unduly prejudicial in rendering its verdict based on its "negative feelings toward gangs"



In re Prempro Products Liability Litigation

In re Prempro Products Liability Litigation, 586 F.3d 549 (8th Cir. Nov. 2, 2009) (Nos. 08-2555, 08-2711, 08-2713) ([Wollman](#), Gibson, Murphy)

Case Link: http://federaevidence.com/pdf/2009/11-Nov/In_re_Prempro_Products_Liability_Litigation.pdf

Case Result: Affirming judgment against defendants on compensatory damages, vacating judgement for one defendant on punitive damages claim and remanding for a new trial on punitive damages pdf

Blog Post: <http://federaevidence.com/node/558>

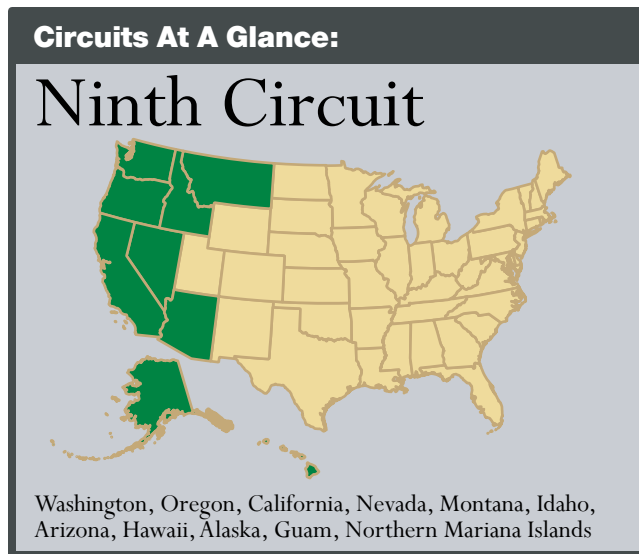
In litigation for failure to warn of breast cancer risk from hormone replacement therapy, plaintiff's expert's testimony as to specific causation (that the defendant's hormone replacement drugs were the cause of the plaintiff's breast cancer) was admissible; fact that plaintiff also had independent "breast cancer risk factors and a family history" of breast cancer did not undermine admissibility of expert's differential diagnosis that plaintiff's cancer "would not have developed without hormone replacement therapy

✓ *Reliability Of Differential Diagnosis:* Admitting expert's testimony as to the differential diagnosis in which he ruled out the possibility that plaintiff's cancer was caused by her own hormones and found that defendant's hormone replacement therapy could account for the cancer; there was no dispute at trial as to the chemical causation of the cancer, as supported by published research and peer review; no error in allowing expert to testify that differential diagnosis suggested that cancer would not have developed without the defendant's drug because the plaintiff's body was not producing sufficient amounts of hormones to cause the cancer and the expert eliminated other risk factors as likely to account for the cancer

✓ *Differential Diagnosis Testimony Admissible:* Expert Testimony based on differential diagnosis admissible even though not all FRE 702 admissibility factors were shown because FRE 702 reflects a "relax[ation of] the traditional barriers to opinion testimony," so that there was "no single requirement for admissibility as long as the proffer indicates that the expert evidence is reliable and relevant" (citations omitted)

✓ *Lack Of Testimony In Conformity With Expertise:* No error in striking testimony of plaintiff's regulatory expert during the punitive damages portion of the trial where her testimony was "largely devoid of regulatory analysis" and she "simply read the contents of exhibits, thus undermining the asserted basis for expert testimony" and the expert failed to "relate" her testimony to specific FDA regulatory guidelines as directed by the trial judge

✓ *Prejudicial Error:* Admission of regulatory expert's testimony which was "largely devoid of regulatory analysis" was a prejudicial error



United States v. Hinkson

United States v. Hinkson, 585 F.3d 1247 (9th Cir. Nov. 5, 2009) (No. 05-30303) (Kozinski, Pregerson (dissenting), O'SDcannlain, Kleinfeld, McLane, Wardlaw (dissenting), W.Fletcher (dissenting), Paez (dissenting), Callahan, Bea, Ikuta, Smith) (*en banc*)

Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Hinkson.pdf

Case Result: Affirming conviction

FRE 403 (Exclusion of Relevant Evidence On Grounds of Prejudice, Confusion, or Waste of Time): Affirming denial of new trial for soliciting murder of federal officials because trial court did not abuse his discretion by excluding letter and military service file offered by defendant to show that key government witness misrepresented himself as having heroic military experience; under FRE 403 the documentary evidence had limited probative value to impeach the witness, since the judge instructed the jury to disregard the witness's military metal testimony; the risk of confusing the jury about this "tangential evidence" and "the time it would take to authenticate and explain" the witness's military file created a "risk of undue prejudice [that] substantially outweighed the reward"

Other Evidence Issues (Abuse Of Discretion Standard): "[O]ur newly stated 'abuse of discretion' test

requires us first to consider whether the district court identified the correct legal standard for decision of the issue before it. Second, the test then requires us to determine whether the district court's findings of fact, and its application of those findings of fact to the correct legal standard, were illogical, implausible, or without support in inferences that may be drawn from facts in the record."

✓ *Application of Abuse Standard:* In this case, risk substantially outweighed the reward, and this conclusion, which was not illogical nor implausible based on the record, did not exceed the bounds of the district court's discretion in applying Rule 403

United States v. Liera

United States v. Liera, 585 F.3d 1237 (9th Cir. Nov. 4, 2009) (No. 07-50546) (Pregerson, Nelson, Thompson)

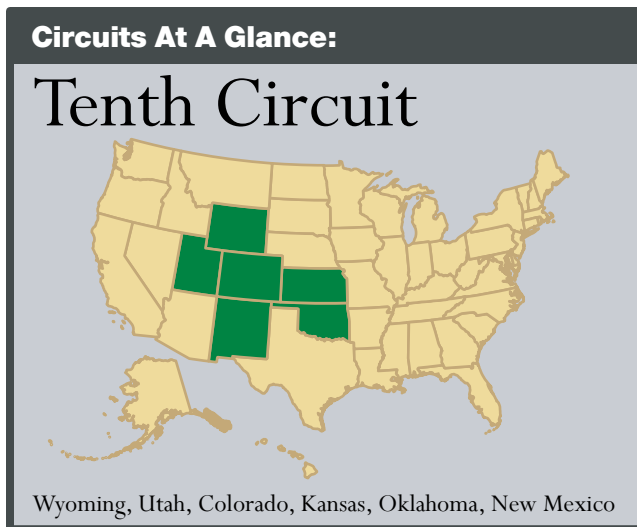
Case Link: http://federalevidence.com/pdf/2009/11-Nov/US_v_Liera.pdf

Case Result: Vacating and remanding conviction

FRE 801(d)(2)(E) (Co-conspirator Exception): Vacating and remanding conviction for bringing aliens into the United States because alien's testimony as to his mother telling him of cost and payment of smuggling a person into the U.S. was erroneous as a co-conspirator statement

✓ The prosecution failed to establish by a preponderance of the evidence that the declarant (alien's mother) knowingly participated in a conspiracy in making the statement, so that the witness's testimony about it could be admitted under FRE 801(d)(2)(E)

✓ Proof that statement by a co-conspirator must be independent of, and not consist solely of the statement sought to be admitted under FRE 801(d)(2)(E)



United States v. Hinson

United States v. Hinson, 585 F.3d 1328 (10th Cir. Nov. 3, 2009) (No. 08-3086) (Lucero, Ebel, Tymkovich)

Case Link: http://federalevideance.com/pdf/2009/11-Nov/US_v._Hinson.pdf

Case Result: Affirming conviction

Blog Post: <http://federalevideance.com/node/563>

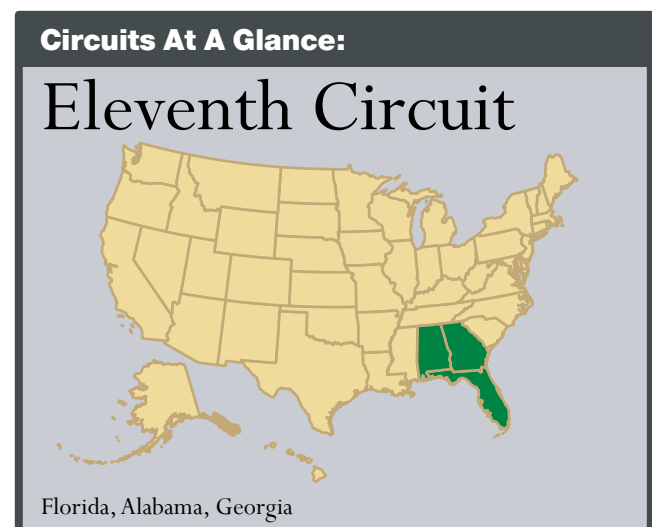
FRE 801(c) (Definition of “hearsay”): In methamphetamine distribution trial, detective’s testimony about hearing defendant’s name mentioned by the cooperating witness as the supplier of the drugs in a controlled buy was hearsay because it was offered for its truth that the defendant was a drug supplier and was not necessary to provide “a coherent story about” the investigation of the defendant; this was not plain error because the cooperating witness also testified that the defendant was his supplier and this was corroborated by the evidence obtained in the controlled buy, so it was unlikely to have had “any serious impact” on the conviction

✓ *Admission For Non-Hearsay Purpose:* While out of court statements offered not for their truth but “instead for relevant context or background, is not considered hearsay,” it is admissible “[1] only if [it] provide[s] information that is necessary to explain the government’s subsequent actions (and not to prove precisely an element of

the crime the government was required to prove), and [2] it is not likely that the jury will “consider the statement[s] for the truth of what was stated with significant resultant prejudice” (quoting *United States v. Becker*, 230 F.3d 1224, 1228 (10th Cir. 2000); *United States v. Cass*, 127 F.3d 1218, 1223-24 (10th Cir. 1997))

✓ *Inference of Improper Purpose:* Where an out of court statement is introduced “on the ultimate issue in a case” and is “not necessary to explain the background of a police investigation,” in the absence of any “tenable non-hearsay purpose” for the statement’s admission, it is a reasonable conclusion that it was offered for the improper purpose of proving the truth of the matter asserted in the statement, and should be excluded as hearsay

✓ *Abuse Of “Background” Exception* “This court has previously criticized the ““apparently widespread abuse”” of the background exception to the hearsay rule” and “remind[s]... all U.S. Attorney’s Offices” that they violate their duty as prosecutors in offering hearsay as unnecessary “background” information on the investigation



United States v. Brown

United States v. Brown, 587 F.3d 1082 (11th Cir. Nov. 10, 2009) (No. 07-13007) (Carnes, Fay, Alarcon (9th))

Case Link: http://federalevideance.com/pdf/2009/11-Nov/US_v._Brown.pdf

In cocaine distribution conspiracy trial:

✓ *Admission Of Prior Drug Convictions*: Evidence of the defendant’s prior convictions for the sale and possession of cocaine was admissible under FRE 404(b) because it was probative of defendant’s intent to commit the charged offense and the prior convictions began only six years prior to beginning of charged conspiracy

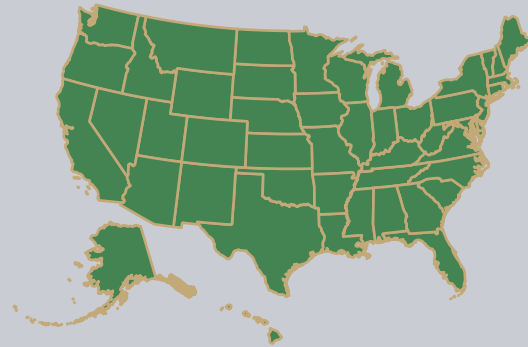
✓ *FRE 404(b) Foundational Factors*: Under FRE 404(b) whether proffered “evidence is more probative than prejudicial” involves a “ ‘common sense assessment of all the circumstances surrounding the extrinsic offense,’ including prosecutorial need, overall similarity between the extrinsic act and the charged offense, as well as temporal remoteness” (citations omitted)

✓ *FRE 901 Admission Of Audio Tape Of Key Drug Transaction*: Authentication of audio tape was sufficient by agent’s testimony because the agent testified that he “heard the original conversation that was being recorded and that it is the same as the one being played at trial”

✓ *FRE 901 Recording Authentication Factors*: “In order to authenticate a recording, the Government ordinarily must show ‘(1) the competency of the operator; (2) the fidelity of the recording equipment; (3) the absence of material deletions, additions, or alterations in the relevant part of the tape; and (4) the identification of the relevant speakers,’” so that “where the agent laying the foundation can testify he or she heard the original conversation that was being recorded and that it is the same as the one being played at trial, this also provides sufficient evidence of authenticity”

Circuits At A Glance:

Federal Circuit



No cases reported this month

Circuits At A Glance:

D.C. Circuit



U.S. District Court for the District of Columbia

No cases reported this month