

FEDERAL RULES OF EVIDENCE

I. GENERAL PROVISIONS

A. PRESERVING THE RECORD, Fed. R. Evid 103:

1. Error must effect substantial rights, Fed. R. Evid. 103(a)
 - a. must specific timely objection, Rule 103(a)(1),
 - b. if excluded, must offer of proof, Rule 103(a)(2); see Luce v. United States, 469 U.S. 38 (1984).
 - sufficient to inform court what intend to show and why, United States v. Ballis, 28 F.3d 1399, 1406 (5th Cir. 1994); see also United States v. Brown, 303 F.3d 582, 600 (5th Cir. 2002).
 - c. Once court makes definitive ruling, party need not renew objection to preserve error. Rule 103; Brown, 303 F.3d at 600.
 - d. Hearings to avoid presentation of inadmissible evidence to jury, Rule 103(c).

B. PRELIMINARY QUESTIONS, Fed. R. Evid. 104:

1. Preliminary questions, i.e. qualification, privilege, admissibility, determined by court outside presence of jury, Fed. R. Evid 104(a), (c);
2. In determining admissibility, court not bound by rules of evidence, Fed. R. Evid. 104(a), Bourjailly v. United States, 483 U.S. 171 (1987);
3. Preliminary determination by preponderance of evidence. Bourjailly, supra;
4. Relevancy conditioned on fact admitted subject to connecting up, Fed. R. Evid. 104(b);
5. Admissibility of confession must be heard outside presence of jury, Fed. R. Evid. 104(c); Jackson v. Denno, 378 U.S. 368 (1964);
6. Motion in Limine must be re-urged at trial, see Luce, supra.
7. Defendant waives appeal of pretrial ruling on admissibility of prior conviction if she introduces evidence herself. Ohler v. United States, 529 U.S. 753 (2000) (overruling United States v. Fisher, 106 F.3d 622, 629 (5th Cir. 1997)).

- C. LIMITING INSTRUCTIONS, Fed. R. Evid. 105:
- United States v. Sisto, 534 F.2d 616 (5th Cir. 1976).
- D. RULE OF COMPLETENESS, Fed. R. Evid. 106:
1. Writing or recorded statement, or part, introduced,
 2. Adverse party may require introduction at that time of any part or other writing,
 3. Which "ought in fairness to be considered contemporaneously with it;"
 4. Omitted portion must be "necessary to qualify, explain or place into context the portion already introduced." United States v. Branch, 91 F.3d 699, 728 (5th Cir. 1996).
 5. Do not let government argue whole statement automatically comes in just because you introduced part. United States v. Pendas-Martinez, 845 F.2d 938 (11th Cir. 1988).
 6. Rule does not apply to agent's testimony from memory about oral statements. United States v. Garcia, 530 F.3d 348 (5th Cir. 2008) (citing United States v. Ramirez-Perez, 160 F.3d 1106, 1113 (11th Cir. 1999)).
- E. JUDICIAL NOTICE, Fed. R. Evid. 201:
1. Must adjudicative fact;
 2. Must generally know within court jurisdiction, or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."

II. RELEVANCE

- A. DEFINITION, Fed. R. Evid. 401:
1. "Evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence;"
 2. Broad definition;

3. Stipulation may make evidence not relevant, e.g. Old Chief v. United States; 519 U.S. 172 (1997) (court should not admit felony to establish felon in possession if defendant stipulates felony); see also United States v. Spletzer, 535 F.2d 950, 956 (5th Cir.1976) (escape case); see also United States v. Grassi, 602 F.2d 1192 (5th Cir. 1979), vacated on other grounds, 448 U.S. 909 (1980) (court discretion to order party to accept stipulation); but see Parr v. United States, 255 F.2d 80, 88 (5th Cir. 1958) (generally cannot preclude proof by stipulation).

B. RELEVANT EVIDENCE ADMISSIBLE, Fed. R. Evid. 402:

- Irrelevant evidence generally inadmissible.

C. EXCLUSION OF RELEVANT EVIDENCE, Fed. R. Evid. 403:

Although relevant, court may (discretion) exclude if "probative value is substantially outweighed by":

1. danger of "unfair prejudice"
 - "improper basis, commonly though not necessarily, emotional one," Notes of Advisory Committee on proposed Federal Rules of Evidence, 28 U.S.C., Rule 403; Old Chief, 519 U.S. at 180; Grassi, supra, 602 F.2d at 1197;
2. Confusion of the issues;
3. Misleading the jury;
4. Undue delay, waste of time, needless presentation of cumulative evidence;
5. Rule 403 balancing reviewed for abuse of discretion, United States v. Abel, 469 U.S. 45 (1984).

III. PROOF OF CHARACTER

A. CHARACTER NOT ADMISSIBLE to prove act in conformity, Fed. R. Evid. 404(a), except:

1. "Pertinent" character trait offered by accused or by prosecutor to rebut same, Rule 404(a)(1), must rebut that trait. United States v. Curtis, 644 F.2d 263 (3d Cir. 1981);
2. Defendant's evidence of good character, United States v. Johns, 309 F.3d

298, 304 (5th Cir. 2002);

3. "Pertinent" character of victim offered by accused or by prosecutor to rebut, including peacefulness to rebut self defense, Rule 404(a)(2); but see United States v. Gulley, 526 F.3d 809, 817-19 (5th Cir. 2008) (evidence of victim's prior acts of violence not relevant to self-defense);
4. If evidence of victim's character is offered by accused, prosecutor may offer same character trait of accused;
5. Witness character for truthfulness, Fed. R. Evid. 607, 608, 609;
6. Predisposition (entrapment) is not character so cannot prove by reputation; United States v. Webster, 649 F.2d 346 (5th Cir. 1981) (en banc).

B. MEANS OF PROOF OF CHARACTER:

1. Reputation or opinion, Fed. R. Evid. 405(a);
2. May ask specific instances on cross, id, Michelson v. United States, 335 U.S. 469 (1948), limited to have you heard;
3. Must good faith basis and relevant, United States v. Renfro, 620 F.2d 497, 501-02 (5th Cir. 1980) (had good faith); United States v. Bynum, 566 F.2d 914, 923 (5th Cir. 1978); see also United States v. West, 58 F.3d 133 (5th Cir. 1995);
4. Normally bound by answer, Rule 608(b), United States v. Cole, 617 F.2d 151, 153 n.3 (5th Cir. 1979);
5. Not limited to criminal conduct, id; United States v. Dalton, 465 F.2d 32 (5th Cir. 1972) (arrests);
6. Can also ask about specific instances of character witnesses concerning third party witness, United States v. Skelton, 514 F.3d 433, 443-45 (5th Cir. 2008);
7. Can prove specific instances if relevant to trait essential element of charge, claim, or defense, Fed. R. Evid 405(b).
8. Cannot ask if opinion change if convicted of offense charged, United States v. Candelaria-Gonzalez, 547 F.2d 291 (5th Cir. 1977); but see United States v. Smith-Bowman, 76 F.3d 634, 636 (5th Cir. 1996) (may ask if familiar with charges);

C. OTHER CRIMES, Fed. R. Evid. 404(b):

1. Evidence of other crimes not admissible to show act in conformity.

2. Admissible other purposes:
 - a. Motive, United States v. Cordell, 912 F.2d 769 (5th Cir. 1990) (civil regulations); see also United States v. Williams, 264 F.3d 561, 575 (5th Cir. 2001) (lost home relevant to motive);
 - b. Opportunity,
 - c. Intent, United States v. Adair, 436 F.3d 520, 526-27 (5th Cir.) (money laundering), cert. denied, 126 S.Ct. 2306 (2006); United States v. Brugman, 364 F.3d 613, 619-20 (5th Cir.) (use excessive force, civil rights), cert. denied, 543 U.S. 868 (2004); United States v. Peters, 283 F.3d 300, 312 (5th Cir. 2002) (drugs); United States v. Hernandez-Guevara, 162 F.3d 863 (5th Cir. 1998) (prior alien smuggling); United States v. LeBaron, 156 F.3d 621, 624 (5th Cir. 1998) (murder); United States v. Cihak, 137 F.3d 252, 258 (5th Cir. 1998) (bank fraud); United States v. Buchanan, 70 F.3d 818, 830-32 (5th Cir. (1996) (drugs); United States v. Wilkes, 685 F.2d 135 (5th Cir. 1982) (prior alien smuggling); compare United States v. Willis, 6 F.3d 257 (5th Cir. 1993) (prior drug convictions admissible to prove intent), with United States v. Yeagin, 927 F.2d 798 (5th Cir. 1991) (prior drug convictions not admissible); see also United States v. Garcia, 291 F.3d 127 (2d Cir. 2002);
 - must be similar, United States v. Beechum, 582 F.2d 898, 911 (5th Cir. 1978) (en banc);
 - cases where government failed to establish similar intent: United States v. Anderson, 933 F.2d 1261, 1267-72 (5th Cir. 1991) (prior fires); United States v. Levario-Quiroz, 854 F.2d 69, 73 (5th Cir. 1988) (prior assault);
 - intent must be criminal, United States v. Riddle, 103 F.3d 423, 432-33 (5th Cir. 1997); see also United States v. Mikolajczuk, 137 F.3d 237, 244 (5th Cir. 1998) (lawful tax protest not admissible);
 - d. Preparation,
 - e. Plan/scheme United States v. Aleman, 592 F.2d 881 (5th Cir. 1979),
 - f. Knowledge, United States v. Dahlstrom, 180 F.3d 677 (5th Cir. 1999); United States v. Williams, 900 F.2d 823, 827 (5th Cir. 1990);

- g. Identity--must be modus operandi so similar that mark as accused, United States v. Goodwin, 492 F.2d 1141, 1154 (5th Cir. 1974); compare United States v. Brown, 71 F.3d 1158, 1162 (5th Cir. 1996) (prior drug offenses not admissible); United States v. Carillo, 981 F.2d 772 (5th Cir.1993) (same), with United States v. Sanchez, 988 F.2d 1384 (5th Cir. 1993) (unusual deals in same location);
- even if not identical, may be admissible to demonstrate defendant was there, United States v. Torres-Flores, 827 F.2d 1031 (5th Cir. 1987); see also United States v. Evans, 848 F.2d 1352, 1360 (5th Cir. 1988), modified, 854 F.2d 56 (5th Cir. 1988)
- h. Absence mistake or accident, Dahlstrom, *supra*.
3. Court must first determine if "probative of a material issue other than character." Huddleston v. United States, 485 U.S. 681, 686 (1988);
- see United States v. Oreira, 29 F.3d 185 (5th Cir. 1994) (dog alert on money not probative of material element in structuring case);
- f. United States v. Jones, 484 F.3d 783 (5th Cir. 2007) (prior firearms conviction not relevant in actual possession case);
4. Government must specify why relevant, cannot offer laundry list; United States v. Fortenberry, 860 F.3d 628, 632 (5th Cir. 1988); see also Anderson, 933 F.2d at 1272.
5. If probative of material issue, court need only find "jury can reasonably conclude that the act occurred and the defendant was the actor." Huddleston, 485 U.S. at 690 (citing United States v. Beechum, 582 F.2d 898, 912-13 (5th Cir. 1978) (en banc));
- see United States v. Ridlehuber, 11 F.3d 516, 520-23 (5th Cir. 1993) (government failed to establish defendant committed act); Fortenberry, *supra* (same);
6. Balancing Test
- a. Court must determine whether probative value is substantially outweighed by potential for unfair prejudice, pursuant to Fed. R. Evid. 403, Huddleston, 485 U.S. at 691-92;
- b. This determination must be made on the record United States v. Zabaneh, 837 F.2d. 1249 (5th Cir. 1988); United States v. Robinson, 700 F.2d 205 (5th Cir. 1983);

- c. Strength of evidence of extrinsic act is a factor in Rule 403 determination. Huddleston, 485 U.S. at 689;
 - d. Remoteness just a factor in balancing, United States v. Broussard, 80 F.3d 1025, 1039-40 (5th Cir. 1996); see also United States v. Walker, 410 F.3d 754, 758-59 (5th Cir.) (admitting sixteen-year-old drug conviction), cert. denied, 126 S.Ct. 633 (2005);
 - e. Though prior theft conviction probative of conspiracy to steal jewelry, outweighed by prejudice where defense was identity, United States v. Jackson, 339 F.3d 349 (5th Cir. 2003).
7. Subsequent acts are also be admissible under Rule 404(b), United States v. Osum, 943 F.2d 1394 (5th Cir. 1991); see also United States v. Morgan, 505 F.3d 332, 340 (5th Cir. 2007) (fraud while on pretrial release); United States v. Terebeki, 692 F.2d 1345 (11th Cir. 1982); but see United States v. Haywood, 280 F.3d 715, 720 (6th Cir. 2002) (subsequent possession not probative of earlier intent to distribute) & United States v. Ramos, 2007 WL 2875791 (5th Cir. July 28, 2008)(subsequent drug trafficking did not establish cooperating witness's was drug trafficker at the time);
 8. Rule 404(b) prohibition does not apply if "intrinsic," i.e. "inextricably linked to offense," United States v. Baptiste, 264 F.3d 578, 590 (5th Cir. 2001); United States v. Stouffer, 986 F.2d 916 (5th Cir. 1993); United States v. Torres, 685 F.2d 921 (5th Cir. 1982) (sample cocaine sales); but see United States v. Sumlin, 489 F.3d 683 (5th Cir. 2007) (unsuccessful drug search not intrinsic to felon in possession); Ridlehumber, 11 F.3d at 520-24(drug lab not inextricably linked to possession of sawed off shotgun);
 9. Defendant has right to reasonable notice of general nature of other crimes evidence upon request, Fed. R. Evid. 404(b);
 10. Defendant may offer bad acts of government witnesses, United States v. Luffred, 911 F.2d 1011 (5th Cir. 1990);
 11. Specific other act evidence:
 - a. Civil violations, United States v Cordell, 912 F.2d 769, 777 (5th Cir. 1990), but government cannot bootstrap criminal case with civil violations, United States v. Christo, 614 F.2d 486, 492 (5th Cir. 1980); see also Riddle, *supra*;
 - b. Flight not admissible where defendant admits committing the crime, United States v. Kang, 934 F.2d 621 (5th Cir. 1991).

- flight or alias may be admissible to show consciousness of guilt, United States v. Murphy, 996 F.2d 94, 96 (5th Cir. 1993) (flight); United States v. Kalish, 690 F.2d 1144, 1156 (5th Cir. 1982) (alias), unless the defendant has other reasons for the flight, United States v. Myers, 550 F.2d 1036, 1044-48 (5th Cir. 1977); see also Turner v. McKaskle, 721 F.2d 999 (5th Cir. 1983).

12. Other defendant's bad acts are not admissible against defendant: United States v. Taylor, 210 F.3d 311, 317-18 (5th Cir. 2000) (codefendant's prior convictions); United States v. Polasek, 162 F.3d 878 (5th Cir. 1998); cf. United States v. Cortinas, 142 F.2d 242 (5th Cir. 1998) (codefendant's bad acts required severance).

D. HABIT, ROUTINE, Fed. R. Evid. 406:

Evidence of habit or routine relevant to prove act in conformity.

E. PLEA DISCUSSIONS, Fed. R. Evid. 410, Fed. R. Crim. P. 11(e)(1)(6):

1. Following are generally inadmissible:
 - a. Withdrawn guilty plea,
 - b. Nolo contendere plea,
 - c. Statements made during withdrawn guilty plea or nolo plea,
 - d. Plea discussions with prosecutor if no guilty plea or plea withdrawn;
2. Exceptions:
 - a. Portion of statement introduced and fairness requires introduction, See also Fed. R., Evid. 106;
 - b. Criminal proceeding for perjury or false statement.

F. VICTIM'S SEXUAL PAST, Fed. R. Evid. 412:

1. Generally not admissible
 - to prove victim engaged in other sexual behavior or
 - to prove victim's predisposition.
2. Except in criminal cases:
 - a. Specific instance of sexual behavior to prove defendant not the source of semen, injury or other physical evidence;

- b. Specific instance sex with accused offered by accused to prove consent or offered by prosecution;
- c. Exclusion would violate defendant's constitutional rights.

3. Procedure:

- a. Notice at least 14 days before trial, served on parties and notify victim or victim's guardian.
- b. Sealed in camera hearing before admitted.

G. EVIDENCE SIMILAR CRIMES FOR SEXUAL ASSAULT, Fed. R. Evid. 413:

If defendant accused of sexual assault, evidence of other sexual assaults are admissible and may be considered for any matter relevant

- Must 15 day advance notice including witness statements or summaries.

H. EVIDENCE SIMILAR CRIMES FOR CHILD MOLESTING, Fed. R. Evid. 414:

If defendant accused sexual assault on child, evidence of other similar conduct admissible

- 15 day disclosure

IV. PRIVILEGES--governed by common law, United States Constitution and statutes. Fed. R. Evid. 501:

A. ATTORNEY-CLIENT:

- 1. Privilege belongs to client, United States v. Fisher, 425 U.S. 391 (1976);
- 2. Not applicable to fees, In re Grand Jury Proceedings (United States v. Jones), 517 F.2d 666, 670-71 (5th Cir. 1975), unless last link, In re Grand Jury Subpoena for Attorney Representing Reyes-Requena (Mike DeGuerin), 913 F.2d 1118, 1121 (5th Cir. 1990);
- 3. Must confidential, no third party, United States v. Miller, 660 F. 2d 563 (5th Cir. 1981); See also United States v. Newell, 315 F.3d 510 (5th Cir. 2002) (waived by telling employees);
- 4. Joint defense privilege, United States v. Stotts, 870 F.2d 228 (5th Cir. 1989); United States v. Fortna, 796 F.2d 724, 729-30 (5th Cir. 1986); Hodges, Grant and Kaufmann v. United States, 768 F.2d 719, 720-21 (5th Cir. 1985); United States v. Melvin, 650 F.2d 641 (5th Cir. 1981);

5. Crime Fraud Exception. In re Grand Jury Proceedings (Pavlick), 680 F.2d 1026 (5th Cir. 1982) (en banc).

- Court in camera hearing, United States v. Zolin, 494 U.S. 554 (1989);

B. SPOUSE:

1. Belongs to testifying spouse, Trammel v. United States, 445 U.S. 40 (1980);
2. Trammel does not affect "marital communications," Blau v. United States, 340 U.S. 332 (1951);
3. Crime Fraud exception, United States v. Entrekin, 624 F.2d 597 (5th Cir. 1980).

C. PHYSICIANS/PSYCHIATRIST,

Jaffe v. Redmond, 518 U.S. 1 (1996), recognizing psychotherapist-patient privilege, but see Pennsylvania v. Ritchie, 480 U.S. 39 (1987) (6th amendment interest in exculpatory information).

D. CLERGY,

see Trammel, 445 U.S. at 51 (need to receive religious guidance).

E. OTHER FAMILY MEMBERS

- No parent-child privilege, Port v. Heard, 764 F.2d 423 (5th Cir. 1985).

V. WITNESSES, GENERALLY

A. In general, every witness is competent. Fed. R. Evid. 601:

B. LACK PERSONAL KNOWLEDGE, Fed. R. Evid. 602:

1. May not testify unless personal knowledge;
2. Exception for experts, Fed. R. Evid. 703;
3. Keep hearsay rules in mind, 800's.

C. OATH OR AFFIRMATION, Fed. R. Evid 603.

D. INTERPRETERS, Fed. R. Evid. 604.

Subject to qualification as expert and oath.

- E. RESIDING JUDGE may not be witness. Fed. R. Evid. 605.
- F. JURORS, Fed. R. Evid. 606:
 - 1. Cannot be witness in trial in which juror sits, Rule 606(a).
 - 2. No testimony about deliberations, Rule 606(b), except
 - a. extraneous prejudicial information brought to jurors' attention;
 - b. jury tampering.

VI. WITNESSES, IMPEACHMENT

- A. ANYONE MAY IMPEACH, Fed. R. Evid. 607:

But can't call just to impeach, United States v. Miller, 664 F.2d 94, 97 (5th Cir. 1981).

Defendant has Sixth Amendment right to establish witness's bias, Davis v. Alaska, 415 U.S. 308 (1974); see also Delaware v. Van Arsdall, 475 U.S. 673 (1986);

- B. WITNESS CHARACTER, Fed. R. Evid. 608:

- 1. May attack or support through opinion or reputation, except,
 - a. Limited to character for truthfulness or untruthfulness, and
 - b. Truthfulness admissible only after witness' character for truthfulness attacked. Fed. R. Evid. 608(a)(2), United States v. Hilton, 772 F.2d 783 (11th Cir. 1985); United States v. Price, 722 F.2d 88, 90-91 (5th Cir. 1983);.
 - c. Mere contradiction not sufficient to permit character rebuttal, United States v. Jackson, 588 F.2d 1046, 1055 (5th Cir. 1979). (Note, truthfulness not relevant to heroin charge).
 - d. Cannot impeach on collateral matter unrelated to substantive issues in case, United States v. Blake, 941 F.2d 334, 340 (5th Cir. 1991); but see United States v. Lopez, 979 F.2d 1024, 1034 (5th Cir. 1992) (witness's account of background not collateral if normal human wouldn't make mistake);
 - e. Opinion need not be based on particular length of acquaintance but must have adequate foundation, United States v. Garza, 448 F.3d 294, 296-97 (5th Cir. 2006) (excluding DOJ investigator's opinion about credibility of government witness); United States v. Dotson, 799 F.2d

189, 192-93 (5th Cir. 1986)(excluding investigator's opinion based solely on current criminal investigation but allowing opinion of agent who had personally interviewed witness and conducted financial investigation).

2. Specific instances:

- a. (i) Cannot prove by extrinsic evidence, except prior convictions, Fed. R. Evid 608(b); United States v. Sutherland, 656 F.2d 1181, 1198-99 (5th Cir. 1981);
- (ii) Extrinsic evidence is permissible to show bias or prejudice, Fed. R. Evid. 607, 611; United States v. Abel, 469 U.S. 45, 56 (1984); United States v. Skelton, 514 F.3d 433, 442 (5th Cir. 2008); United States v. Ramirez, 622 F.2d 898 (5th Cir. 1980); see also United States v. Harper, 527 F.3d 396, 407 (5th Cir. 2008)(informant's post-cooperation domestic assault);
- b. May, in court discretion, ask on cross:
 - (i) Ask witness about instances if probative truthfulness or untruthfulness, United States v. Reed, 700 F.2d 638, 644 (11th Cir. 1983) (marijuana possession is not), but bound by witness answer, Sutherland,
 - (ii) Ask of other character witnesses, See also Fed. R. Evid. 405(b),
- c. Testify does not waive privilege against self incrimination about matter relating solely to credibility, but see United States v. Beechum, 582 F. 2d 898 (5th Cir. 1978) (en banc) (may question about 404(b) material).

C. PRIOR CONVICTIONS, Fed. R. Evid. 609:

1. Generally "shall" be admitted if

- a. Felony,
 - (i) Punishable by death or prison excess one year under law of conviction, and
 - (ii) if not the accused, meets Rule 403,
 - (iii) If the accused, admitted if court determines probative value outweighs prejudicial effect to accused. (Reaction to Green v. Bock Laundry Machine Co., 490 U.S. 504 (1989), or

- b. It can be “readily determined” that the crime involved dishonesty or false statement, regardless of punishment, 609(1)(2).
 - c. Under 609(a)(1), balancing must be done on the record. United States v. Preston, 608 F. 2d 626, 638 (5th Cir. 1979); Factors include:
 - (i) Impeachment value of crime,
 - (ii) Time of conviction and witness' subsequent history,
 - (iii) Similarity past and current crime, United States v. Martinez, 555 F.2d 1273 (5th Cir. 1977),
 - (iv) Importance of defendant's testimony,
 - (v) Centrality of credibility, United States v. Mahone, 537 F.2d 922, 929 (7th Cir. 1976);
 - d. Not crimes of "dishonesty or false statement,"
 - (i) Robbery, Preston, supra, 608 F. 2d at 638 n.15,
 - (ii) Shoplifting, United States v. Ashley, 569 F.2d 975, 978-79 (5th Cir. 1978),
 - (iii) Felony theft, Howard v. Gonzales, 658 F.2d 352 (5th Cir. 1981); but see United States v. Harper, 527 F.3d 396, 408 (5th Cir. 2008)(theft by check),
 - (iv) Heroin, United States v. Barnes, 622 F.2d 107 (5th Cir. 1980).
 - (v) Prostitution. United States v. Cox, 536 F.2d 65 (5th Cir. 1976),
 - (vi) Crimes of violence, Gordon v. United States, 383 F.2d 936 (D.C. Cir. 1967);
 - e. No discretion to exclude crimes of dishonesty or false statement under 609(a)(2), United States v. Toney, 615 F.2d 277, 279 (5th Cir. 1980).
2. Definition of Conviction
- a. Governed by federal law. United States v. Georgalis, 631 F.2d 1199 (5th Cir. 1977); United States v. Turner,

- 497 F.2d 406 (10th Cir. 1974) (deferred adjudication on guilty plea is conviction) (cited with approval in United States v. Klein, 560 F.2d 1236, 1239 (5th Cir. 1977)); but see United States v. Hamilton, 48 F.3d 149, 153-54 (5th Cir. 1995) (no abuse exclude deferred);
- b. Pendency of appeal does not render conviction inadmissible, Fed. R. Evid. 609(e); United States v. Klein, 560 F.2d 1236 (5th Cir. 1977); but see Spiegel v. Sandstrom, 637 F.2d 405 (5th Cir. 1981) (not admissible if appeal on violation sixth amendment right to counsel);
 - c. Nolo pleas can be used, United States v. Sony Mutual Center, 934 F.2d 277 (5th Cir. 1991); United States v. Williams, 642 F.2d 136 (5th Cir. 1981);
 - a. Not admissible if reversed, United States v. Russell, 221 F.3d 615, 620 (4th Cir. 2000).
3. Juvenile adjudication generally inadmissible except in criminal case
- attack credibility witness other than accused, and
 - necessary to fair determination of issue of guilt or innocence. Fed. R. Evid. 609 (d); see also Davis v. Alaska, 415 U.S. 308 (1974) (sixth amendment cross-examination right to questions about juvenile record).
4. If rehabilitated, not admissible if
- a. Pardon, annulment, certificate of rehabilitation or equivalent based on
 - (i) finding of rehabilitation, see United States v. Wiggins, 566 F.2d 944 (5th Cir. 1978), and
 - (ii) no subsequent felony conviction, Fed. R. Evid. 609 (c)(1),
or
 - b. Pardon, annulment, or other equivalent based on finding innocence, Fed. R. Evid. 609(c)(2);
 - c. Governed by state law, Wilson v. Attaway, 757 F.2d 1227, 1244 (11th Cir. 1985).
5. Remoteness, Fed. R. Evid 609(b)
- a. Not admissible if more than ten years since "date of conviction," United States v. Lopez, 979 F.2d 1024 (5th

Cir. 1992), or "confinement," United States v. Daniel, 957 F.2d 162, 168 (5th Cir. 1992); unless

- b. Interests of justice, probative value supported by "specific facts and circumstances" substantially outweighs prejudicial effect,
- c. Must advance written notice.
- d. Presumption against admit remote, United States v. Estes, 994 F.2d 147 (5th Cir. 1993); see also United States v. Avants, 367 F.3d 433, 448-49 (5th Cir. 2005); United States v. Privett, 68 F.3d 101 (5th Cir. 1995);

6. Details

Normally not admissible, Shows v. M/V Red Eagle, 695 F.2d 114 (5th Cir. 1983); United States v. Tomblin, 551 F.2d 1001 (5th Cir. 1977);

7. Non-convictions-bias: pending case may be admissible to prove bias, United States v. Landerman, 109 F.3d 1053, 1061 & n.12 (5th Cir.); modified, 116 F.3d 119 (5th Cir. 1997); but see United States v. Alexius, 76 F.3d 642 (5th Cir. 1996) (no showing feds could influence state);

8. Civil litigation may be admissible to show bias, United States v. Gambler, 662 F.2d 834, 837-39 (D.C. Cir. 1981); United States v. Carreon, 572 F.2d 683 (9th Cir. 1978).

D. RELIGIOUS BELIEFS, Fed. R. Evid. 610:

Religion does not impair or enhance credibility.

E. MODE OF PRESENTATION, Fed. R. Evid. 611:

- 1. Court control:
- 2. a. Scope cross limited to direct and credibility, Fed. R. Evid 611(b),
- b. Court may permit additional matters "as if on direct," id;
- 3. Leading ordinarily only on cross, or hostile witness, adverse party.

F. WRITING USED TO REFRESH MEMORY, Fed. R. Evid. 612, subject to 18 U.S.C. § 3500, see also Fed. R. Crim. P. 26.2,

- 1. If use while testify or
 - before testify, court discretion order if necessary in interests of justice, adverse party right to examine writing, cross-examine witness, introduce

portions which relate to testimony;

2. If claim writing contains other matters, court examine and excise but preserve in record;
3. If writing not produced, any sanction but in criminal case, if government no comply, court "shall" strike testimony, or may declare mistrial.

G. PRIOR STATEMENTS, Fed. R. Evid. 613:

1. Need not show to witness;
2. Show to opposing counsel on request;
3. Extrinsic evidence prior inconsistent statement not admissible unless
 - a. witness opportunity to explain or deny, United States v. Devine, 934 F.2d 1325, 1344-45 (5th Cir. 1991) (citing United States v. Sisto, 534 F.2d 616 (5th Cir. 1976)); and
 - b. opposing party opportunity question, or interests of justice.
4. Does not apply to party admissions.
5. Omission is inconsistent if would reasonably expect person to mention, United States v. Rice, 550 F.2d 1364, 1373 (5th Cir. 1977);
 - liberal construction of rule permitting introduction of any prior statement that promises to expose falsehood, Collins v. Wayne Corp. 621 F.2d 777, 785 (5th Cir. 1980); but see United States v. Avants, 367 F.3d 433, 447-48 (5th Cir. 2005)(suspect's denial of knowledge was mere denial of guilt, not inconsistent statement).
6. Should permit reading prior statement if claim lack of knowledge or memory of statement. See Devine, 934 F.2d at 1344-45; United States v. Dennis, 625 F.2d 782, 796 (8th Cir. 1980), see also Fed. R. Evid. 804(b)(1) (former testimony);
7. Defense entitled to cross-examine on prior inconsistent statement even if prosecutor elicited on direct. United States v. Freeman, 164 F.3d 243 (5th Cir. 1999) (Sixth Amendment right to confrontation);
8. Beware of opening door to prior consistent statement, Fed. R. Evid. 801(d)(1)(B).

H. COURT WITNESSES, Fed. R. Evid. 614.

I. RULE OF EXCLUSION, Fed. R. Evid. 615,

Cannot exclude;

1. Party who is natural person;
2. Representative of party who is not a natural person;
3. Person whose presence is essential.

VII. EXPERTS

A. OPINIONS BY LAY WITNESSES, Fed. R. Evid. 701:

1. Limited to opinions or inferences
 - a. "rationally based on the perception of the witness," and
 - b. helpful
 - (i) to clear understanding of witness' testimony, or
 - (ii) determination of a fact in issue; and
 - (iii) not based on scientific or other knowledge covered by Rule 702.
2. Must be based on fact observed by witness, not conduct in abstract, United States v. Riddle, 103 F.3d 423, 428-29 (5th Cir. 1997).

B. EXPERTS, Fed. R. Evid. 702:

1. If scientific, technical or other specialized knowledge will assist trier of fact
 - a. to understand the evidence or
 - b. determine fact in issue,
2. Qualified as expert by
 - a. Knowledge,
 - b. Skill,
 - c. Experience,

- d. Training, or
 - e. Education.
3. May testify in opinion or otherwise.
 4. Testimony must be:
 - a. based on scientific facts or data;
 - b. product of reliable principles and methods;
 - c. principles and methods properly applied to the case. Rule 702(Dec. 1, 2000);
 5. Rule 702 replaces the old Frye test. Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993):
 - a. Must be scientific knowledge, that is, “supported by appropriate validation”
 - b. Scientific knowledge “establishes a standard of evidentiary reliability,” 509 U.S. at 590
 - c. Trial judge is the gatekeeper, should consider:
 - whether opinion can be and has been tested
 - subject to peer review and publication
 - known or potential rate of error
 - maintenance of control standards
 - general acceptance509 U.S. at 592-95
 - d. Must be “helpful,” i.e. relevant, 590 U.S. at 95-98.
 - e. Daubert relevance and reliability analysis applies to all expert testimony, not just scientific testimony, Kumho Tire Co. V. Carmichael, 526 U.S. 137, 141 (1999);
 - f. The decision to admit or exclude expert testimony is reviewed for abuse of discretion. General Electric Co. v. Joiner, 522 U.S. 136, 143 (1997).
 6. Examples:
 - a. United States v. Moore, 786 F.2d 1308 (5th Cir. 1986) (eyewitness identification expert);

- b. United States v. Newman, 849 U.S. 156, 164 (5th Cir. 1988) (psychological susceptibility to entrapment);
- c. United States v. Pasado, 57 F.3d 428 (5th Cir. 1995) (polygraph); see also United States v. Pedigrew, 77 F.3d 1500 (5th Cir. 1996); United States v. Galbreth, 908 F. Supp. 877 (D.N.Mex. 1995); but see United States v. Scheffer, 523 U.S. 303 (1998) (prohibition on use of polygraph not unconstitutional)
- d. United States v. Cavin, 39 F.3d 1299 (5th Cir. 1994) (expert on ethical constraints of lawyers);
- e. United States v. Katz, 178 F.3d 368 (5th Cir. 1999) (no abuse of discretion to exclude expert testimony about age of children where expert could not tell age because of poor quality photos);
- f. United States v. Drones, 218 F.3d 496 (5th Cir. 2001) (voice identification);

United States v. Havvard, 260 F.3d 597 (7th Cir. 2001) (fingerprints); United States v. Llera-Plaza, 188 F.S.2d 549 (E.D. Pa. 2002);

United States v. Jolivet, 224 F.3d 902 (8th Cir. 2000) (handwriting); United States v. Paul, 175 F.3d 906 (11th Cir. 1999) (handwriting expert admissible and no abuse in not admitting expert critique); United States v. Velasquez, 64 F.3d 844 (3d Cir. 1995) (admissible but should allow defense expert critique); but see United States v. Garza, 448 F.3d 294 (5th Cir. 2006) (expert based on multigeneration copies); United States v. Saelee, 162 F.S.2d 1097 (D. Al. 2001) (handwriting expert excluded); United States v. Rutherford, 104 F.S.2d 1190 (D. Neb. 2000) (same); United States v. Hines, 55 F.S.2d 62 (D. Mass. 1999) (can identify similarities but not identity of author); United States v. Starzeczpyzel, 880 F.S. 1027 (S.D.N.Y. 1995) (can testify as someone with specialized skill, not expert);

- i. United States v. Hitt, 473 F.3d 146, 158 (5th Cir. 2006) (“typical” behavior of child molesters and victims), cert. denied, 127 S.Ct. 2083 (2007); see also United States v. Simmons, 470 F.3d 1115 (5th Cir. 2006), cert. denied, 127 S.Ct. 3002 (2007);
- j. Beware of law enforcement “experts” testifying about how criminals do business, compare United States v. Gutierrez-Farias, 294 F.3d 657 (5th Cir. 2002) (cannot testify drug dealers do not use people who do not know about drugs); United States v. Ibarra, 493 F.3d 526, 532 (5th Cir. 2007); United States v. Cantu, 167 F.3d 198, 205-06 (5th Cir. 1999) (officer’s testimony defendant knew of investigation inadmissible but harmless); United States v. Hall, 653 F.2d 1002,

1005 (5th Cir. 1981) (not admissible); see also United States v. Williams, 957 F.2d 1241-43 (5th Cir. 1992); United States v. Cruz, 981 F.2d 659 (2d Cir. 1992); United States v. Castillo, 924 F.2d 1227, 1231-35 (2d Cir. 1991); with United States v. Sanchez-Hernandez, 507 F.3d 826, 831 (5th Cir. 2007), cert. denied, 128 S.Ct. 1912 (2008); United States v. Griffith, 118 F.3d 318 (5th Cir. 1997); United States v. Washington, 44 F.3d 1271, 1283 (5th Cir. 1995).

C. BASES EXPERT OPINION, Fed. R. Evid. 703:

1. Facts or data in the particular case, which expert bases opinion/inference on:
 - a. May be perceived by or made known to expert at or before hearing,
 - b. If type reasonably relied on by experts in that field, facts or data need not be admissible.
2. Revised to prevent giant hearsay exception: Inadmissible facts and data shall not be disclosed to jury unless court finds probative value in assisting evaluation of expert opinion substantially outweighs prejudicial effect. Rule 703.
3. On cross, talk about facts/data not relied on which should have been, e.g.-hypotheticals - treatises.
4. If basis of opinion not offered for the truth, no Sixth Amendment violation. United States v. Stone, 222 F.R.D. 334, 338 (E.D.Tenn. 2004), aff'd, 432 F.3d 651, 653 (6th Cir. 2006).

D. ULTIMATE ISSUE, Fed. R. Evid. 704:

1. Generally can give opinion on ultimate issue, Fed. R. Evid. 704(a);
2. a. Expert
 - b. Testify about mental condition of defendant in criminal case,
 - c. Cannot opine if defendant had mental state or condition constituting element of crime or defense. Such ultimate issue for trier of fact alone, Fed. R. Evid. 704(b).
3. Beware of hypotheticals, United States v. Levine, 80 F.3d 129 (5th Cir. 1996).

E. ADVANCE DISCLOSURE BASIS EXPERT OPINION, Fed. R. Evid. 705:

1. Advance disclosure data not required unless court says so,

2. But see Fed. R. Crim. P. 16(a)(1)(D), (E), 16(a)(2)(B),
3. May require disclosure on cross.

F. COURT APPOINTED, Fed. R. Evid. 706:

These are court experts as opposed to CJA experts, compare 18 U.S.C. § 3006A (e).

VIII. HEARSAY:

A. GENERALLY:

1. If evidence is “testimonial,” Sixth Amendment permits introduction of out-of-court statement only if declarant is unavailable and defendant had adequate opportunity for cross-examination. Crawford v. Washington, 541 U.S. 36, 68 (2004) (partially overruling Ohio v. Roberts, 448 U.S. 56 (1980)).

2. Hearsay rules are consistent with Sixth Amendment for non-testimonial evidence. Crawford, 541 U.S. at 68.

3. Roberts test, i.e. "firmly rooted hearsay exception" or evidence contains particular guarantees of trustworthiness, has been overruled. Whorton v. Bockting, 127 S.Ct. 1173 (2007);

4. “Testimonial” evidence, at minimum, includes: preliminary hearing, grand jury, former trial, police interrogations, Crawford, 541 U.S. at 68, witness admission of guilt, id. at 65; United States v. Alvarado-Valdez, 521 F.3d 337 (5th Cir. 2008) (police interrogation of fugitive codefendant); United States v. McClain, 377 F.3d 219, 221-22 (2d Cir. 2004) (codefendant guilty plea); ex parte statements, affidavits and depositions, Crawford, 541 U.S. at 51; see also Lilly v. Virginia, 527 U.S. 116, 137 (1999) (plurality opinion);

5. Statements are not testimonial if circumstances objectively indicate primary purpose was to seek assistance in ongoing emergency. Conversely, statements are testimonial if primary purpose is to establish past events relevant to criminal prosecution. Davis v. Washington, 547 U.S. 813, 822-23(2006);

6. Adequate opportunity for cross-examination must include similar motive. Dorchy v. Jones, 398 F.3d 783 (6th Cir. 2005) (capital codefendant did not have similar motive).

B. DEFINITION, Fed. R. Evid. 801:

1. Hearsay is
 - a. A statement,
 - b. Other than one made by declarant while testifying at the trial or hearing,
 - c. Offered to prove the truth of the matter asserted, Fed. R. Evid. 801(c),
 - d. Hearsay even if declarant now testifies, United States v. Summers, 598 F.2d 450, 459 n.11 (5th Cir. 1979).

2. A "statement" is
 - a. Oral or written assertions, or
 - b. Nonverbal conduct intended by the person to be an assertion, Fed. R. Evid. 801(a),
 - c. Examples of non-hearsay:
 - (i) Operative words, not offered for truth. United States v. Jones, 663 F.2d 567, 571 (5th Cir. 1981) (threats), see also United States v. Holmes, 406 F.3d 337, 348-50 (5th Cir.) (no Sixth Amendment violation where deposition not offered for truth), cert. denied, 126 S.Ct. 375 (2005),
 - (ii) Show knowledge, United States v. Parry, 649 F.2d 292 (5th Cir. 1981) (Statement to mother that person is narcotics agent), United States v. Carter, 491 F.2d 625 (5th Cir. 1974), (statement to defendant car not stolen); see also United States v. Gonzalez, 436 F.3d 560, 576 (5th Cir. 2006)(victim's statement put defendant on notice of pain);
 - (iii) Advice to accused - intent, United States v. Wellendorf, 574 F.2d 1289 (5th Cir. 1978), (tax protestor);
 - (iv) Info caused officer to investigate, United States v. Vitale, 596 F.2d 688 (5th Cir. 1979);
 - (v) Effect on state of mind. United States v. Rubin, 591 F.2d 278, 283 (5th Cir. 1978); United States v. Herrera, 600 F.2d 502 (5th Cir. 1979) (duress);
 - (vi) Significance is fact made, not truth, proving conspiracy,

United States v. Bobo, 586 F.2d 355, 371 (5th Cir. 1978).

- (vii) Words used to entrap, United States v. Cantu, 876 F.2d 1134 (5th Cir. 1989);
- (viii) Agents' statements to defendant giving statement, United States v. Ballis, 28 F.3d 1399, 1403-04 (5th Cir. 1994);
- d. Must be relevant, United States v. Kang, 934 F.2d 621 (5th Cir. 1991) (agent's intent not relevant); United States v. Hernandez, 750 F.2d 1256 (5th Cir. 1985) (same); see also United States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004).
- e. "Declarant" is person who makes statement.

C. NOT HEARSAY, Fed. R. Evid 801(d):

1. Prior statement by witness, Fed. R. Evid. 801(d)(1):

- a. Testifies at proceeding and subject to cross-examination concerning statement; and
- b. (i) Inconsistent and given under oath subject to penalty of perjury at trial, deposition or other proceeding, see e.g. United States v. Cisneros-Gutierrez, 517 F.3d 751, 757 (5th Cir. 2008) (guilty plea stipulations of selectively forgetful witness); United States v. Acosta, 475 F.3d 671, 683 (5th Cir. 2007) (safety valve debriefing); or
- (ii) Consistent and offered to rebut express or implied charge recent fabrication or improper influence or motive, or
- (iii) Identification of person after perceiving person.

- consistent statement offered to rebut claim of fabrication must have been made before improper influence or motive to fabricate arose, Tome v. United States, 513 U.S. 150 (1995); United States v. Riddle, 103 F.3d 423, 432 (5th Cir. 1997); see United States v. Wilson, 355 F.3d 358, 361-62 (5th Cir. 2003) (admissible where possible motive to fabricate was different).

- witness's prior identification of defendant admissible although witness does not remember, United States v. Owens, 484 U.S. 554 (1988);

2. Admission of Party Opponent, Fed. R. Evid. 801(d)(2):

- a. Party's statement in individual or representative capacity,
- b. Party adopt or manifest belief in truth,
- c. Statement by person authorized by party, e.g. lawyer,
- d. Statement by
 - (i) Agent,
 - (ii) Within scope of agency or employment,
 - (iii) During existence of relationship, or
- e. Statement by
 - (i) Conspirator,
 - (ii) During course and in furtherance of conspiracy;

INS agent's notes of defendant interview were hearsay, United States v. Orellana-Blanco, 294 F.3d 1143 (9th Cir. 2002).

3. Conspirator statements

- a. Government must prove:
 - (i) Existence of conspiracy between declarant and non-offering party,
 - (ii) Statement made in course and in furtherance of conspiracy,
 - (iii) Must prove by preponderance of the evidence.

Bourjaily v. United States, 483 U.S. 171 (1987).

- b. Can consider statement itself, Bourjaily, supra, to determine if coconspirator statement but statement itself is "not alone sufficient to establish..the existence of the conspiracy and the participation of the declarant and the party against whom the statement is offered." Fed. R. Evid. 801(d)(2); see also Advisory Committee Notes to 1997 Amendment; Bourjaily, 482 U.S. at 184-85 (Stevens, J. concurring); United States v. Lindeman, 85 F.3d 1232, 1238-39 & n.4 (7th Cir. 1996) (citing cases);
- c. Conspirator or accomplice must be someone who could be indicted for offense as a party or accessory, Risinger v. United States, 236

F.3d 96, 99 & n.2 (5th Cir. 1956);

- d. Government must prove statement made during and in furtherance of conspiracy and not "idle chatter," United States v. Cornett, 195 F.3d 776 (5th Cir. 1999); United States v. McConnell, 988 F.2d 530, 533 (5th Cir. 1993); see also United States v. Dickey, 102 F.3d 157 (5th Cir. 1996);
- e. Includes statements describing prior criminal exploits;
- f. Should not include statements made after arrest, Bruton v. United States, 391 U.S. 123 (1968). Beware ongoing concealment argument. United States v. Broussard, 80 F.3d 1025, 1038 (5th Cir. 1996);
- g. Should not include statements made after defendant's withdrawal, see United States v. Nicoll, 664 F.2d 1308, 1315 n.6, n.7 (5th Cir. 1982);
- h. Coconspirator need not be available as a witness, United States v. Inadi, 475 U.S. 387 (1988);
- i. Coconspirator statements non-testimonial. Crawford, 541 U.S. at 56; United States v. Robinson, 367 F.3d 278, 292 n.20 (5th Cir.), cert. denied, 543 U.S. 1005 (2004).

D. HEARSAY GENERALLY NOT ADMISSIBLE, Fed. R. Evid. 802:

E. HEARSAY EXCEPTIONS, AVAILABILITY OF DECLARANT IMMATERIAL, Fed. R. Evid. 803:

1. PRESENT SENSE IMPRESSION, 803(1):

- a. Statement describing or explaining event or condition,
- b. Made while perceiving event or immediately thereafter,
- c. Too long after, United States v. Cain, 587 F.2d 678, 681 (5th Cir. 1979);
- d. Statement describing ongoing event not testimonial under Sixth Amendment, Davis, 126 S.Ct. at 2273-74.

2. EXCITED UTTERANCE, 803(2):

- a. Relating to "startling" event or condition,
- b. While declarant under stress of excitement,

- c. Caused by the event or condition,
 - d. e.g. United States v. Proctor, 505 F.3d 366 (5th Cir. 2007) (911 caller says brother is felon with a gun), cert. denied, 128 S.Ct. 1457 (2008); United States v. Hefferon, 314 F.3d 211 (5th Cir. 2002)(complainant identifying defendant as child molester); United States v. Lawrence, 699 F.2d 697 (5th Cir. robbery victim says "he's the guy");
 - e. Even if declarant is stressed, statement is testimonial if primary purpose was to describe past events. Davis (Hammon), 547 U.S. at 830-32.
3. THEN EXISTING MENTAL, EMOTIONAL OR PHYSICAL CONDITION, 803(3):
- a. Declarant's state of mind, emotion, sensation, physical condition,
 - b. Must be relevant, Prather v. Prather, 650 F.2d 88 (5th Cir. 1981);
 - c. Does not include statement of memory or belief, id;
 - d. Lead example. Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892).
 - e. State of mind - suspicious, United States v. Newell, 315 F.3d 510 (5th Cir. 2002).
4. PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT 803(4):
- a. For purposes medical diagnosis or treatment, and
 - b. Describing
 - (i) Medical history,
 - (ii) Past or present symptoms,
 - (iii) Pain or sensations, or
 - (iv) Inception or general character of cause, if
 - c. "Reasonably pertinent to diagnosis or treatment." See Rock, infra.;
 - d. See White v. Illinois, 502 U.S. 346 (1992) (sexual assault victim statement); but see United States v. Peneaux, 432 F.3d 882, 893 (8th Cir. 2005) (identity of attacker not pertinent to treatment unless family member).

5. RECORDED RECOLLECTION, 803(5):
- a. Memorandum or record,
 - b. Witness once had knowledge but now insufficient to testify fully and accurately,
 - c. Made or adopted by witness while
 - (i) Matter fresh in witness' memory, and
 - (ii) Reflects knowledge correctly.
 - d. May read in evidence but not exhibit unless offered by adverse party.

See United States v. Judon, 567 F.2d 1289, 1294 (5th Cir. 1978) (robber's license plate).
 - e. Example where party failed to establish witness once knew or that it was reliable, cannot be hearsay within hearsay, Rock v. Huffco Gas & Oil Co., Inc. 922 F.2d 272 (5th Cir. 1991);
6. RECORDS OF REGULARLY CONDUCTED ACTIVITY, 803(6):
- a. Memorandum, report, record, or data compilations, in any form,
 - b. Of acts, events, conditions, opinions or diagnoses,
 - c. Made at or near time, United States v. Williams, 661 F.2d 528 (5th Cir. 1981) (three years later too long),
 - d. By employee of business or from information transmitted by person with knowledge, United States v. Davis, 571 F.2d 1354, 1360 (5th Cir. 1978) (response to ATF questionnaire not admissible); see also Broadcast Music, Inc. V. Xanthas, 855 F.2d 233, 238 (5th Cir. 1988) (letters from proprietors not admissible); United States v. Moore, 748 F.2d 246, 248 (5th Cir. 1984); but see United States v. Ismoila, 100 F.2d 380 (5th Cir. 1996) (creditcardholders statements in bank records admissible under residual hearsay exception); if
 - e. Kept in course regularly conducted business activity, and
 - f. Regular practice keep such records, e.g. of exclusion, United States v. Robinson, 700 F.2d 205, 210 (5th Cir. 1983); Williams, 661 F.2d at 530-31; see also Wilender v. McDermott, 887 F.2d 88, 91 (5th Cir. 1989); Pan-Islamic Trade Corp. v. Exxon Corp., 632 F.2d 539 (5th

- Cir. 1980),
- g. Shown by "custodian or other qualified witness," e.g. United States v. Veytia-Bravo, 603 F.2d 1187 (5th Cir. 1980); United States v. Flom, 558 F.2d 1179 (5th Cir. 1977) (person who received records),
 - h. Or by sworn certification; Rule 803(6);
 - i. Unless sources of information or method or circumstances of preparation indicate lack trustworthiness, see United States v. Duncan, 919 F.2d 981, 986 (5th Cir. 1991) (primary emphasis is reliability and trustworthiness); see also United States v. Wells, 262 F.3d 455, 459 (5th Cir. 2001) (destroyed "drug ledgers" insufficiently reliable);
 - j. Cannot be prepared primarily for litigation, Broadcast Music, 855 F.2d at 238; Williams, 661 F.2d at 530; Pan-Islamic Trade, 632 F.2d at 560;
 - k. Cannot use to circumvent prohibition on police reports in criminal cases. United States v. Cain, 615 F.2d 380 (5th Cir. 1980);
 - l. Computer records admissible United States v. Hutson, 821 F.2d 1015 (5th Cir. 1987);
 - m. See also United States v. Baker, 693 F.2d 183, 187-88 (D.C. Cir.1982) (excellent discussion of exception)
 - n. Business records not governed by Sixth Amendment testimonial rules, Crawford, 541 U.S. at 56.
7. ABSENCE OF ENTRY 803(7);
- a. Absence of entry may prove nonoccurrence if
 - b. Entries normally kept in accordance with 803(6) and
 - c. Matter is of kind regularly recorded,
 - d. Also trustworthiness requirement.
8. PUBLIC RECORD AND REPORTS, 803(8):
- a. Public records "in any form,"
 - b. Of public office or agency,
 - c. Setting forth

- (i) activities of agency, or
 - (ii) matters observed pursuant to duty imposed by law and duty to report.
- d.
- (i) excluding in criminal cases matters observed by law enforcement personnel, e.g., United States v. Cain, 615 F.2d 380 (5th Cir. 1980) (escape report); see also United States v. Bishop, 264 F.3d 535, 548 (5th Cir. 2001) (investigating agent's notes);
 - (ii) against government in criminal cases, federal findings resulting from investigation pursuant to law. United States v. Sarmiento-Perez, 633 F.2d 1092, 1105 n.9 (5th Cir. 1981) (lab reports should not be admitted);
 - (iii) law enforcement exception does not apply to "routine, objective observations, made as part of the everyday function of the preparing official or agency," United States v. Lopez-Moreno, 420 F.3d 420, 437 (5th Cir. 2005) (quoting United States v. Quezada, 754 F. 2d 1190, 1193 (5th Cir. 1985), cert. denied, 126 S.Ct. 1449 (2006));
 - (iv) Cert granted on whether lab reports are testimonial, Melendez-Diaz v. Massachusetts, 128 S.Ct. 1647 (2008);
- e. Must also trustworthy,
- f. Do not rule out police reports on behalf of defendant, United States v. Sims, 617 F.2d 1371, 1377-78 n.11 (9th Cir. 1980),
- g. Require authentication:
- (i) public records self-authenticate if writing authorized by law and so recorded and certified, Fed. R. Evid. 902(4).
- h. Example of required exclusion, United States v. Davis, 571 F.2d 1354 (5th Cir. 1978) (ATF investigation).
9. ABSENCE OF PUBLIC RECORD, 803(10):
- a. Absence record to prove nonoccurrence,
 - b. Record regularly made and preserved,
 - c. 902(4) certification,
 - d. Typically used to prove failure to file tax return, United States v.

Johnson, 577 F.2d 1304 (5th Cir. 1978); no firearms license, United States v. Harris, 551 F.2d 621 (5th Cir. 1977);

- e. Certificate of non-existence of immigration record, United States v. Valdez-Maltos, 443 F.3d 910 (5th Cir. 2006).

10. ANCIENT DOCUMENTS, 803(16):

- a. Document in existence twenty years;
- b. Authenticated, Fed. R. Evid. 901(8).

11. LEARNED TREATISES, 803 (18):

- a. To expert on cross or rely on direct,
- b. May read into evidence but not exhibit.

12. JUDGMENT OF PRIOR CONVICTION, 803 (22):

- a. Trial or guilty plea (not nolo),
- b. Punishable by year or more,
- c. To prove fact essential to sustain judgment, not
- d. (i) Not offered by government in criminal prosecution for purpose other than impeachment or judgment against persons other than accused,
(ii) May show appeal pending but does not render inadmissible.
- e. See United States v. Robles Vertiz, 155 F.3d 725 (5th Cir. 1998) (no abuse discretion admit previous smuggling conviction in A-file);
- f. Acquittal is not admissible to prove defendant not guilty. United States v. De La Rosa, 171 F.3d 215 (5th Cir. 1999).

F. EXCEPTIONS, DECLARANT UNAVAILABLE, Fed. R. Evid. 804:

1. Definition unavailable, 804(a):

- a. Exempted by privilege, see e.g. United States v. Salerno, 505 U.S. 317, 321 (1992),
- b. Persist refuse testify after court order,
- c. Lack of memory,

- d. Physical or mental incapacity,
- e. Absent and proponent unable produce by process or other reasonable means (e.g. out of country), see United States v. Aguilar-Tamayo, 300 F.3d 562, 566 (5th Cir. 2002)(gov't must show took steps to obtain foreign witness);
- f. Forfeiture by wrongdoing only if defendant intended to prevent testimony, Giles v. California, 128 S.Ct. 2678 (2008).

2. FORMER TESTIMONY, 804(b)(1):

- a. Testimony of witness given at hearing or deposition,
- b. Party against whom offered had opportunity and similar motive develop testimony on direct or cross.
- c. Examples:
 - (i) pretrial hearing, California v. Green, 399 U.S. 149 (1970);
 - (ii) another trial offered against government if same sovereign.
 - (iii) grand jury testimony not automatically admissible against government, not necessarily similar motive, United States v. Salerno, 505 U.S. 317 (1992);
- d. Governed by Sixth Amendment, Crawford, 541 U.S. at 56; United States v. Avants, 367 F.3d 433, (5th Cir. 2005) (preliminary hearing testimony of deceased witness, Sixth Amendment satisfied).

3. DYING DECLARATION, 804 (b)(2):

- a. Homicide prosecution,
- b. Made while declarant believe death imminent,
- c. Concerning cause or circumstances of death.

4. STATEMENT AGAINST INTEREST, 804(b)(3):

- a. At time make statement, so contrary to pecuniary or proprietary interest, or subject to civil or criminal liability,
- b. Reasonable person wouldn't make statement unless believe true,

- c. If declarant inculpatated but offered to exculpate accused, need corroborating circumstances "clearly indicate trustworthiness." United States v. Thomas, 571 F.2d 285 (5th Cir. 1978) (should have admitted),
- d. Accomplice confession not admissible against defendant, violates confrontation clause, Lilly v. Virginia, 527 U.S. 116 (1999); *see also*, United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977) (immunized testimony), *see also* United States v. Rodriguez-Martinez, 480 F.3d 303 (5th Cir. 2007)(informant information to officer); United States v. Jones, 371 F.3d 363, 368-69 (7th Cir. 2004);
- e. Must meet reliability and firmly rooted exception standard if offered for truth, United States v. Walker, 148 F.3d 518, 524-25 (1999); *see also* United States v. Sarmiento-Perez, 633 F.2d 1092, 1105 (5th Cir. 1981), *cert. denied*, 459 U.S. 834 (1982); (codefendant statement insufficiently trustworthy), Gonzalez, *supra*.
- f. Collateral non-inculpatory statements not admissible, Williamson v. United States, 512 U.S. 594 (1994);
- g. Proposed amendment to require corroboration for prosecution statements;

5. PERSONAL OR FAMILY HISTORY, 804(b)(4).

G. RESIDUAL EXCEPTION, 807:

- a. "Equivalent circumstantial guarantee trustworthiness,"
- b. Court must determine:
 - (i) offered as evidence material fact,
 - (ii) more probative than other evidence which proponent can procure through reasonable efforts, and
 - (iii) interest of justice served.
- c. (i) must advance notice sufficient to provide opportunity to meet it,
 - (ii) must state intent to offer, particulars of statement, name and address of declarant;
- d. Must clear basis trustworthiness. Central Freight Lines, Inc. v. NLRB, 653 F.2d 1023 (5th Cir. 1981).

- e. Examples - accomplice confession when accomplice available, United States v. Barnes, 586 F.2d 1052 (5th Cir. 1978); but see United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977) (immunized grand jury testimony of unavailable witness);
 - police affidavit just after event, officer available, United States v. Williams, 573 F.2d 284 (5th Cir. 1978);
 - foreign bank records, United States v. Wilson, 249 F.3d 366 (5th Cir. 2001);

- f. Excluded - deported alien statements, United States v. Perez, 217 F.3d 323, 330 (5th Cir. 2000); United States v. Walker, 410 F.3d 754 (5th Cir. 2005) (witness police interview).

H. MULTIPLE HEARSAY, Fed. R. Evid. 805:

Each level of hearsay must meet an exception. United States v. Dotson, 821 F.2d 1034 (5th Cir. 1987); see also Rock v. Huffco Gas & Oil Co. Inc., 922 F.2d 272, 277-83 (5th Cir. 1991);.

I. ATTACKING AND SUPPORTING DECLARANT CREDIBILITY, Fed. R. Evid. 806:

- 1. Hearsay or non-hearsay statement under 801 (d)(2)(C)-(E), attacked and supported like any other testimony, United States v. Moody, 903 F.2d 321 (5th Cir. 1990); United States v. Newman, 849 F.2d 156 (5th Cir., 1988)
- 2. Inconsistent conduct or statement not subject to requirement of opportunity deny or explain,
- 3. Party against whom offered may call declarant as witness and examine concerning statement as if on cross.

IX. AUTHENTICATION

A. GENERALLY, Fed. R. Evid. 901:

- 1. Evidence sufficient to support a finding matter is what proponent claims;
- 2. Examples
 - a. testimony by witness with knowledge, 901(b)(1);
 - b. key witness familiar with handwriting, not acquired for purpose litigation. 901(b)(2), United States v. Pitts, 569 F.2d 343, 348 (5th Cir. 1978);

- c. Comparison with authenticated specimen by expert or trier of fact, 901(b)(3);
 - d. Distinctive characteristics, 901 (b)(4);
 - e. Voice exemplars, 901(b)(5);
 - f. Telephone, 901(b)(6);
 - (i) To number assigned to person or business, and
 - (ii) Person self identifies, or
 - (iii) Business, related to business reasonably over phone.
 - g. Public records, 901 (b)(7); see also 902(4):
 - (i) writing authorized by law;
 - (ii) so recorded, or
 - (iii) from public office where normally kept
 - h. Ancient documents, 901(b)(8):
 - (i) document in condition no suspicion concerning authenticity;
 - (ii) where likely kept if authentic, and
 - (iii) exist 20 yrs or more when offered.
 - i. Foreign documents, Fed. Civ. P. 44(a)(2):
 - (i) official publication or copy,
 - (ii) attested to by person so authorized, and
 - (iii) certificate genuineness signature and official position of attesting person or appropriate foreign official (e.g. consul, vice-consul, etc.),
 - (iv) court may admit attested copy without final certification for good cause shown if all parties had reasonable opportunity to investigate authenticity and accuracy of documents;
- B. SELF-AUTHENTICATION, Fed. R. Evid. 902:
- 1. Domestic public document under seal 902(1)

- a. of U.S., State, etc.
 - b. attestation;
2. Domestic Public Document, no seal, 902(1):
- a. signature of person under 902(1)
 - b. officer with seal certify under seal genuine
3. Foreign public document:
- a. document purport to be executed or attested in official capacity by person authorized by law foreign country,
 - b. certification genuine signature and official position
 - (i) of attesting person or
 - (ii) foreign official in chain of certificate, consul, etc. e.g. United States v. Deverso, 2008 WL 581218 (11th Cir. 2008) (foreign birth certificate to prove age);
 - c. court may presume authentic without final authentication for good cause if all parties reasonable opportunity investigate authenticity and accuracy;
4. Certified copy public records, 902(4):
- a. official record,
 - b. authorized by law to be recorded or filed and so recorded in public office,
 - c. certified by custodian or other authorized person that complies with above certification needs.
5. Newspapers, 902(6).
6. Sworn certification that domestic or foreign record is business record. Rule 902(11), (12); cf. United States v. Morgan, 505 F.3d 332, 339 (5th Cir. 2007) (grand jury testimony).

X. BEST EVIDENCE

A. REQUIREMENT OF ORIGINAL, Fed. R. Evid. 1002:

Generally must provide original writing, recording or photograph if proving contents.

B. DEFINITIONS, Fed. R. Evid. 1001:

1. Original, Rule 1001(3):

- a. writing or recording itself, or
- b. counterpart intended to have same effect by person executing or issuing it,
- c. Original photograph includes negative and any part from it,
- d. Computer data-all printouts are original.

2. Duplicate, Rule 1001(4):

- a. counterpart produced by same impression, matrix or by photography, recording, chemical reproduction or equivalent,
- b. which accurately reproduces original.

C. ADMISSIBILITY DUPLICATES, Fed. R. Evid 1003:

Admissible unless

1. genuine question raised authenticity of original, or
2. would be unfair.

D. OTHER EVIDENCE OF CONTENTS, Fed. R. Evid. 1004:

Admissible if

1. original lost or destroyed and no proponent bad faith; or
2. original unobtainable,
3. opponent has original, or
4. not closely related to controlling issue.

E. PUBLIC RECORDS, Fed. R. Evid. 1005:

1. Admit through certified copy,
2. Alternative if cannot certified copy through reasonable diligence.

F. SUMMARIES, Fed. R. Evid. 1006;

1. may present summaries of voluminous material,
2. must make originals available,
3. court may order production of originals.
4. Gov't should not be permitted to put agent on as summary witness just to repeat testimony, United States v. Castillo, 77 F.3d 1480 (5th Cir. 1996); see also United States v. Nguyen, 504 F.3d 561, 571-72 (5th Cir. 2007), cert. denied, 128 S.Ct. 1324 (2008).

Chart must accurately reflect underlying testimony. United States v. Taylor, 210 F.3d 311, 314-17 (5th Cir. 2000).

G. PARTY ADMISSION, Fed. R. Evid. 1007:

No need original.