Evidence Update
2020 GENERAL PRACTICE REVIEW
Drake University Law School

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I. Introduction

This Update covers developments in evidence law that have occurred during the last year. The Update discusses recent and pending amendments to the Federal Rules of Evidence, as well as recent evidence cases. The Update focuses primarily upon evidentiary decisions of the Iowa Supreme Court rendered during its 2019–2020 term (from August 1, 2019 through August 1, 2020).

The Iowa Court of Appeals also issued many opinions during that period that address evidentiary issues. Most of those opinions have not been published. However, under IOWA R. APP. PROC. 6.904(2)(c) provides that while an unpublished opinion does not constitute controlling legal authority, an unpublished opinion may be cited in a brief. For that reason, this Update also identifies evidentiary opinions of the Iowa Court of Appeals decided during the Update period.

Finally, because many of the Iowa Rules of Evidence are patterned upon the Federal Rules of Evidence, Iowa courts frequently take guidance from federal precedent construing analogous federal provisions. This Update thus briefly describes recent evidence decisions from the federal Circuit courts, particularly the U.S. Court of Appeals for the Eighth Circuit.

II. RULE AMENDMENTS

A. IOWA RULES OF EVIDENCE

The Iowa Evidence Rules underwent a comprehensive restyling in 2017. Those amendments, however, made no substantive changes to the Iowa Rules. The last substantive amendments to the Iowa Evidence Rules occurred in 2009.

B. FEDERAL RULES OF EVIDENCE

■ 2019 Amendment to Residual Hearsay Exception—Fed. R. Evid. 807:

Effective December 1, 2019, federal rule of evidence 807 was significantly amended and now differs from its Iowa counterpart. The prior version of the residual hearsay exception (on

which Iowa R. Evid. 5.807 is patterned) allowed a court to admit hearsay "not specifically covered" by an 803 or 804 exception if the statement has (1) "equivalent circumstantial guarantees of trustworthiness," (2) evidences a "material fact," (3) is more probative on a point than other evidence reasonably available to the proponent, and (4) will serve "the interests of justice." Fed. R. Evid. 807(a)(1)-(4) (pre-Dec. 1, 2019).

Sufficient Guarantees of Trustworthiness: The revised "catch-all" exception no longer requires that a court find "equivalent circumstantial guarantees of trustworthiness." The Advisory Committee deemed the "equivalence" standard "difficult to apply, given the different types of guarantees of reliability, of varying strength, found among the categorical exceptions (as well as the fact that some hearsay exceptions, e.g., Rule 804(b)(6), are not based on reliability at all)." *See* Fed. R. Evid. 807 advisory committee's note to 2019 amendment. Instead, the focus under the revised residual exception is on whether the hearsay statement is "supported by sufficient guarantees of trustworthiness," considering the circumstances under which the statement was made and the existence and strength of corroborating evidence. Fed. R. Evid. 807(a)(1) (effective Dec. 1, 2019).

Under the pre-2019 state and federal residual rule, courts evaluated the trustworthiness of a hearsay statement by evaluating the circumstances under which it was made. Courts differed on whether corroborating evidence could also be considered in determining trustworthiness. The amended federal residual exception clarifies that confusion and explicitly directs courts to consider the "evidence, if any, corroborating the statement" in evaluating its trustworthiness under the residual rule. Fed. R. Evid. 807(a)(1) (2019 amendment). The federal advisory committee explains:

> The amendment specifically requires the court to consider corroborating evidence in the trustworthiness enquiry. Most courts have required the consideration of corroborating evidence, though some courts have disagreed. The absence of corroboration is relevant to, but not dispositive of, whether a statement should be admissible under this exception. Of course, the court must consider not only the existence of corroborating evidence but also the strength and quality of that evidence.

Fed. R. Evid. 807 advisory committee's note to 2019 amendment.

A consideration that should *not* factor into the assessment of trustworthiness is the credibility of the in-court witness who testifies about the out-of-court statement. As explained by the federal advisory committee:

> The credibility of an in-court witness does not present a hearsay question. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses. The rule provides

> that the focus for trustworthiness is on the circumstantial guarantees surrounding the making of the statement itself, as well as any independent evidence corroborating the statement. The credibility of the witness relating the statement is not a part of either enquiry.

Fed. R. Evid. 807 advisory committee's notes to 2019 amendment.

Necessity: The 2019 amendment to federal rule 807 retains the necessity requirement of the former federal (and Iowa) rules. Thus, to be admissible under the federal catch-all, the proponent must demonstrate that the evidence "is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." Fed. R. Evid. 807(a)(2) (2019 amendment). The necessity requirement "prevent[s] the residual exception from being used as a device to erode the categorical exceptions" and continues to ensure that it is used "very rarely, and only in exceptional circumstances." Fed. R. Evid. 807 advisory committee's note to 2019 amendment.

Materiality and Justice: Significantly, although the federal residual exception still requires trustworthiness and necessity, it deletes both the materiality and the "interests of justice" requirements because they are redundant of existing rules such as Fed. R. Evid. 102 and 401. The Iowa residual exception continues to require both these additional requirements. See Iowa R. Evid. 5.807(a)(3)-(4).

Notice: The 2019 amendment updates the current notice requirement in federal rule 807(b). The notice provision requires that the proponent disclose "in writing" a sufficiently specific description of the "substance" of the hearsay statement to be offered under rule 807. This written (including electronic) notice must be given "before the trial or hearing" unless the court "for good cause" excuses the lack of advanced notice. Fed. R. Evid. 807(b) (2019 amendment). The amendment explicitly recognizes a "good cause" exception to the pretrial notice provision.

"**Near Misses:"** Under Iowa Rule of Evidence 5.807, the residual clause only applies to statements "not specifically covered by a hearsay exception in rule 5.803 or 5.804." Iowa R. Evid. 5.807. The question arises whether the residual clause can be used to admit a hearsay statement that is similar to those defined by another specific exception, but does not actually qualify for admission under that exception—so-called "near misses." Courts construing the federal residual clause before it was amended in 2019 divided on this issue. A minority of courts reserved the residual clause to new and unanticipated types of hearsay not envisioned by the framers of the evidence rules. Under this approach, statements of a type addressed by a specific exception must meet the terms of that exception and could not qualify for admission under the residual clause. In contrast, most federal courts rejected this near miss theory and allowed a statement to be considered for admission under the residual clause even if it failed to qualify for

admission under a more specific exception. The 2019 amendment to the federal residual clause adopts this prevailing position. Under amended federal rule 807, a court can admit hearsay under the residual clause even if it is "not admissible" under a rule 803 or 804 exception. However, a trial court can still consider "the reasons that the hearsay misses the admissibility requirements of the standard exception" as part of the trustworthiness calculus. Fed. R. Evid. 807 advisory committee's note to 2019 amendment. The Iowa Supreme Court has not yet used Rule 5.807 (or its predecessors) to grant admissibility to statements that arguably fall within specific exceptions, but do not meet all the requirements of those exceptions.

The amended federal residual exception now reads:

Rule 807. **Residual Exception**

(a) In General. Under the following conditions, a hearsay statement is not excluded by the rule against hearsay even if the statement is not admissible under a hearsay exception in Rule 803 or 804:

(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and

(2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.

(b) Notice. The statement is admissible only if the proponent gives an adverse party reasonable notice of the intent to offer the statement—including its substance and the declarant's name—so that the party has a fair opportunity to meet it. The notice must be provided in writing before the trial or hearing—or in any form during the trial or hearing if the court, for good cause, excuses a lack of earlier notice.

Fed. R. Evid. 807 (2019 amendment).

■ **2020 Amendment to Fed. R. Evid. 404(b)-Crimes, Wrongs, or Other Acts:**

The Advisory Committee on the Federal Rules of Evidence has been evaluating the frequently used and litigated federal rule 404(b) governing "crimes, wrongs, or other acts" for a number of years. The Committee was particularly concerned with the admission of such potentially prejudicial evidence against an accused in criminal cases. However, the Committee eventually decided against any substantive changes that would unduly complicate the trial court's decision whether to admit an accused's other crimes for a non-character purpose. Instead of recommending substantive amendments to rule 404(b), the Committee proposed strengthening the existing notice provision to protect defendants in criminal cases.

Under the amendment, defendants no longer need to request pretrial notice from the prosecution concerning other bad act evidence. Instead, prosecutors must provide advance written notice of "the permitted purpose for which the prosecutor intends to offer [such] evidence and the reasoning that supports the purpose." Fed. R. Evid. 404(b)(3)(B) (effective Dec. 1, 2020). As explained by the federal Advisory Committee notes, under the revised notice provision, the "prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose." Fed. R. Evid. 404(b) advisory committee's note to 2020 amendment. The notice must provide the accused "a fair opportunity to meet" the other wrongs evidence. Absent Congressional action, the notice provision will become effective on December 1, 2020.

As amended, the federal notice provision, Fed. R. Evid. 404(b)(3) provides:

(3) Notice in a Criminal Case. In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

Although Iowa's rule governing other bad acts mirrors the federal rule in substance, Iowa Rule 5.404(b) contains no notice provision whatsoever.

III. IOWA SUPREME COURT EVIDENCE DECISIONS

Since the last edition, the Iowa Supreme Court has rendered significant decisions addressing evidentiary issues.

■ Preservation of Error

In ***State v. Leedom***, 938 N.W.2d 177, 191-192 (Iowa 2020), a grandfather was prosecuted for the sexual abuse of his granddaughter when she was between 9- and 12-years-old. Id. at 182. During her pretrial deposition, the victim asserted that she had told her therapist, a mandatory reporter, about the abuse. Id. In an *in limine* ruling, the trial court quashed Leedom's attempt to subpoena the child's therapists, concluding that the therapist-patient privilege protected those communications unless the State opened the door at trial. On appeal, the Iowa Supreme Court held that Leedom failed to preserve error concerning that *in limine* ruling because the defendant

never called the child's therapists or made any offer of proof at trial concerning their testimony. Id. at 191-192.

■ **Character Evidence—Victim's Character in Self-Defense Cases**:

In ***State v. Baltazar,* 935 N.W.2d 862 (Iowa 2019)**, the Court applied the rule that it clarified last term in *State v. Williams*, 929 N.W.2d 621 (Iowa 2019) regarding the methods of proving a victim's character in a criminal case where the defendant asserts the justification of self-defense. In *Baltazar*, a defendant charged with first-degree murder asserted the justification of self-defense. The trial court refused to admit two videos offered by the defendant that depicted the deceased victim engaging in fights with other individuals the day before and the day of the charged assault. Id. at 866. The Court affirmed that evidentiary ruling because the defendant had failed to produce any evidence that he knew about either of the specific violent incidents in the excluded videos. Id. at 873. Citing *Williams*, the *Baltazar* Court held that a defendant asserting self-defense may not prove the victim's "aggressive or violent behavior through previously unknown specific conduct." Id.

Under *Baltazar* and *Williams,* then, unless a defendant claims to have knowledge of a victim's specific violent conduct, a defendant's claim of self-defense does *not* put a victim's violent character "in issue" or make that character an "essential element" of the defense. Instead, a defendant who asserts self-defense is using the victim's character circumstantially—to show that the victim had a violent character and therefore was more likely to have acted in conformity with that violent character as the first aggressor. Although this circumstantial use of a victim's character is permitted under Iowa R. Evid. 5.404(a)(2), a defendant is limited to reputation and opinion evidence in proving that character.

In contrast, if a defendant has knowledge of the victim's violent character or prior violent acts, evidence of a victim's character may shed light upon the defendant's state of mind (apprehension and fear) during the litigated encounter and the reasonableness of defendant's response to the attack. In addition to the victim's reputation as violent and quarrelsome and opinions to that effect, specific instances of conduct suggesting the victim's violent nature are admissible if the defendant knew of those prior acts when he used defensive force. In this situation, rule 5.404(b) does not bar the evidence because the specific acts are offered because of their effect on the defendant; they are not being used as character evidence to prove conduct in conformity with prior conduct.

■ **Plea Discussions under Rule 5.410:**

In ***In re 2018 Grand Jury of Dallas County,* 939 N.W.2d 50 (Iowa 2020)**, the rejected a "fruit-of-the-poisonous-tree" argument concerning rule 5.410. Iowa Rule 5.410 declares

inadmissible in a civil or criminal proceeding (1) a withdrawn guilty plea, (2) a plea of nolo contendere, (3) statements made in any criminal proceeding under Federal R. Crim. P. 11, Iowa R. Crim. P. 2.10 or equivalent procedures in other states, and (4) any statement made in the course of plea discussions with an attorney for the prosecution which fail to conclude in a guilty plea or result in a withdrawn guilty plea. The Rule supports a free and open plea bargaining process by prohibiting the prosecution from using at trial on the charge being negotiated any statement made during plea discussions. Importantly, as the Court confirmed in *2018 Grand Jury*, however, the rule only bars admission of the "statements" themselves and does not prevent the prosecution from using the information communicated during plea discussions.

In that case, a grand jury was constituted to determine whether child endangerment charges should be brought against the father of a child whose day care had reported seeing multiple bruises on the child's back. During plea discussions, the father's attorney disclosed that he had retained a consulting physician who believed that the markings on the child were from a skin condition, rather than physical abuse. Id. at 52. The State then subpoenaed the defense expert to testify before the grand jury. The father moved to quash the grand jury subpoena, arguing that the prosecution had violated rule 5.410 and that the expert's opinions were non-discoverable work product. Id. at 56-57. Although the Court held that the work product doctrine required quashing the subpoena, it rejected the father's "fruit-of-the-poisonous-tree argument" concerning rule 5.410. According to the Court, rule 5.410 only prevented the State from admitting the statements that were made by defense counsel to prosecutors during plea negotiations. The rule did not prohibit the State from pursuing the information communicated during that discussion or from making "derivative use" of the statements. Id. at 59 (stating that "[i]t is the statements of [defense counsel] to prosecutors that are thus inadmissible," not the expert's identity or opinions) (citations omitted).

■ Character Evidence—Victim's Past Sexual Behavior

The Iowa Supreme Court decided two cases last term construing Iowa's rape shield rule—Iowa R. Evid. 5.412. That rule generally prohibits a defendant from introducing evidence of a victim's past sexual behavior in criminal sexual abuse prosecutions. Specifically, rule 5.412 prohibits introduction of reputation or opinion evidence concerning the complainant's sexual history and substantially limits admissibility of evidence of specific instances of complainant's other sexual behavior. Specific instances of a victim's sexual behavior is only admissible in criminal cases if it falls within one of the rule's three exceptions, one of which would admit such evidence when "exclusion would violate the defendant's constitutional rights." Iowa R. Evid. 5.412(b)(1)(C).

The scope of this constitutional exception remains unclear. The Iowa courts have repeatedly indicated that an accused does not have a constitutional right to admit evidence of a

victim's other sexual behavior that is irrelevant or whose probative value is outweighed by unfair prejudice. In some exceptional cases, however, a defendant may be constitutionally entitled to offer evidence of a victim's sexual history for impeachment purposes in order to show bias or to establish a motive to fabricate charges. See Olden v. Kentucky, 488 U.S. 227 (1988). In cases involving a very young victim, an accused might invoke this exception with respect to the child's sexual history (including prior sexual abuse) to explain the victim's age-inappropriate sexual knowledge or to prove an alternative source of the child's ability to describe the sexual abuse (i.e, that the victim's age-inappropriate sexual knowledge may have been obtained through sexual experiences with someone other than the accused).

In ***State v. Walker*, 935 N.W.2d 874 (Iowa 2019)**, the Court addressed the split among courts concerning this type of evidence. In *Walker*, the defendant unsuccessfully attempted to offer evidence that his 4-year-old niece may have learned age-inappropriate sexual information from her 8-year-old brother, rather than from any sexual experience with the defendant. The Court acknowledged "'that a child victim's sexual knowledge [that] resulted from an encounter with someone other than the defendant may be relevant and material to a defendant's defense of mistaken identity or false accusation.'" Id. at 877 (citations omitted). However, the defendant in this case had failed to make any offer of proof beyond simple speculation that such prior sexual abuse had in fact occurred. Id. Moreover, even if minimally relevant, the evidence was confusing and unduly prejudicial. Id. at 878 (concluding that proposed evidence "was, at best, only marginally relevant," and "would have merely confused the issues, misled the jury, and created multiple trials within the trial."). Finally, the defendant had failed to provide the required pretrial notice of his intent to offer this evidence of "other sexual behavior" under Iowa's rape shield rule. Id. at 878 (upholding as "not clearly untenable or clearly unreasonable" district court's decision to exclude evidence of possible prior sexual abuse of victim because defendant had not filed timely pretrial motion or offer any excuse for failing to do so). See also Iowa R. Evid. 5.412(c)(1)(A) (rape shield rule's notice provision).

In his separate concurrence in *Walker*, Justice Appel questioned the majority's "categorical exclusion or diminishment" of evidence of prior sexual abuse offered to "show that the alleged victim's sexual knowledge comes from another source or that another individual perpetrated the crime." Walker, 935 N.W.2d. at 882-884 (Appel, J., concurring) (discussing non-Iowa cases and questioning the majority's "narrow application of relevance"). Although Justice Appel upheld the exclusion of the sexual history evidence under rule 5.403 and as harmless error, id. at 883, he noted that such evidence might be particularly relevant in other cases depending upon the similarity between the charged conduct and the child's other sexual experiences, as well as the strength of the sexual history evidence. Id. at 883-884. (Appel, J., concurring). Another factor of potential importance may be the defendant's need to offer this type of evidence in rebuttal. That is, if a prosecutor argues that the child would not have the sexual knowledge to describe the alleged sex abuse but for the defendant's alleged involvement,

evidence pointing to an alternative source of the child's sexual sophistication might be important counter-proof. Id. See also Christopher B. Mueller & Laird C. Kirkpatrick, Evidence § 4.33 (5th ed. 2012) (explaining that "merely because a victim could have acquired sexual knowledge from others does not give defendant a right to prove such relationships in absence of an attempt by the prosecutor to draw adverse inferences against the defendant from the victim's sexual sophistication.").

***State v. Trane*, 934 N.W.2d 447 (Iowa 2019)** was the other case decided this term concerning Iowa's rape shield rule. Specifically, the *Trane* Court considered the relationship between rule 5.412's pretrial notice requirement and a criminal defendant's right to a speedy trial.

In *Trane*, the former owner of a school for troubled youth was charged with sexually abusing and exploiting a 17-year-old female student. The defendant refused to waive his right to a speedy trial even though digital copies of voluminous school records were not produced to the defendant until two weeks before trial was set to commence. In her deposition, which was not taken until the afternoon before trial, the alleged victim testified that she had made prior allegations of sexual abuse against her foster parents and her adoptive parents. Id. at 453. Following the deposition, after conferring with the victim's adoptive mother and on the eve of trial, defense counsel filed a motion to admit evidence of the victim's false allegations of sexual abuse. Id. The defendant argued that the district court should excuse the rule's pretrial notice requirement because the evidence was newly discovered and could not have been offered 14-days before the scheduled trial. See Iowa R. Evid. 5.412(c)(1)(A) (requiring that motion be filed "at least 14 days before trial unless the court determines that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence, ... "). The State contended the motion was untimely and could not be granted without violating the defendant's right to a speedy trial, which the defendant had declined to waive. The trial court denied the motion as untimely without holding a hearing. Id. at 453-54.

In *Trane*, the Iowa Supreme Court held that the district court had abused its discretion in denying the defense motion as untimely in order to avoid a speedy trial violation. The State had apparently conceded that the defense could not have obtained the evidence needed to file the rule 5.412 motion before the eve of trial. Thus, the "escape valve for newly discovered evidence" applied and the 14-day pretrial deadline was excused. At the same time, the *in camera* hearing and screening process dictated by rule 5.412 likely could not have taken place without a continuance past the speedy trial deadline. Id. at 459. Rather than denying the motion as untimely, however, the trial court should have clearly notified the defendant that granting his evidentiary motion might push the trial past the speedy trial deadline. If the defendant insisted on pursuing his rule 5.412 motion, the court could have found good cause to extend the speedy trial deadline under Iowa R. Crim. P. 2.33(2)(b). Id. at 459-460. That is, rather than forcing the

defendant to choose between his right to a speedy trial and the use of this evidence, the trial court should have balanced those two rights. Id. at 460.

That *Trane* involved arguably unique "temporal and discovery restraints," as well as prior false sexual allegations, helps explain the Court's willingness to excuse the pretrial notice requirement of the rape shield rule. Id. at 461. The cases discussed and distinguished by the Court suggest that the pretrial notice requirement may be enforced in circumstances where a defendant knew or should have known about the other sexual behavior evidence before the motion deadline or had sufficient time through discovery to obtain that evidence. Id. at 460-462. See Id. at 462 (affirming that "states may impose and enforce *reasonable* notice requirements for rape shield exceptions," and that the "escape valve for newly discovered evidence" makes rule 5.412's notice provision reasonable).

The *Trane* Court also considered the trial court's alternative ground for excluding the evidence—that Trane had failed to prove that the victim's prior allegations of sexual abuse were indeed false. Id. at 462. Evidence of false reports of sexual abuse do not qualify as "other sexual behavior" and thus are not technically barred by rule 5.412. Id. at 457. However, because this type of evidence risks undermining the policies served by the rape shield rule, Iowa courts require criminal defendants to satisfy the procedural requirements of rule 5.412 and to make a threshold *in camera* showing that the victim made the prior report of sexual abuse and that such report was false by a preponderance of the evidence. Even then, the evidence is admissible only if the probative value of the false accusations outweighs the danger of unfair prejudice. Id. at 457-458. The trial court in the case, however, had denied Trane's motion without sufficient information and without any *in camera* hearing. Id. at 462.

The *Trane* Court suggested that it would not ordinarily overturn the trial court's refusal to hold a rule 5.412 hearing unless the evidence of the victim's alleged false reports of sexual abuse was "relevant and important, and its probative value outweighed the danger of unfair prejudice." Id. at 462-463. However, this case turned on a conflict in credibility concerning the victim and the defendant. If the victim's prior reports of sexual abuse by her adoptive or foster parents were indeed false (something that could not be determined without a hearing), that evidence would have been important to the defense theory regarding the 17-year-old victim's motive to retaliate against authority figures like the defendant. Id. at 463. Thus, although a defendant's ability to impeach the victim's credibility must be "tempered with a recognition of the important policies served by the rape shield statute—protection of victims and their privacy, avoiding trials of victims rather than perpetrators, and ensuring that victims of sexual abuse are encouraged to report"—the trial court abused its discretion in not holding an *in camera* hearing on Trane's motion and, if necessary, briefly postpone the trial. Id. The *Trane* Court thus remanded the case so that the trial court could hold an *in camera* hearing to determine, by a preponderance of the evidence, whether the victim had made the prior reports of sexual abuse by her adoptive or foster parents and, if so, whether those accusations were false. Id.

■ Privileges

● Attorney-Client Privilege/ Work Product Protection

In ***In re 2018 Grand Jury of Dallas County*, 939 N.W.2d 50, 58-59 (Iowa 2020)**, the Iowa Supreme Court extended the protection afforded both work product and the attorney-client privilege to grand jury proceedings. In that case, a grand jury was constituted to determine whether child endangerment charges should be brought against the father of a child whose day care had reported seeing multiple bruises on the child's back. During plea discussions, the father's attorney disclosed that he had retained a consulting physician who believed that the markings on the child were from a skin condition, rather than physical abuse. Id. at 52. The State then subpoenaed the defense expert to testify before the grand jury. The father moved to quash the grand jury subpoena, arguing that the expert's opinions were non-discoverable work product. Id. at 56-57.

The attorney-client privilege is distinct from the independent doctrine restricting discovery of the "work product" of opposing counsel. The latter doctrine restricts access to an adversary's materials collected or prepared for purposes of litigation. While the attorney-client privilege is absolute and protects confidential communications between an attorney and her client, the broader work product doctrine protects against production of litigation materials. Iowa Rule of Evidence 5.502 defines work product as "the protection that applicable law provides for tangible materials (or its intangible equivalent) prepared in anticipation of litigation or for trial." The doctrine essentially provides qualified protection from discovery for materials prepared in anticipation of litigation or for trial. See Iowa R. Civ. P. 1.503(3). Special work product protection extends to non-testifying experts retained in anticipation of litigation or preparation for trial. See Iowa R. Civ. P. 1.508(2). Although those rules only apply to civil proceedings, they codify the "firmly established" common law work product doctrine that, like the attorney-client privilege, applies in both criminal and civil proceedings.

In *2018 Grand Jury*, the Court held that "the State cannot subpoena an expert retained by the defense to testify before the grand jury regarding her opinion on the criminal matter being investigated." Id. at 52, 58-59. Although the expert consulted by the defense counsel had not yet prepared any "tangible" material, the Court noted that work product protection also protects "intangible equivalent[s], such as the tentative conclusions or observations" of the expert. Id. at 58. Because the State had not overcome work product protection by showing "exceptional circumstances" or waiver, the district court should have quashed the grand jury subpoena. Id. at 60.

● **Physician-Patient Privilege and the Statutory Protocol regarding Mental Health Records:**

***State v. Leedom*, 938 N.W.2d 177 (Iowa 2020)** is the latest decision to interpret and apply the statutory protocol in I.C. A. § 622.10(4) governing whether a criminal defendant can access a witness's privileged mental health records that might contain exculpatory evidence. In *Leedom*, a grandfather was prosecuted for the sexual abuse of his granddaughter when she was between 9- and 12-years-old. Leedom, 938 N.W.2d at 182. During her pretrial deposition, the victim asserted that she had told her therapist, a mandatory reporter, about the abuse. Id. The defendant subsequently moved under I.C.A. § 622.10(4) for an *in camera* review of the therapist's records, arguing that the records could impeach the victim's credibility either by contradicting her claim that she had told her therapist or by containing an inconsistent description of the abuse. Id. at 187-188. The trial court denied Leedom's request and Leedom was subsequently convicted. Id. at 184-185.

The Iowa Supreme Court held that the trial court abused its discretion in failing to conduct the *in camera* review of the complainant's mental health records to determine whether they contained exculpatory evidence. Id. at 187. In so holding, the Court clarified that "exculpatory" information includes impeachment evidence that could undermine the credibility of a witness. Id. at 188 (rejecting any distinction between impeaching and exculpatory evidence and noting that in cases that turn on a witness's credibility, impeachment evidence can make the difference between conviction and acquittal). The absence of any notation of abuse in the mandatory reporter's records, or a description of the abuse that contradicted the victim's account at trial, would be useful in cross-examining the victim and helpful to the jury given the absence of corroborating physical evidence and the need to evaluate the dueling accounts. Id. at 187-188. The Court thus remanded for the trial court to examine the therapist's records *in camera* and determine whether they contained exculpatory impeachment evidence. If exculpatory information was found, the trial court would then balance the need to disclose such evidence against the victim's privacy interests. If the records contained no such exculpatory evidence, the defendant's conviction would stand. Id. at 188-189. The Court's decisions in *Leedom* and its earlier decision in *State v. Edouard*, 854 N.W.2d 421, 439-443 (Iowa 2014) resulted in this admonishment to trial courts in future cases: "We encourage district court judges in close cases to examine the records in camera." Leedom, 938 N.W.2d at 188.

● **Constitutional Privilege against Self-Incrimination:** Although constitutional privileges are beyond the scope of this presentation, in ***State v. Gibbs*, 941 N.W.2d 888 (Iowa 2020)**, the Court examined whether a reporting provision in Iowa's stand-your-ground legislation violated the homicide defendant's Fifth Amendment privilege against compulsory self-incrimination. The Court in *Gibbs* held: "[W]e conclude that it invades the defendant's Fifth Amendment rights when a trial judge instructs the jury in a homicide case that the defendant was required to notify law enforcement of his or her use of deadly force." Id. at 891. However, the

Court deemed the error harmless beyond a reasonable doubt given the overwhelming evidence of the defendant's guilt. Id.

■ **Opinion Testimony**

● **Necessity for Expert Testimony**

In ***Susie v. Family Health Care of Siouxland*, 942 N.W.2d 333 (Iowa 2020)**, the Court addressed the necessity for expert testimony in a medical malpractice suit. In that case, the Court affirmed summary judgment for the health care provider because the plaintiff had presented no qualified expert to establish a causal link between a physician's assistant's failure to diagnose necrotizing fasciitis and promptly administer antibiotics and the amputation of plaintiff's right arm and eight toes. Id. at 337.

● **Vouching**

In ***State v. Leedom*, 938 N.W.2d 177 (Iowa 2020)**, the Court held that the State did not commit prosecutorial misconduct in a child sex abuse case by eliciting generalized expert testimony concerning delayed disclosure and the grooming process. In that child sex abuse prosecution, the State's expert described why victims of child sex abuse may "delay disclosure of the abuse, the grooming process, why children have an inability to recall specific dates, and the possibility that others can be in the room when abuse occurs." Id. at 193. Importantly, the expert had never met with or treated the child, never used the child's name during her testimony, and never connected the child's symptoms or experiences to the expert's generalized testimony about the behavior of child sex abuse victims. Id. The expert thus did not improperly comment on or vouch for the credibility of the child. Id.

Leedom confirms that an expert can testify about the physical and psychological symptoms and behaviors displayed by victims of child sexual abuse. An expert crosses the line, however, if she opines that a child is truthful, displayed symptoms of sexual abuse trauma, or had symptoms consistent with child abuse.

■ **Hearsay**

● **Statements of a Party-Opponent under Rule 5.801(d)(2)**

In ***State v. Shorter*, 945 N.W.2d 1 (Iowa 2020)**, the Court rejected a criminal jury instruction that that told the jury that it could consider a defendant's prior, out-of-court statements as if they had been made at trial. Specifically, the jury instruction advised the jury to consider a defendant's prior, out-of-court statements "as part of the evidence, *just as if they had been made at this trial*." Id. at 19 (emphasis in original). The Court held that the instruction misstated the law by equating an opposing party's out-of-court statements under rule 5.801(d)(2) "with sworn trial testimony." Id. at 19-21. The Court explained:

> When a person testifies at trial they are put under oath, subjecting them to potential prosecution for perjury. The formalities of being placed under oath, both the presence of an official to administer it and the use of the language "under penalty of perjury," are intended to "bind the conscience" of the person taking the oath, i.e., impress upon them the gravity of testifying. In addition, in-court testimony allows the jury to observe nonverbal cues that can assist in judging the credibility of the declarant and the context in which the statement was made. An out-of-court statement is not subject to these protections and therefore cannot be fully equated with in-court testimony made at trial in front of the jury. . . .

Id at 20. (citations omitted). The instruction misstated the law because "[b]y telling the jury to treat an out-of-court statement as if it had been made at trial, the challenged language of the instruction circumscribes the defendant's ability to explain why the out-of-court statement is less reliable than the in-court sworn testimony." Id. at 20-21.

The instruction struck down in *Shorter* was based on a former version of the pattern Iowa Criminal Jury Instructions that has since been updated to eliminate the "just as if made at trial" language. Id. at 19-20 & n. 3. See also Iowa State Bar Ass'n., Iowa Criminal Jury Instruction 200.44 (2019). While *Shorter* may cast doubt on a number of prior Iowa Court of Appeals decisions that have upheld the problematic instruction, see State v. Chrzan, 2019 WL 5067174 (Iowa Ct. App. 2019) (Table); State v. Garcia, 924 N.W.2d 533 (Iowa Ct. App. 2018) (Table); State v. Yenger, 919 N.W.2d 768 (Iowa Ct. App. 2018) (Table), the *Shorter* Court acknowledged that the legally erroneous instruction might not necessarily be prejudicial in a particular case. Shorter, 945 N.W.2d at 21.

Thus, statements of an opposing party are admissible whether or not the opponent testifies. The opposing party's statements constitute substantive evidence of the facts asserted, but are not conclusive evidence of those facts. Moreover, "[t]hat an out-of-court statement by an opposing party is admissible as substantive evidence at trial does not necessarily mean it can be equated with sworn trial testimony." Shorter, 945 N.W.2d at 20.

- **Statements for Medical Diagnosis or Treatment under Rule 5.803(4)**

In ***State v. Walker*, 935 N.W.2d 874 (Iowa 2019)**, the Court discussed the foundation for admitting statements made by child sexual abuse victims to medical providers under the medical diagnosis or treatment hearsay exception in rule 5.803(4). In *Walker*, the Court considered whether the trial court had properly admitted statements made by the defendant's 4-year-old niece to an examining physician at the Child Protection Response Center more than two weeks after the alleged abuse. While acknowledging that statements of identity made by very young victims of abuse are frequently admitted under the medical diagnosis or treatment hearsay exception, the Court again rejected any "categorical rule allowing such testimony." Id. at 879. Instead, the statement's proponent still bears the burden of establishing

the medical pertinence of each assertion made by a child abuse victim on a case-by-case basis. Id. Nevertheless, the Court held that the State had satisfied the exception's "liberal" two-pronged foundation with respect to the 4-year-old's statements concerning the abuse and its perpetrator. Id. at 881.

The child's mother had taken her daughter to see the doctor for treatment after being referred there by a sexual assault nurse at the emergency room. The Court noted that while there is "no categorical rule" governing such statements, the State had met its burden of demonstrating both that the child's motive in making the statements was to obtain medical treatment and that the abuser's identity was reasonably relied upon by the provider in providing that treatment. Id. at 880. The Court noted that "[i]n cases of child sexual abuse, ascertaining the identity of the abuser is important for medical purposes because the child's age prevents her from implementing self-care and because parents are often ill-equipped to elicit the abuser's identity." Id. at 879. Moreover, the information elicited from the child was the type of information the doctor would rely upon in diagnosing and treating the child's emotional trauma. Id. at 880. The Court did not regard the eighteen-day delay between the assault and the child's statements as significant given that "emotional and psychological injuries may linger longer than physical injuries." Id. The Court characterized the 18-day delay in that case as "short," or "at least . . . not sufficiently long," to rule out any medical purpose for the exam. Id. at 880-881. Thus, the child's statements to the doctor satisfied the hearsay exception in Iowa R. Evid. 5.803(4). Id.

- **Residual Clause under Rule 5.807**

In ***State v. Veverka*, 938 N.W.2d 197 (Iowa 2020)**, the Court considered whether a video recording of a forensic interview with a 14-year-old alleged sex abuse victim was admissible under the residual hearsay exception in rule 5.807. As it had done with a child-declarant's statements made for medical diagnosis or treatment, the Court in *Veverka* rejected any categorical approach that would have presumptively admitted child forensic interviews under the catch-all hearsay exception. Instead, the Court endorsed a case-specific analysis under which particular factors relevant to this type of hearsay and the residual exception's five elements are applied to the unique facts and circumstances of each case. Id. at 204.

The trial court in *Veverka* had refused *in limine* to admit the video of the child's forensic interview under the residual clause because it was not "testimonial." In reversing that evidentiary ruling, the Iowa Supreme Court noted that while the testimonial nature of the video was potentially relevant to confrontation clause analysis, that factor was irrelevant to whether it should be admitted under the residual exception. Instead, the trial court should have examined prior residual clause precedent for factors pertinent to the exception's five requirements—"indicia of trustworthiness," "necessity," "materiality," and the "interests of justice"—and then applied those considerations to the specific facts and circumstances of the case. Id. at 202-204.

Because the "district court failed to consider the indicia of trustworthiness as identified in the relevant precedents" and had considered "extraneous factors unrelated to the relevant [trustworthiness] inquiry," the Court vacated the *in limine* ruling and remanded for a case-specific residual clause analysis. Id. at 204.

In the course of its opinion, the *Veverka* the Court drew upon precedent to identify several "indicia of trustworthiness" relevant to statements made by child sex abuse victims that may prove useful in similar future cases. These circumstantial factors included whether the session was conducted by an experienced forensic interviewer; whether questions were open-ended and non-leading; the purpose for conducting the interview; whether questions were likely to encourage a child to fabricate answers; the level of detail provided by the child concerning the abuse and the surrounding circumstances; the consistency of the child's account and whether or not it had been recanted; whether the child used age-appropriate descriptions; the timing of the interview and the existence of a motive to fabricate; the need for the evidence, and the advantage of having the fact-finder observe for itself "the questions … asked, what the declarant said, and the declarant's demeanor." Id. at 203-204 (citations omitted).

Finally, *Veverka* clarified some of the other residual exception requirements. Evidence offered under the residual exception must be "more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." Iowa R. Evid. 807(a)(3). Addressing this necessity element, the Court cautioned that "[e]vidence is not necessary merely because the State claims to need the evidence to prosecute certain categories of offenses." Id. at 204. Additionally, while evidence must serve the "interests of justice" under Iowa R. Evid. 807(a)(4), the non-testimonial nature of a forensic interview is not relevant to whether its admission will advance the interests of justice. Veverka, 938 N.W.2d at 204.

- **Eyewitness Identification**

Although the subject is outside the scope of this presentation, the Iowa Supreme Court decided two cases during its last term that addressed the constitutionality of eyewitness identification, see ***State v. Doolin*, 942 N.W.2d 500 (Iowa 2020)** (discussing admissibility of first-time, in-court identification); ***State v. Booth-Harris***, 942 N.W.2d 562 (Iowa 2020) (addressing due process challenge to out-of-court identification).

IV. Iowa Court of Appeals Evidence Decisions

The following briefly summarizes selected (largely unpublished) decisions decided by the Iowa Court of Appeals during the Update period. Although these unpublished decisions do "not constitute controlling legal authority," they may be cited in a brief as persuasive authority under IOWA R. APP. PROC. 6.904(2)(c).

A. Preservation of Evidentiary Error

State v. Dessinger, 948 N.W.2d 534 (Iowa Ct. App. 2020) (Table) (petition for further review granted) (citing this treatise and holding that trial court's sustaining of defense objection to day care worker's testimony about child's verbal statements did not preserve error concerning testimony by two other witnesses relating to the child's same verbal statements).

B. Judicial Notice

Karwal v. Brookshire-Bailey, 2020 WL 1888771 (Iowa Ct. App. 2020) (Table) (refusing, in paternity, custody, support, and visitation proceeding, to take judicial notice on appeal of other juvenile court cases involving the mother's other children).

C. Presumptions

Kinzenbaw v. Tindal, 929 N.W.2d 273 (Iowa Ct. App. 2019) (Table) (noting "key distinction" between a presumption, which shifts the burden of producing evidence regarding an attorney's authority to act for his client, and the burden of persuasion concerning that issue).

D. Relevance and Unfair Prejudice

State v. Good, 949 N.W.2d 249 (Iowa Ct. App. 2020) (Table) (trial court did not abuse its discretion in admitting photograph taken at police station showing a shirtless defendant with a "small and barely noticeable" swastika tattoo; photograph, which was the only full image of defendant after the altercation, showed that the defendant did not have any injuries that would support his claim of self-defense and swastika tattoo was one of numerous larger and more "attention grabbing" tattoos on defendant's body).

State v. Wadsworth, 948 N.W.2d 530 (Iowa Ct. App. 2020) (Table) (admitting photos of crime scene, murder victim's clothing, and autopsy photos of victim's injuries to demonstrate malice and the vicious nature of attack; photos were not cumulative because they depicted different relevant evidence and were necessary after defendant minimized his actions by testifying that he disagreed with the medical examiner about the number of stab wounds).

Wermerskirchen v. Canadian Nat'l R.R., 946 N.W.2d 538 (Iowa Ct. App. 2020) (Table) (petition for further review granted) (holding that trial court did not abuse its discretion in excluding evidence of several "near misses" at other intersections along railroad's route on the same wintry morning as plaintiff's accident with the defendant's locomotive; plaintiff's offer of proof was "scarce in details" concerning earlier incidents and failed to demonstrate that earlier events "occurred under substantially similar circumstances").

State v. Purk, 941 N.W.2d 31 (Iowa Ct. App. 2019) (Table) (discounting potential prejudice from inadmissible reference to polygraph test in bench trial).

E. Character Evidence

State v. Guill, 948 N.W.2d 532 (Iowa Ct. App. 2020) (Table) (holding that character was not an essential element in a murder prosecution in which the defendant argued that the mother had killed the infant victim and that the trial court had thus properly excluded testimony from the defendant's younger twin brothers that the defendant never attacked or assaulted them during the time he cared for them when they were children; defendant's proffer contained no opinions about defendant's character and merely described the defendant's conduct).

State v. Buelow, 941 N.W.2d 594 (Iowa Ct. App. 2019) (Table) (petition for further review granted) (holding, in murder prosecution where defendant claimed that the victim committed suicide by stabbing herself, that trial court should not have excluded evidence of victim's mental health records and related psychiatric testimony regarding victim's two prior suicide attempts three years before her death; while not all suicides are caused by mental illness, the victim's suicidal disposition stemmed from her mental illness, not her character).

F. Other Crimes and Wrongs under Rule 5.404

State v. Campbell, 946 N.W.2d 760 (Iowa Ct. App. 2020) (Table) (questioning whether a photo that was taken a week before the robbery showing the defendant wearing a bandana and holding a gun constituted an "other crime or wrong" because there was nothing wrong or criminal about "act" depicted in the photo and it was unclear what forbidden character inference could be drawn from photo).

State v. Miller, 947 N.W.2d 225 (Iowa Ct. App. 2020) (Table) (noting that court can consider the "enormity" of the charged versus the uncharged conduct in assessing prejudice under rule 5.404(b)).

State v. Goodson, 949 N.W.2d 262 (Iowa Ct. App. 2020) (Table) (affirming admission of defendant's prior acts of domestic violence toward sex abuse victim as relevant to consensual nature of encounter and necessary given the "he said/ she said" nature of the dispute; jury needed a full picture of defendant's relationship with the victim and should not decide guilt or innocence based on false presentation of that relationship).

State v. Syperda, 941 N.W.2d 596 (Iowa Ct. App. 2019) (Table) (allowing evidence of husband's prior acts of domestic violence against missing wife in murder prosecution without a body; need for evidence to prove identity and motive was great and bench trial reduced prejudice).

State v. Stephens, 928 N.W.2d 885 (Iowa Ct. App. 2019) (Table) (affirming admission of text message sent from defendant's cell phone a few days after hit and run collision that instructed recipient to deny knowing defendant's whereabouts if anyone (including the police) asked; text

demonstrated defendant's intent to avoid police and that defendant knew or had reason to anticipate that the accident had resulted in death or injury to another).

State v. Frederick, 941 N.W.2d 362 (Iowa Ct. App. 2019) (Table) (applying *Putman's* "striking similarity" higher threshold to evidence of defendant's similar acts of harassment and aggression toward the victim following the discontinuation of their relationship in order to identify the defendant, who asserted an alibi, as the victim's assailant).

State v. Purk, 941 N.W.2d 31 (Iowa Ct. App. 2019) (Table) (ruling that prosecution satisfied "clear proof" standard under rule 5.404(b) because even though witnesses could not recall specific dates, they gave reasonably detailed descriptions of seeing the defendant choke his now missing fiancé into unconsciousness).

G. Rape Shield Rule 5.412

State v. Smith, 947 N.W.2d 224 (Iowa Ct. App. 2020) (Table) (rejecting defendant's effort to admit, under constitutional exception to rape shield rule, evidence that child victim had also accused the defendant's son of sexual abuse to show that child may have been confused as to the identity of abuser).

State v. DeLong, 928 N.W.2d 858 (Iowa Ct. App. 2019) (Table) (barring defendant from introducing evidence that 14-year-old victim may have had sexual intercourse with her boyfriend the night before the alleged assault to provide alternative explanation for victim's pain the morning after the charged assault; neither victim, nor boyfriend admitted having sex that date and testimony of sole minor witness who had not actually seen the alleged sexual encounter was "speculative" and of "uncertain credibility").

H. Impeachment

State v. Fontenot, 949 N.W.2d 25 (Iowa Ct. App. 2020) (Table) (petition for further review granted) (noting that trial court properly instructed jury to consider child's prior inconsistent statements in forensic interview only to assess the child's credibility and not for the truth).

State v. Swift, 948 N.W.2d 534 (Iowa Ct. App. 2020) (Table) (holding that defense counsel was not ineffective for failing to object to prosecutor's questioning of witnesses on *Turecek* grounds because impeaching evidence was independently admissible and State did not call the witnesses knowing that they would give unfavorable testimony; indeed, witnesses testified for the State concerning circumstances of the shooting).

State v. Swift, 948 N.W.2d 534 (Iowa Ct. App. 2020) (Table) (noting that if witness "'denies making the prior statement, or is evasive in his answer, or cannot remember making it at all, then the statement may be admitted into evidence for purposes of impeachment'" and explaining how *State v. Ware*, 338 N.W.2d 707 (Iowa 1983) changed prior practice by allowing extrinsic

evidence to prove a prior inconsistent statement even if the witness admits making the prior statement) (citations omitted).

State v. Juste, 939 N.W.2d 664, 678-679 (Iowa Ct. App. 2019) (ruling that while State could impeach defense witness, who testified that he and his family shared a residence with the defendant, the alleged child victim, and the child's mother during the time of the alleged sex abuse, with employment records of witness' wife that listed a different address, wife's statements within employment records were inadmissible hearsay; error was harmless, however, because same information was introduced without objection in wife's timecards).

I. Opinion Testimony

State v. Mincks, 948 N.W.2d 532 (Iowa Ct. App. 2020) (Table) (holding that mental health counselor did not vouch for alleged child sex abuse victim by testifying that she had reported the child's allegations to the DHS; counselor did not voice an opinion on the veracity of child or the need for an investigation, but merely followed through on her mandatory reporting obligations).

State v. Wiggins, 948 N.W.2d 524 (Iowa Ct. App. 2020) (Table) (finding defense counsel ineffective for failing to object to police lieutenant's expert testimony that the police in the case did not need to look any further than the defendant because drugs had been found under passenger seat where defendant was sitting and no drug paraphernalia was found in car).

State v. Lindaman, 946 N.W.2d 536 (Iowa Ct. App. 2020), as amended, (Feb. 26, 2020) (Table) (ruling that forensic interviewer's testimony about delayed disclosure and grooming was not improper vouching because the witness did not interview this victim or tie her testimony to the victim or the facts of the case).

State v. Southideth-Whiten, 943 N.W.2d 73 2020 (Iowa Ct. App. 2020) (Table) (trial court did not improperly restrict testimony of defense expert in inmate homicide prosecution; professor of criminology fully testified about the general fear of violence and personal safety concerns in a prison environment, but was properly prohibited from testifying that defendant's response was reasonable or justified under the circumstances because that would have amounted to an improper comment on defendant's guilt or innocence).

Alcala v. Marriott Int'l., Inc., 941 N.W.2d 359 (Iowa App. 2019) (Table) (holding, in slip and fall case, that trial court erroneously allowed a walkway safety expert to testify about the "general behavior of people walking in winter conditions" and whether a slip-and-fall plaintiff was reasonable in how she walked because the topic was likely within "the common knowledge and experience of an Iowa jur[y]" who was equally capable of resolving that question for itself, but error was not grounds for a new trial because the testimony did not substantially affect the defendant's rights).

State v. Holt, 940 N.W.2d 453 (Iowa Ct. App. 2019) (Table) (upholding testimony by forensic interviewer explaining the reasons why child sex abuse victims may not fully or timely disclose abuse and the grooming process; although witness stated "in this case," she clarified that she was referring to cases of child sexual abuse and she never revealed that she had interviewed the victim).

State v. McMullen, 940 N.W.2d 456, 461 (Iowa Ct. App. 2019) (allowing police officer to testify that he smelled marijuana because "[s]mell is a sense that is hard [to] describe. . . . 'It is virtually impossible to verbally describe a smell except in terms of conclusions rather than specific identifiable facts.'") (citations omitted).

Goebel v. Green Line Polymers, 940 N.W.2d 45 (Iowa Ct. App. 2019) (Table) (ruling that safety engineer at plaintiff's employer, while lacking formal education, was sufficiently experienced in the trucking industry to testify that plaintiff improperly allowed his truck to be loaded with unbanded pipes).

Franzen v. Kruger, 940 N.W.2d 43 (Iowa Ct. App. 2019) (Table) (reversing plaintiff's verdict in dental malpractice case and remanding for new trial because plaintiff's expert based her opinion that the standard of care for tooth extraction required the use of a bite plate or throat pack on the expert's survey of over 30 oral surgery programs; plaintiff failed to lay the necessary foundation that experts in the field reasonably rely upon such surveys or that the expert's survey methodology was sound).

State v. Juste, 939 N.W.2d 664, 673 (Iowa Ct. App. 2019) (ruling that nurse's testimony, that in 95% or higher of sex abuse cases child's genitalia are normal, did not improperly vouch for child; statement was "general and merely explain[ed] that sexual abuse does not always lead to physical trauma of a person's genitalia").

Intlekofer v. Reitberry Rental Prop., 939 N.W.2d 115 (Iowa Ct. App. 2019) (Table) (affirming summary judgment in negligence case after plaintiff failed to designate an expert to testify about how defendant's construction of a parking lot/curb/sidewalk caused water infiltration on plaintiff's property; while it is common knowledge that water runs downhill, subject matter involved a technical or scientific matter that required expert testimony).

State v. Olson, 928 N.W.2d 664 (Iowa Ct. App. 2019) (Table) (holding that forensic interviewer's testimony did not improperly vouch for child's credibility by stating that child's statements during CPC interview were "fluent, detailed, and consistent" and that "generally children can remember a high level of detail surrounding a traumatic event;" witness never testified that child's behavior or level of recollection were consistent with that of a child sexual abuse victim).

J. Hearsay

1. Definition of Hearsay

State v. Dessinger, 948 N.W.2d 534 (Iowa Ct. App. 2020) (Table) (petition for further review granted) (classifying 4-year-old's non-verbal demonstration of defendant choking him as a "statement" because child was trying to communicate what the defendant had done to him).

State v. Goodon, 947 N.W.2d 772 (Iowa Ct. App. 2020) (Table) (holding that telephone call from VA warning domestic assault victim that defendant had threatened her was properly admitted for non-hearsay purpose of explaining the victim's "actions and reactions" to the defendant's conduct).

State v. Marcelino, 943 N.W.2d 66 (Iowa Ct. App. 2020) (Table) (analyzing an unavailable declarant's instruction to his girlfriend to tell the police that the defendant did the shooting; although not ordinarily hearsay, an instruction "may be hearsay if it contains 'an implicit assertion of the fact'" and boyfriend's instruction to "point the finger at someone else carried the implication that [the boyfriend, not the defendant] was the shooter).

2. Prior Statements of Declarant

***State v. Fontenot**, 949 N.W.2d 25 (Iowa Ct. App. 2020) (petition for further review granted) (holding, in child sex abuse prosecution, that child's prior consistent statement must be made "before the *allegation* of motive to fabricate arose, not before the initial report of alleged abuse," and finding that the "implicit allegation of recent fabrication arose during defense counsel's cross-examination of [the child] or, at the earliest, during [the child's] deposition. . . .") (emphasis added)

***[Note that *Fontenot* appears to incorrectly require that a prior consistent statement be made before the declarant's improper motive or influence is *alleged*. However, a prior consistent statement offered under rule 5.801(d)(1)(B) must be made before the underlying improper motive or influence arose, not before that improper motive is first alleged.]

****State v. Juste**, 939 N.W.2d 664, 678 (Iowa Ct. App. 2019) (allowing address listed by defense witness' wife in her employment application to impeach husband's inconsistent trial testimony that he and wife lived with the defendant during a period when defendant allegedly sexually abused the child).

**[Note: This aspect of *Juste's* holding may not be correct. Using a prior inconsistent statement for impeachment is not hearsay because the witness who says one thing on the stand, but another thing out-of-court, is impeached regardless of the truth of the prior inconsistent statement—the witness must be lying then or lying now. In contrast, a hearsay problem arises when an in-court witness is impeached with the inconsistent statement of another person. In that situation, the out-of-court statement must be true in order to contradict the testimony of the in-

court witness. Unless the statement meets a hearsay exception or exclusion, it should not be admissible even if offered solely to impeach].

State v. Juste, 939 N.W.2d 664, 674 (Iowa Ct. App. 2019) (ruling that prior consistent statements made by alleged child sex abuse victim in school survey and to school counselor and DHS officials were not admissible under rule 5.801(d)(1)(B) because all of the statements were made after child's motive to fabricate (anger at having to move to Iowa and away from family in North Carolina) arose).

3. Statements of Party-Opponent

Dee v. Burgett, 2020 WL 4577116 (Iowa Ct. App. 2020) (Table) (holding that a document attached by the defendant to an e-mail was not admissible against the defendant as an adoptive admission because attached document had been prepared by an independent contractor and the body of the defendant's email was blank and record thus did not demonstrate the defendant's "clear and unambiguous assent or adoption" of the attachment; moreover, e-mail attachment did not satisfy business records exception because proponent had failed to lay the foundation for all rule 5.803(6) requirements and because attachment was prepared in anticipation of litigation).

Ceaser v. Marshalltown Medical and Surgical Center, 947 N.W.2d 230 (Iowa Ct. App. 2020) (Table) (noting that while statements of a party-opponent are generally not subject to the restrictions of the opinion rule, the hearsay exclusion does not trump the requirement that expert opinions be made by a qualified witness; thus a medical malpractice plaintiff could not admit the statements of nurse practitioner against the defendant medical clinic that employed her because "[a] statement about the standard of care owed in medical treatment is not admissible as an admission by an employee of the defendant when the employee is a lay person. . . ." and there was no showing that the nurse practitioner had the necessary expertise to opine whether a patient should be lying down when vaccinated).

4. Present Sense Impressions and Excited Utterances

State v. Johnson, 949 N.W.2d 24 (Iowa Ct. App. 2020) (Table) (upholding admission of out-of-court statement uttered by declarant while looking out the window and describing who he saw kicking in victim's back door as a present sense impression).

State v. Anderson, 943 N.W.2d 79 (Iowa Ct. App. 2020) (Table) (admitting as excited utterance 911 recording and transcript of 911 call made by upstairs neighbor after investigating loud disturbance in victim's downstairs apartment and bringing victim back to neighbor's apartment; caller described, without prompting by 911 operator, victim's appearance and condition and reported that victim looked like she'[d] been beaten by her husband).

State v. Velic, 949 N.W.2d 10 (Iowa Ct. App. 2020) (Table) (noting that declarant's "lack of fluency in English is not equivalent to being unable to communicate what happened while still

under the stress of the event;" declarant can act rationally and function normally and still utter an excited utterance).

State v. Clemens, 928 N.W.2d 121 (Iowa Ct. App. 2019) (Table) (admitting as present sense impression fifteen minute recording of 911 call made by defendant's 80-year-old mother during the course of assault on declarant's husband/defendant's father).

5. Business and Public Records

Ceaser v. Marshalltown Medical & Surgical Ctr., 947 N.W.2d 230 (Iowa Ct. App. 2020) (Table) (deciding that medical records contained inadmissible double hearsay when records included a handwritten note documenting a phone call made by the plaintiff's mother to the defendant clinic one week after her daughter's vaccination).

State v. Fiems947 N.W.2d 672 (Iowa Ct. App. 2020) (Table) (holding that defendant accused of child endangerment failed to lay the business records foundation for admission of a sleep study when she failed "to offer testimony from the doctor or other party involved in creating or keeping the record, a certification from a custodian of the proffered record, or a stipulation to the document's admission").

State v. Juste, 939 N.W.2d 664, 678-679 (Iowa Ct. App. 2019) (holding that employment records that listed address supplied by witness' wife in her employment application were inadmissible to the extent they contained third-party hearsay within a business record).

6. Community Reputation Concerning Boundaries

Brewer v. Plagman, 940 N.W.2d 792 (Iowa Ct. App. 2019) (Table) (suggesting that testimony concerning oral "handshake deal" between witness' father and neighboring land owner was admissible under rule 5.803(20) [community reputation concerning boundaries] notwithstanding that witness was a member of both the community and the family when witness' testimony was not controverted by any other neighbor).

7. Statements against Interest

State v. Marcelino, 943 N.W.2d 66 (Iowa Ct. App. 2020) (Table) (excluding, in homicide prosecution, exculpatory statement against penal interest that declarant-boyfriend made to his testifying girlfriend, who was present with him at the scene of the shooting, that the defendant was going to prison for something the boyfriend had done; although the testifying girlfriend's credibility was "best left for the jury to weigh," the defendant had not proffered sufficient corroborating circumstances to clearly indicate the trustworthiness of the boyfriend's third-party confession given the lack of evidence regarding the "speaker's good character" or the spontaneity of his statement, the fact that the boyfriend had waited to implicate himself to his girlfriend until days after the shooting and defendant's arrest, and the absence of "circumstances that substantiated" the declarant's statement that he was the perpetrator).

State v. Marcelino, 943 N.W.2d 66 (Iowa Ct. App. 2020) (Table) (refusing to admit exculpatory statement of drug distributor who lived in apartment where murder weapon was found as a statement against interest of an unavailable declarant because record did not establish why the defendant had not called the declarant to testify).

8. Residual Exception

State v. Barnard, 941 N.W.2d 44 (Iowa Ct. App. 2019) (Table) (trial court did not abuse discretion in finding necessity to admit child's forensic interview under residual hearsay exception when child was unable to describe the events of her assault and interview was the most probative evidence reasonably available).

9. Confrontation Clause

State v. Sykes, 940 N.W.2d 790 (Iowa Ct. App. 2019) (Table) (characterizing 911 call made by domestic abuse victim to be nontestimonial and thus not barred by Confrontation Clause).

State v. Richards, 928 N.W.2d 158 (Iowa Ct. App. 2019) (Table) (holding that domestic abuse victim's statements on police body cam video were made in course of ongoing emergency and thus were nontestimonial).

State v. Walker, 927 N.W.2d 687 (Iowa Ct. App. 2019) (Table) (holding "open-line" 911 call that recorded ongoing assault of woman "begging, screaming, and struggling" to be non-testimonial).

State v. Ware, 939 N.W.2d 118 (Iowa Ct. App. 2019) (Table) (holding that defendant's Sixth Amendment rights were not violated by the admission of a photograph depicting the assault victim's injuries even though the defendant did not have an opportunity to cross-examine the victim because "a camera is not a witness that is amenable to cross-examination") (citations omitted).

State v. Barnard, 941 N.W.2d 44 (Iowa Ct. App. 2019) (Table) (holding that accused's right of confrontation was not violated by child's inability to relate the details of the sexual abuse during both direct and cross-examination; child did testify and defendant was allowed to expose the infirmities in child's testimony on cross-examination).

K. Authentication

State v. Goodwin, 947 N.W.2d 428 (Iowa Ct. App. 2020) (Table) (upholding authentication through circumstantial evidence of text message allegedly sent by the defendant accused of "thefts using a Craigslist guise" to the cell phone of defendant's acquaintance/girlfriend about robbing someone on Craigslist of "2 crispy 100s;" state offered evidence linking the defendant to the person on whose phone the text was discovered; the text was sent on the same evening as one

of the Craigslist thefts where two hundred dollar bills were stolen, and the robbery victim identified the defendant as the perpetrator).

V. Federal Evidence Decisions (emphasizing decision from Eighth Circuit Court of Appeals)

A. Judicial Notice

Schweitzer v. Investment Committee of Philips 66 Savings Plan, 960 F.3d 190, 193 n. 3 (5th Cir. 2020) (taking judicial notice of publicly traded company's stock price).

B. Relevance

United States v. Ross, 969 F.3d 829 (8th Cir. 2020) (holding the admission of text messages between defendant and coconspirator proposing they commit a robbery was relevant to prove the charged conspiracies to commit carjacking and kidnapping because the evidence that an agreement to commit the charged offenses took place only two days prior to the crimes tended to make it more probable that they agreed to carjack the victim's vehicle and kidnap him).

United States v. Everett, 977 F.3d 679 (8th Cir. 2020) (holding the district court was not required to decide whether similarly probative information on the same matters could have been obtained from alternative sources before admitting telephone calls which contained highly damaging admissions because defendant failed to identify any unfair prejudice).

C. Other Crimes or Wrongs

United States v. Howard, 977 F.3d 671 (8th Cir. 2020) (holding that admission of ticket indicating defendant had pawned a firearm on a particular date was not impermissible character evidence because it tended to show he knowingly and intentionally possessed a firearm and ammunition after the date on the ticket; the court also held dash cam video evidence of the traffic stop showing defendant fighting the officer and fleeing was relevant as circumstantial evidence of consciousness of guilt and not unfairly prejudicial because the video had strong probative value on the issue of intentional flight and the court gave the jury a careful instruction for determining the weight or significance of the evidence).

United States v. Croghan, 973 F.3d 809 (8th Cir. 2020) (holding pictures of defendant's minor female relative on a child pornography website and related testimony were admissible as other-acts evidence because they were offered for the permissible purpose of proving defendant's identity as the website user "Beau2358" who posted images of the relative on the website; it was also relevant to show that defendant, as Beau2358, looked at a "Jail Bait" section on another child pornography website).

United States v. Jefferson, 975 F.3d 700 (8th Cir. 2020) (holding admission of a text message from defendant to his girlfriend that referred to "getting smacked with a gun" was proper because it was used to demonstrate defendant considered the drug trade dangerous and therefore had a motive to possess the firearm and ammunition; the court also held admission of expert witness testimony was proper because defendant made the issue of forensic evidence relevant and the witnesses' testimony about how it rare it is to find forensic evidence on firearms or ammunitions was helpful to the jury; the court also found admission of a photograph of defendant sitting handcuffed on a sofa during the warrant search was not unduly prejudicial because it was relevant to proving that Jefferson was at the home when officers executed the warrant (a fact Jefferson refused to stipulate), and the court gave the jury a cautionary instruction to minimize prejudice).

United States v. Free, 976 F.3d 810 (8th Cir. 2020)(holding that exclusion of evidence that victim kept drugs in her bedroom and tested positive for marijuana use shortly before she disclosed that defendant had been abusing her was proper because, while the evidence was relevant to show the victim retaliated against and falsely accused defendant, the court did not limit defendant's opportunity to ask whether the victim was concerned defendant would punish her; the court only prohibited questions regarding the victim's marijuana possession and drug test, which would have tended to prove the alleged motives of retaliation and avoiding punishment).

U.S. v. Welch, 951 F.3d 901, 906-07 (8th Cir. 2020) (affirming admission of evidence that defendant was found with "the exact same (unique) kind of synthetic marijuana" as was found in his home one month earlier to prove his motive to illegally possess gun).

U.S. v. Warren, 951 F.3d 946 (8th Cir. 2020) (stating that a defendant's general denial places his state of mind at issue and that defendant's prior drug and gun convictions were thus relevant to his knowledge and intent concerning current drug and weapons charges).

U.S. v. Shelledy, 961 F.3d 1014, 1021 (8th Cir. 2020) (ruling that defendant's membership in motorcycle "club" demonstrated defendant's consciousness of guilt and helped to explain how defendant knew the other members of the drug conspiracy).

U.S. v. Fortier, 956 F.3d 563, 568-69 (8th Cir. 2020), cert. denied 2020 WL 6551830 (U.S. 2020) (admitting, in prosecution of defendant for filming two underage girls with his iPhone for purpose of producing pornography, testimony by ex-girlfriend that defendant also recorded them having sex when she was 17 in order to refute defendant's claim that he pushed the wrong button on his iPhone; "[a] person who has successfully used a cell phone in the past to film explicit sexual acts appears less credible when he claims that the next time was only an accident").

U.S. v. Splettstoeszer, 956 F.3d 545 (8th Cir. 2020) (ruling defendant's prior convictions for sexually abusing his daughter and stepdaughter admissible in child pornography prosecution to show defendant's propensity to be sexually interested in minors).

United States v. Bartunek, 969 F.3d 860 (8th Cir. 2020) (holding that photographs of four life-sized dolls found in defendant's bedroom, which were replicas of children, ranging in age from infancy to five years, were admissible to establish motive because the dolls were relevant to overcome the defense that someone else accessed defendant's internet to download and distribute child pornography by showing his motive for acquiring and distributing child pornography. The court also held the district court's admission of testimony from witness that defendant began showing him child pornography when he was 14-years-old was not an abuse of discretion because it was admissible under Rule 414 and alternatively under 404(b) to show defendant's knowledge, intent, or lack of mistake; the admission was not unfairly prejudicial simply because it detailed events that occurred twenty years ago).

U.S. v. Guzman, 926 F.3d 991 (8th Cir. 2019) (admitting, in methamphetamine prosecution, intrinsic evidence of defendant's involvement with marijuana and two firearms, and stating that intrinsic evidence includes not only "inextricably intertwined" evidence, but also evidence that completes the story of the crime or provides context to charged crime).

U.S. v. Monds, 945 F.3d 1049, 1052 (8th Cir. 2019), cert. denied 2020 WL 5883896 (U.S. 2020) (admitting prior felony drug convictions, including one over 10 years old, to prove defendant's knowledge that seized substance was cocaine and to demonstrate that defendant intended to distribute the drugs, rather than hold them for personal use).

United States v. Harry, 930 F.3d 1000 (8th Cir. 2019) (using incarceration as a factor in considering the remoteness of a prior crime).

D. Privileges

United States v. Ivers, 967 F.3d 709 (8th Cir. 2020) (holding the defendant's threatening statements made toward a federal judge at the end of a phone call with his attorneys were not protected by the attorney client privilege because they were not for the purpose of obtaining legal advice about his pending lawsuit; courts routinely decide which specific communications are privileged and segregate those from non-privileged in particular conversations—"[t]hat some parts of the call were privileged does not mean that the entire call was privileged.").

E. Impeachment and Rules 601-615

Smith v. Nagy, 962 F.3d 192 (6th Cir. 2020), cert. denied 2020 WL 6121655 (U.S. 2020) (declaring, in habeas proceeding, that jurors' mistaken belief that felony murder carries a lighter sentence was likely based on "preconceived notions or beliefs about the legal system," rather than improper extraneous influences).

U.S. v. Shelledy, 961 F.3d 1014, 1023 (8th Cir. 2020) (noting that defendant had failed to demonstrate any exceptional circumstances that would have rebutted the presumption against impeaching the government witness with a conviction more than 10-years-old).

United States v. Dowty, 964 F.3d 703 (8th Cir. 2020)(holding there was no Confrontation Clause violation because the defendant failed to identify any witness he could not cross-examine; the defendant also acknowledged himself that he "vigorously" contested the eyewitnesses' identification testimony at issue).

Sittner v. Bowersox, 969 F.3d 846 (8th Cir. 2020) (holding the limitation on cross-examination of a social worker who testified about the victim's unusual sexual knowledge did not violate petitioner's Confrontation Clause rights because he was given a sufficient opportunity to cross-examine and impeach the witness at trial and there was already evidence in the record showing S.S. had alternative sources for her sexual knowledge other than petitioner's physical abuse. Additionally, the State had an interest in protecting the privacy of child victims of sexual crimes and did not bar petitioner from establishing his defense strategy).

U.S. v. Collier, 932 F.3d 1067 (8th Cir. 2019) (ruling that a violation of a sequestration order is not reversible error unless there is actual prejudice).

F. Opinion Testimony

United States v. Delorme, 964 F.3d 678 (8th Cir. 2020) (holding that it was not abuse of discretion to permit a forensic examiner to testify as a lay witness about his experience in forensic interviews because it was not based on scientific, technical, or other specialized knowledge, but instead on his own perception).

United States v. Gilbertson, 970 F.3d 939 (8th Cir. 2020) (holding that lay witness testimony of a business consultant specializing in reverse mergers was properly admitted as the witness was testifying from personal experience about his interpretation of text message conversations with defendant and was not an expert witness opining on the legal significance of the defendant's acts; the Court found the lay witness properly explained his reaction to a text from the defendant, noting that he was "concerned" because he believed the text showed the defendant was attempting to interfere with the market; the Court also found that the lay witness properly testified about his own participation in criminal conduct because he did not offer an opinion on the legal significance of the defendant's acts, but instead provided an account of his own bad acts).

United States v. Overton, 971 F.3d 756 (8th Cir. 2020) (holding that district courts and counsel should take appropriate measures to minimize the problems that may arise from dual-role testimony by a case agent where portions of a case agent's testimony constituted admissible expert testimony, but other portions did not; the Court concluded the jury was not given the

necessary information to distinguish between the lay and expert testimony because it was never clear when the case agent's testimony went beyond the specific code words at issue and was permissibly based on personal perceptions or if it was impermissibly based on hearsay statements).

U.S. v. Smith, 962 F.3d 755 (4th Cir. 2020) (pet. for cert. filed) (characterizing the "fine" line between expert and lay opinion as "a classic evidentiary call for which a federal trial court is afforded a good deal of discretion" and allowing law enforcement officer to offer lay opinions in drug case prosecution based on his "decades of policework").

U.S. v. Perez, 962 F.3d 420 (9th Cir. 2020) (noting that while opinions regarding gang activities and communications have been offered by experts in other cases, classification of opinion as expert or lay "depends on the basis of the opinion, not its subject matter").

U.S. v. Clotaire, 963 F.3d 1288 (11th Cir. 2020) (pet. for cert. filed) (noting that investigator's opinion that three-dimensional objects may look different in person than in a two-dimensional photograph did not require specialized expertise; however, his testimony regarding the two types of camera distortion was expert opinion subject to rule 702).

Ackerman v. U-Park, 951 F.3d 929, 933 (8th Cir. 2020) (upholding exclusion of property manager's testimony in personal injury suit against owner of asphalt parking lot that plaintiff's fall was caused by black ice formed in birdbath; opinion failed to satisfy *Daubert* and rule 702's reliability standards because it was based upon "vague theorizing and amorphous general principles" and there was no evidence other than expert's "ipse dixit" that birdbath even existed at the time of the slip and fall that occurred two years before the expert even visited the accident site).

U.S. v. Juhic, 954 F.3d 1084, 1087-88 (8th Cir. 2020) (holding that trial court did not abuse its discretion in refusing to appoint an expert to examine undercover agent's laptop that he used to download child pornography that had been traced to an IP address registered to the defendant; defendant had provided no evidence that ransomware had infected the agent's computer at the relevant time).

G. Hearsay

1. Definition of Hearsay

U.S. v. Juhic, 954 F.3d 1084, 1089-90 (8th Cir. 2020) (holding that while harmless error, computer-generated reports that included notations indicating that images and videos were child pornography were inadmissible hearsay; it was only after "human statements and determinations were used to classify the files as child pornography" that "hash value or series information was inserted into the computer program and automatically noted in future reports").

2. Statements of Party-Opponent

U.S. v. Dunnican, 961 F.3d 859 (6th Cir. 2020) (admitting text messages on defendant's cell phone under rule 801(d)(2)(A), including portions of electronic conversations from unidentified persons who conversed with the defendant, to provide context to defendant's own statements).

3. Present Sense Impressions and Excited Utterances

U.S. v. Bates, 960 F.3d 1278 (11th Cir. 2020) (affirming exclusion of defendant's statements to investigator that he did not know that police were at his door and that he fired gun because he thought he was being robbed; record indicated that the defendant had calmed down by the time he made the statement after making 911 call, being arrested, and being escorted to squad car).

4. Business Records

U.S. v. Clotaire, 963 F.3d 1288 (11th Cir. 2020) (pet. for cert. filed) (holding that still photos extracted from longer surveillance videos recorded by banks' ATM machines qualified as self-authenticating business records even though photos were redacted for purposes of trial from the original surveillance videos that qualified as business records; "extracting static images from a video is like printing a selection of pages from a longer record, not like creating a new document that summarizes an original record;" moreover, "government's selection of which record–or which portion of a longer record—to introduce at trial [did not] transform a qualifying business record into a record prepared for the purposes of trial").

U.S. v. Ruan, 966 F.3d 1101 (11th Cir. 2020) (allowing state pharmacy director to lay business records foundation for printout from state's Prescription Database Monitoring Program that contained information provided by prescribing physicians and reporting pharmacists who filled prescriptions; defendant doctors' statements were statements of party-opponent and pharmacists had duty to report prescription information to state).

5. Former Testimony

United States v. Ralston, 973 F.3d 896 (8th Cir. 2020) (holding that a defendant waived his challenge to a witness' unavailability when he conceded to the fact that the witness would be unavailable to testify in person due to medical issues; the defendant had an opportunity and similar motive to cross-examine the witness at the state preliminary hearing where the witness testified under oath and the defendant's counsel cross-examined her regarding the substance of her testimony including the basic facts, inconsistencies in her testimony, and her delay in reporting the incident; the Court recognized that a preliminary hearing is more circumscribed than an actual trial, but that and any other differences were not dispositive).

6. Residual Exception

United States v. Gallardo, 970 F.3d 1042 (8th Cir. 2020) (holding that any error in admitting victim testimony through a forensic interviewer under the residual hearsay exception was harmless because the testimony was generally cumulative with what the victim stated in her direct testimony; the Court noted this case was a close call because the victim testified to some details of the sexual contact but was also unresponsive to many questions; the Court found it troubling that the Government failed to file a notice stating it would admit the victim's statements through the forensic interviewer, even though defense counsel requested Rule 807(b) information twice).

U.S. v. Bruguier, 961 F.3d 1031, 1033-34 (8th Cir. 2020) (holding that statement made by defendant's girlfriend to the FBI before her death was not sufficiently trustworthy under the totality of the circumstances when unsworn statement was made 9 months after the episode and after the girlfriend's romantic partner (the defendant who was offering the statement) had been accused of a serious crime; audio recording of her statement merely ensured that the statement was faithfully reproduced and provided "little assurance that the statement was truthful and reliable when spoken").

7. Confrontation Clause

U.S. v. Jones, 930 F.3d 366, 377-378 (5th Cir. 2019) (holding that defendant's rights under Confrontation Clause were violated when police officer testified that he had followed the defendant, rather than another possible suspect, because a confidential informant told the officer that the defendant had received a large amount of methamphetamine).

U.S. v. Robertson, 948 F.3d 912, 916-917 (8th Cir. 2020), cert. denied 2020 WL 5882805 (U.S. 2020) (characterizing anonymous 911 call made at the scene of the charged assault as non-testimonial; excited utterances on call identifying the defendant as "the same one that shot his gun over here last month" were intended to help the police identify and arrest an armed and threatening individual).

U.S. v. Clotaire, 963 F.3d 1288 (11th Cir. 2020) (pet. for cert. filed) (joining other circuits in holding that business records certifications are non-testimonial and holding that defendant did not have right to confront person who extracted and purportedly enhanced still photographs taken from banks' surveillance videos; photo processor was only getting the clearest image from videos and "made no assertion about what the image showed or who it might be").

H. Authentication and Best Evidence

Bacon v. Avis Budget Group, 959 F.3d 590, 603-04 (3rd Cir. 2020) (holding that employee who testified about screenshot of booking website lacked personal knowledge that the 2017 screenshot accurately depicted the website as it appeared to rental car customers in 2016).

U.S. v. Dunnican, 961 F.3d 859 (6th Cir. 2020) (upholding certification under rule 902(14) of data extracted by ATF agent from defendant's cellular telephone through the use of digital fingerprint generated by special software).

U.S. v. Dunnican, 961 F.3d 859 (6th Cir. 2020) (admitting summary of text messages from defendant's phone when downloaded contents yielded "11,038 pages of potential evidence—a number so unwieldy and robust that it would take multiple months (possibly, even years) for a court to examine").

Vogt v. State Farm Life Ins. Co., 963 F.3d 753 (8th Cir. 2020) (holding, in breach of contract class action against insurer regarding costs of insurance fees, that discovery sanctions were not appropriate because expert's damages models were properly admitted summaries of evidence under Fed. R. Evid. 1006, rather than untimely disclosed expert materials; case involved "complicated and voluminous data" regarding fees charged to numerous policyholders over a significant period of time and expert used summaries to assist the jury in understanding the evidence).