



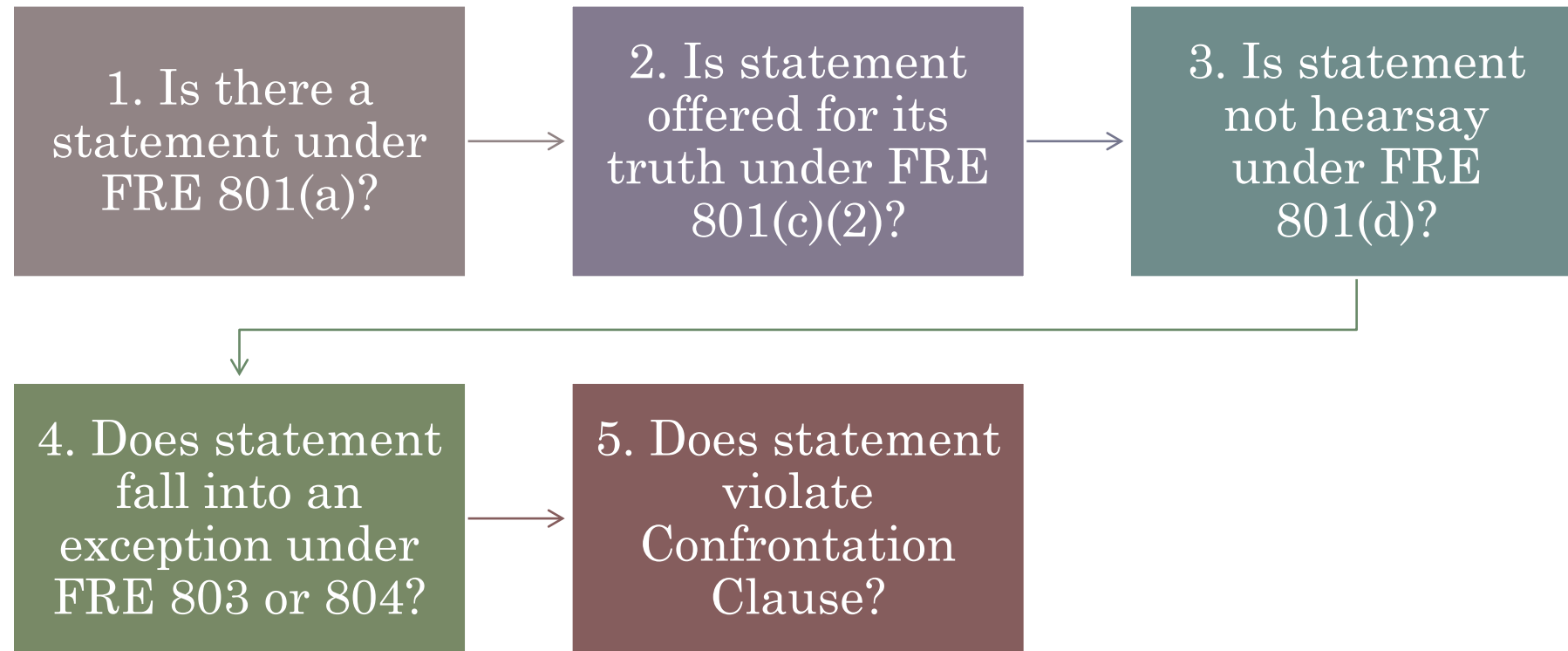
**FEDERAL PUBLIC
DEFENDER**
—— District of Nevada ——

Hearsay for the Busy Lawyer

Rene L. Valladares, Federal Public Defender, District of Nevada



Approach to Hearsay



Objection

- Q calls for hearsay
- A is Hearsay
- Move to strike A
- Move to instruct jury to disregard A
- Need for motion for mistrial?



Hearsay Definitions-FRE 801(a),(b) and (c)



Hearsay-Definition

FRE 801(c)

1. A declarant's
2. Out of court
3. Statement
4. Offered for the truth of the matter asserted

FRE 801(c)(1); FRE 801(c)(2)

Declarant-FRE 801(b)

- Must be human
- Not dogs
- Not machines



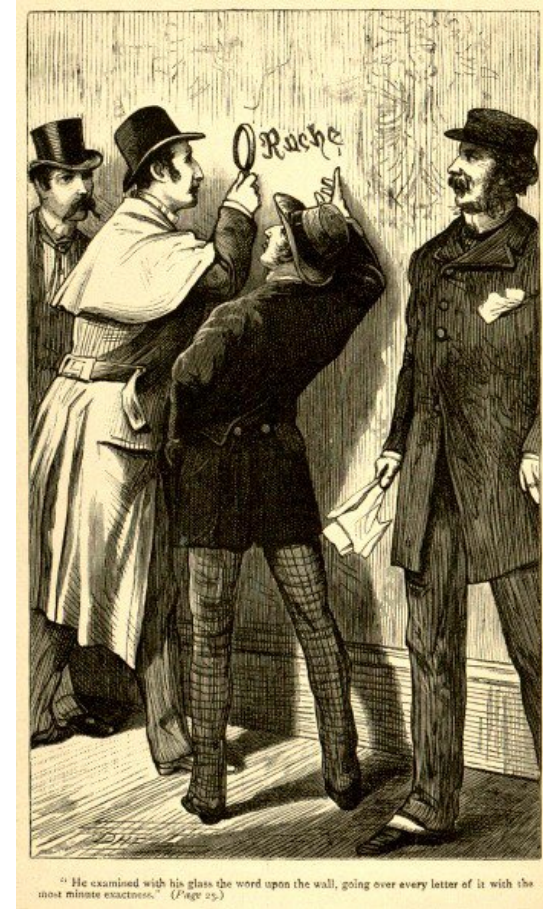
Out of court FRE 801 (c)(1)

- Out of court statement is (potentially) hearsay even if declarant is repeating it on the stand



Statement-FRE 801(a)

- Assertion:
- Not defined in FRE
- “A declaration that something is the case”
- Instructions and questions usually not assertions



Statement-FRE 801(a)

- Oral or written assertion
- Nonverbal conduct intended as an assertion



Not for Truth of the Matter Asserted- FRE 801(c)(2)

- Effect on hearer/reader
- Impeachment
- Course of investigation



Course of Investigation

- Statement not hearsay if offered to show why investigation undertaken.



Course of investigation subject to FRE 403 analysis

- Testimony that Officer acted on information received should suffice.



D. Favorable example: United States v. Becker, **230 F.3d 1224 (10th Cir. 2000):**

- At trial, an officer testified that “an unidentified, non-testifying confidential informant told him that [the defendant] was selling methamphetamine and manufacturing hash oil and that this informant provided ‘true and reliable’ information.” Id. at 1228.
- The defendant objected to this testimony, but the district court overruled the objection. Id.

- The Tenth Circuit held that the district court erred in admitting the evidence. Id. at 1229. The Tenth Circuit noted that the evidence the government presented to “explain the course of its investigation” went to the issue that the government was required to prove. Id.
- During closing arguments, the government referenced the out-of-court statements when it argued that “[w]e know that at least 48 hours prior to the search warrant...there was methamphetamine in the [d]efendant’s residence.” Id. The Tenth Circuit noted that the “evidence directly implicates the issue of guilt and the government clearly relied on the informant’s statements as truthful.” Id.

D. Favorable example: reliance on advice

- U.S. v. Bishop, 291 F.3d 1100, 1111 (9th Cir. 2002).
- Court erred in excluding as hearsay D's testimony concerning tax advice he relied on in taking the position that advances from employer were loans rather than compensation.
- Testimony not offered to prove content of advice, but to prove understanding of advice.



D. Favorable example: to show inducement

U.S. v. Cantu, 876 F.2d
1134, 1137 (5th Cir. 1989)

- Reversible error to prevent defendant claiming entrapment from testifying about statements DEA agent made to induce commission of crime.



Hearsay Exclusions-FRE 801(d): Declarant/Witness Prior Statements, and Opposing Party Statements



Hearsay Exclusions: FRE 801(d)- Declarant-Witness Prior Statement

- FRE 801(d)(1)(A): Prior **inconsistent** statement given under oath and subject to c/e
- FRE 801(d)(1)(B): Prior **consistent** statement offered to rebut claim of recent fabrication
- FRE 801(d)(1)(C): Statement of **identification**



FRE 801(d)(1)(A): Prior Inconsistent Statement Under Oath

- Declarant testifies at current proceeding and subject to c/e
- Declarant gave prior inconsistent statement under oath at a prior proceeding
- Police station “interrogations” or similar circumstances do not qualify as an “other proceeding” under Rule 801(d)(1)(A).

FRE 801(d)(1)(B): Prior Consistent Statement

- Declarant testifies at proceeding and subject to c/e, and
- Prior statement consistent and offered to rebut express charge of recent fabrication/improper influence
- Or, to rehabilitate declarant when attacked on other grounds
- Tome v. United States, 513 U.S. 150 (1995):
- Under Rule 801(d)(1)(B)(i), a prior consistent statement is admissible if it was made before the alleged fabrication, influence, or motive came into being.

FRE 801(d)(1)(C): Statement of Identification

- Out-of-court statement by the witness identifying a person
- Applies to photograph/sketch
- Applies even if witness was able to make in-court identification
- FRE does not address issues of suggestiveness



Hearsay Exclusions: FRE 801(d)(2)- Opposing Party Statements

- FRE 801(d)(2)(A):
Personal statement
- FRE 801(d)(2)(B):
Adoptive statement
- FRE 801(d)(2)(C): By
authorized spokesperson
- FRE 801(d)(2)(D): By
agent/employee
- FRE 801(d)(2)(E): By
co-conspirator



FRE 801(d)(2)(e): Co-conspirator Stat

- Government must show that a conspiracy existed which involved the declarant and the defendant
- The statement must be during the course of a conspiracy, and
- The statement must be in furtherance of the conspiracy.



Broad Scope

- Government does not have to charge conspiracy to introduce co-conspirator statements.
- Statements from unindicted co-conspirators can also be used (so long as it can be established declarant part of conspiracy).

Furtherance of a Conspiracy

- Idle conversation is not sufficient.
- Casual conversation about past events not “in furtherance.”

D Favorable Example: United States v. Darwich, 337 F.3d 645 (6th Cir. 2003)

Facts:

- Defendant Darwich was indicted for conspiracy to distribute marijuana for selling to customers in a market store that he owned.
- A government's witness testified that Darwich sold approximately a pound of marijuana each day.
- When questioned as to how he arrived at this figure, the witness noted that his nephews worked as marijuana baggers at Darwich's home and that they would sometimes tell him that they bagged from one to two pounds at night.
- Defendant argued that the statements submitted were not made in furtherance of the conspiracy, but instead were *mere idle chatter*.

Holding:

- The court held that the witness' nephews' statements were not made in furtherance of the conspiracy.
- As an initial matter, it is quite clear that mere “idle chatter or casual conversation about past events” is not considered a statement “in furtherance of the conspiracy.”
- The nephews' statements as to how much marijuana they bagged were neither attempts to “**keep co-conspirators advised**”, nor were they “**statements that identify participants and their roles in the conspiracy.**”
- **These statements were casual conversation about past events** - indicative of how hard the nephews worked on a particular evening—and, other than the illegal nature of the work, are no different than a statement by a farmer that he harvested forty acres of wheat by sundown.

Hearsay Exceptions

- FRE 803 – Availability of declarant immaterial (23)
- FRE 804 – Declarant must be unavailable (5)



Hearsay Exceptions: FRE 803

Availability Immaterial

Stu's Views

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In the future, please say "I object"
rather than "that's total bullshit."

FRE 803(1): Present Sense Impression

Present Sense Impression

1. Statement describing event or condition
 2. made while declarant perceived it or immediately after
- Statement **need not be startling**.
 - Statement must be **nearly contemporaneous** with incident.

FRE 803 (2): Excited Utterance

Excited Utterance

1. Statement relating to
 2. Startling event or condition
 3. Made while declarant was under stress of excitement.
- Event **must be startling** (i.e.: accident, crime).

FRE 803(3): Then Existing Mental, Emotional, Condition (State of Mind)

1. Statement describes state of mind, or emotional/physical condition of declarant at time made

2. Does not include statement of memory or belief.

- Such a statement might be introduced to prove that declarant acted in accordance with stated intent. See Mutual Life Ins. Co. of New York v. Hillmon, 145 US 285 (1892).

Example: Then existing state of mind

- U.S. v. Barraza, 576 F.3d 798, 804-805 (8th Cir. 2009).
- Victim's out-of-court statements to friend and victim's journal entries, both made day before she disappeared, stating that she intended to take trip to Mexico with defendant, were admissible as evidence of victim's then existing state of mind.



Note: Statement of memory or belief excluded

- Statement of memory or belief excluded:
 - “I’m scared”: OK.
 - “I’m scared because Joe Smith threatened me”: not OK.



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Note: Statement of memory and belief excluded

Example:

- Shepard v. United States, 290 U.S. 96 (1933)
- Supreme Court refused to admit statement by defendant's wife that "Dr. Shepard has poisoned me."
- Statement includes wife's belief that husband poisoned her.



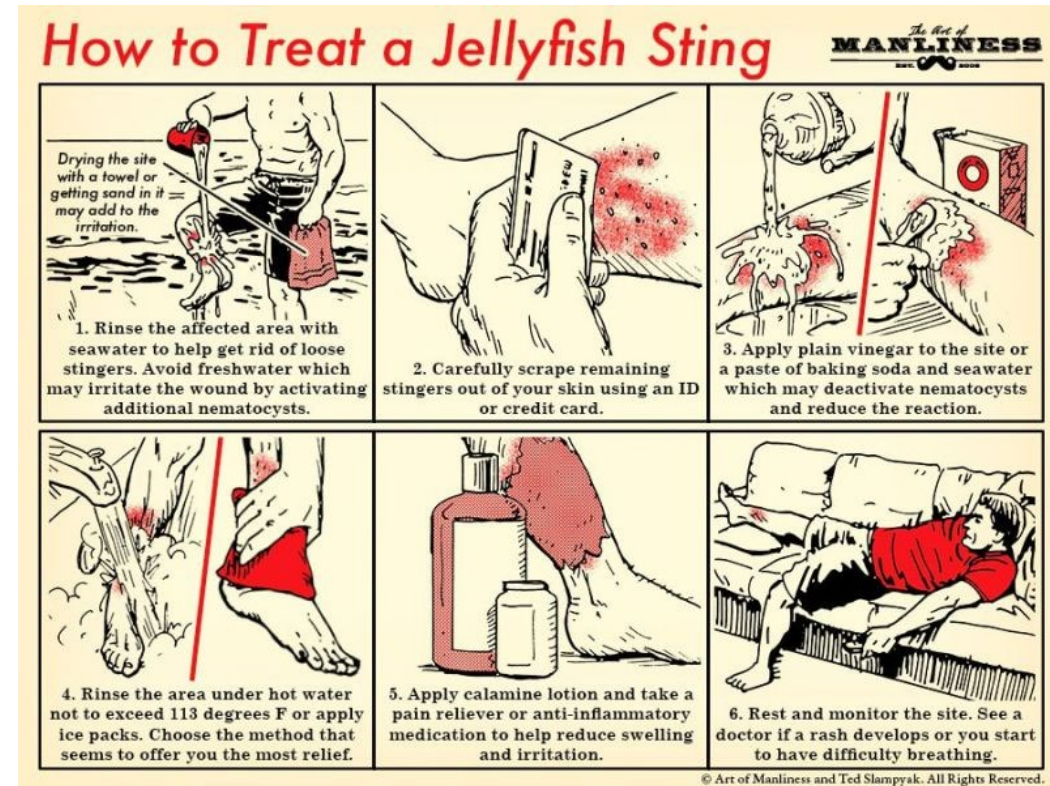
803(4): Statement for Purposes of Medical Diagnosis or Treatment

1. Statement is made for medical diagnosis/treatment
2. Statement would be **reasonably** relied upon by health care provider for treatment or diagnosis



Broad Scope:

- Doctor, my knee hurts.
- Nurse, my knee hurts.
- Doctor, my knee hurt yesterday.
- Doctor, I was stung by a jellyfish while I was visiting Mary at the beach.
- Doctor, Mary was stung by a jellyfish at the beach.

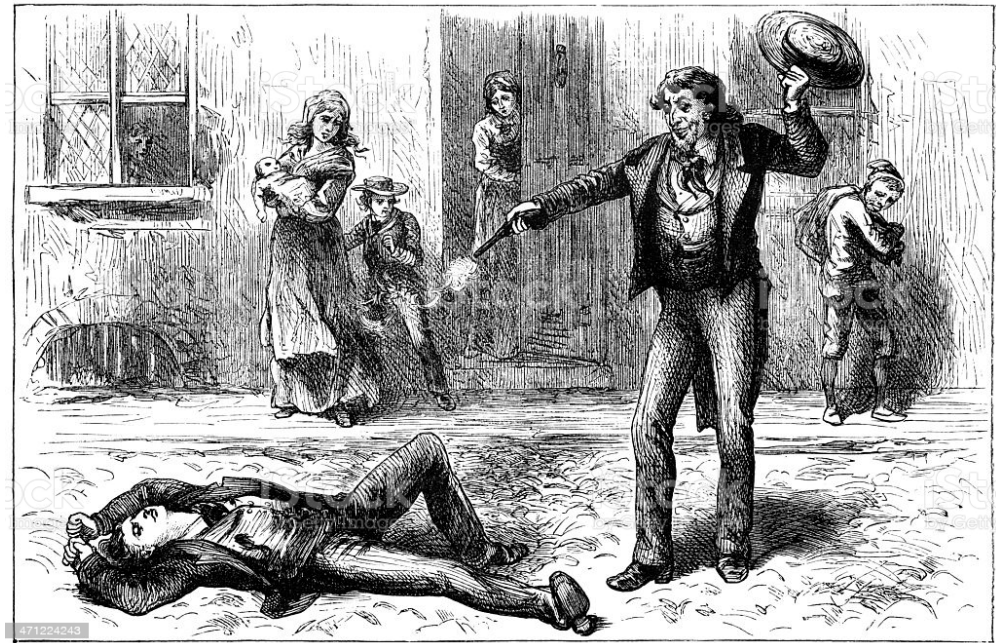


Note: A statement that identifies perpetrator usually excluded

- Statement that assigns fault or identifies perpetrator usually excluded.

Example:

- U.S. v. Renville, 779 F.2d 430 (8th Cir. 1985) (doctors rarely rely on statements of identity to provide treatment).



FRE 803(5): Past Recollection Recorded

- 1. Witness once had knowledge but has forgotten
- 2. Record made or adopted by the witness
- 3. At a time when the matter was fresh in his/her memory
- **Record can be read to jury but does not come in evidence unless offered by opposing party**

FRE 803(6): Business Records

- 1. Record **in any form**,
- 2. Made at or near **the time**,
- 3. By, or from information transmitted by, **a person with knowledge**,
- 4. If kept in the course of a **regularly conducted business activity**,
- 5. Regular practice to keep such records.
- 6. As shown by the testimony of the **custodian** or other qualified witness, or by certification.

FRE 803(6): Business Records (cont.)

- **Cannot** be prepared in anticipation of litigation
- **Lookout** for hearsay within hearsay



FRE 803(8): Public Records

- 1. Records setting forth activities of a public office or agency, or
- 2. matters observed in the course of official duties
- 3. may be admitted unless opponent show lack of trustworthiness



Note: Law Enforcement Exclusion

- FRE 803 (8) bars the prosecution in a criminal case from introducing factual findings resulting from an investigation.
- The defendant, however, can use these factual findings.



Example:

Officer spots someone running away after a burglary and writes in his report, “The burglar was a 6’ male with a large scar in his right cheek.”

In a criminal case against D for the burglary, this report can’t be introduced against D. **But it can be used by D to show that D doesn’t fit the description.**

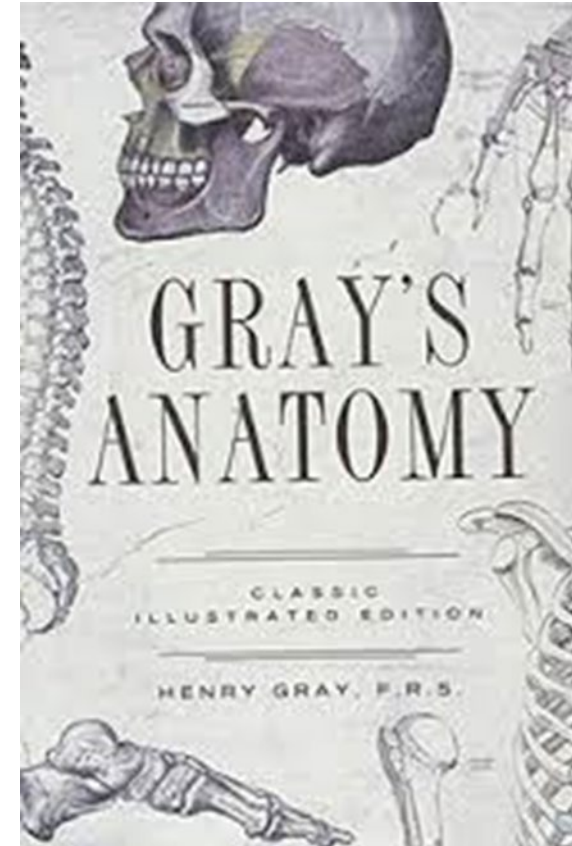
FRE 803 (7), (10): Absence of Record

- Absence of entry may prove non-occurrence. FRE 803(7), (10).
- Unless opponent shows lack of trustworthiness
- Examples:
 - Failure to file tax return
 - Failure to obtain firearms license.
 - Certificate of non-existence of immigration records.

Freedom Forge September 1st 1792.		129
145 147	Genl Charges L ^o To Wm Smith for 1 Year Salary as Clerk 110 Dollars, equal to ... 41. 5	
	" 8 Mo. Boarding himself 1790-7	48 5
113 114	Sundries L ^o To Bar Iron Wm Mite for 2 ^o per day 24 ^o ... 8	
119	George Nixon for 7 ^o ... 24 ^o ... 2.. 4	
123 148	Cash rec ^d of Zimmerman for 17 ^o ... 5.. 8	8 8
147 148	Horse Provender L ^o To Thomas Braeken for 95 Bundles Straw 2 P. ...	7 11
147 145	Frederick Nipple L ^o To Genl Charges for 1 Bushel of wheat from Mite ...	4 6
145 119	Genl Charges L ^o To Thomas Beale for 6 ^o Bushels of wheat 24 ^o ...	1 6
127 132	Wm Smith L ^o To Cash paid him ... 3 ^o ...	5 8
150 151	Sundries L ^o To Bar Iron Robert Nelson for 60 ^o ... 24 ^o ... 1.. 0.. 0	
150	Robert Irvine for 10 ^o ... 24 ^o ... 3.. 4	
150	Wm Beatty for 2 ^o 27 ^o ... 24 ^o ... 1.. 3.. 9	
147	Frederick Nipple for 8 ^o ... 24 ^o ... 2.. 8	

FRE 803 (18): Learned Treatises

- 1. The statement in LT is brought to the attention of an expert in cross, or relied by expert on direct
- 2. LT is established as reliable authority
- 3. May read into e., but not received as exhibit



FRE 803 (22): Judgment of prior Conviction

- 1. Trial or guilty plea (not nolo)
- 2. Punishable by year or more
- 3. To prove fact essential to judgment
- May show appeal pending, but does not render inadmissible

CASE NO. CR2005-2500

2006 MAY 17 AM 11:00

CLERK OF DISTRICT COURT
LATAH COUNTY
BY JH DEPUTY

IN THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF LATAH

STATE OF IDAHO,	)	
	)	
Plaintiff,	)	
	)	Case No. CR-2005-02500
V.	)	
	)	JUDGMENT OF CONVICTION AND
JAMIN C. WIGHT,	)	ORDER RETAINING JURISDICTION
DOB: 09-19-1977	)	PURSUANT TO I.C. 19-2601(4)
SSN: [REDACTED]	)	
	)	
Defendant.	)	

On the 12th day of May, 2006, the defendant, JAMIN C. WIGHT, defendant's counsel, James E. Siebe, and the State's attorney, William W. Thompson, Jr., appeared before this Court for pronouncement of judgment.

At that time the defendant was advised that an Amended

JUDGMENT OF CONVICTION AND ORDER
RETAINING JURISDICTION PURSUANT
TO I.C. 19-2601(4): Page -1-

Hearsay Exceptions: FRE 804 Declarant Unavailable

The person you are
trying to reach is
emotionally
unavailable at this
time. Please try again
later.

someecards
user card



FRE 804(a): “Unavailable”

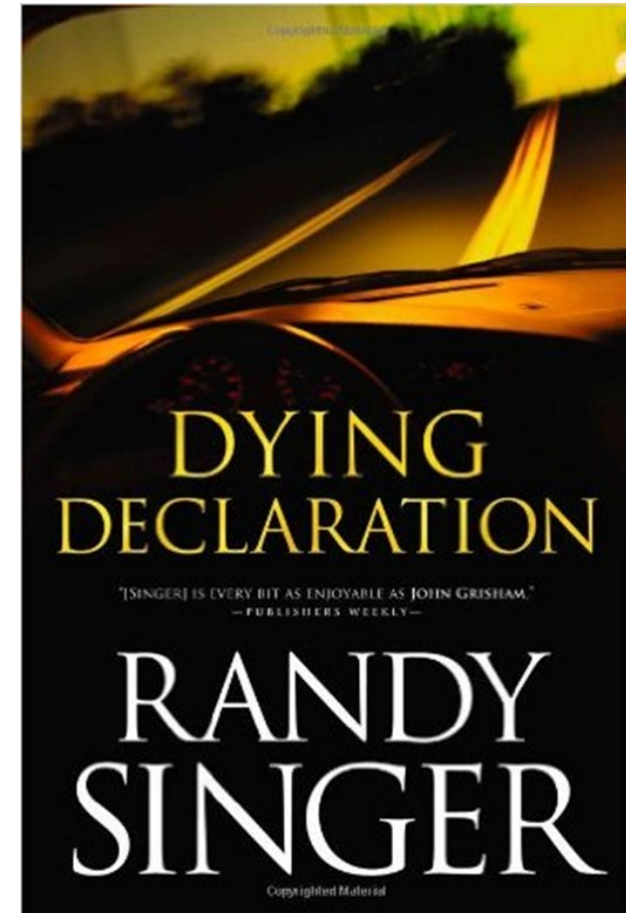
- Not necessarily absent from the proceeding
 - Privilege
 - Refuses to testify despite a court order
 - Lack of memory
- Absent and proponent of evidence cannot procure witness's attendance
- Forfeiture by wrongdoing (only if defendant intended to prevent testimony).

FRE 804(b)(1): Former testimony

- 1. Testimony at formal hearing
- 2. Offered against party
- 3. Party had prior opportunity to develop testimony

FRE 804(b)(2): Dying Declaration

- 1. Homicide case
- 2. Made while declarant believed death was imminent
- 3. Concerning cause of death



Example:

Valerie, believing she will soon die of gunshot wounds, says, “Dexter shot me.”

If Valerie dies (or is otherwise unavailable at Dexter’s trial), her statement is admissible against Dexter to show that Dexter shot her.

FRE 804 (b)(3): Statement Against Interest

- 1. Statement against interest
- 2. Pecuniary or proprietary
- 3. Subjects declarant to civil or criminal liability
- If declarant inculpated but offered to exculpate accused, need corroborating circumstances “clearly indicative of trustworthiness.”

Compare:

Party Admissions

1. Have to be made by the party against whom they are being used.
2. Do not have to be against interest when made.
3. Declarant can be available.

Statement Against Interest

1. Can be made by anyone, party or not.
2. Must be against interest when made.
3. Declarant must be unavailable.

Example:

- After a car accident, the passenger tells police, “We should have had our lights on.”



FRE 806: Attacking and Supporting Declarant Credibility

- Hearsay or non-hearsay statement such as co-conspirator statement can be attacked and supported like any other testimony.
- Party against whom offered may call declarant as witness and examine concerning statement as if on cross.

Hearsay and Crawford

- Is statement being offered for its truth?
- Is statement a violation of confrontation clause?
- Is statement testimonial?
- Is primary purpose of statement “to establish or prove past events potentially relevant to criminal prosecution”?
- A hearsay objection will not preserve a confrontation clause challenge.



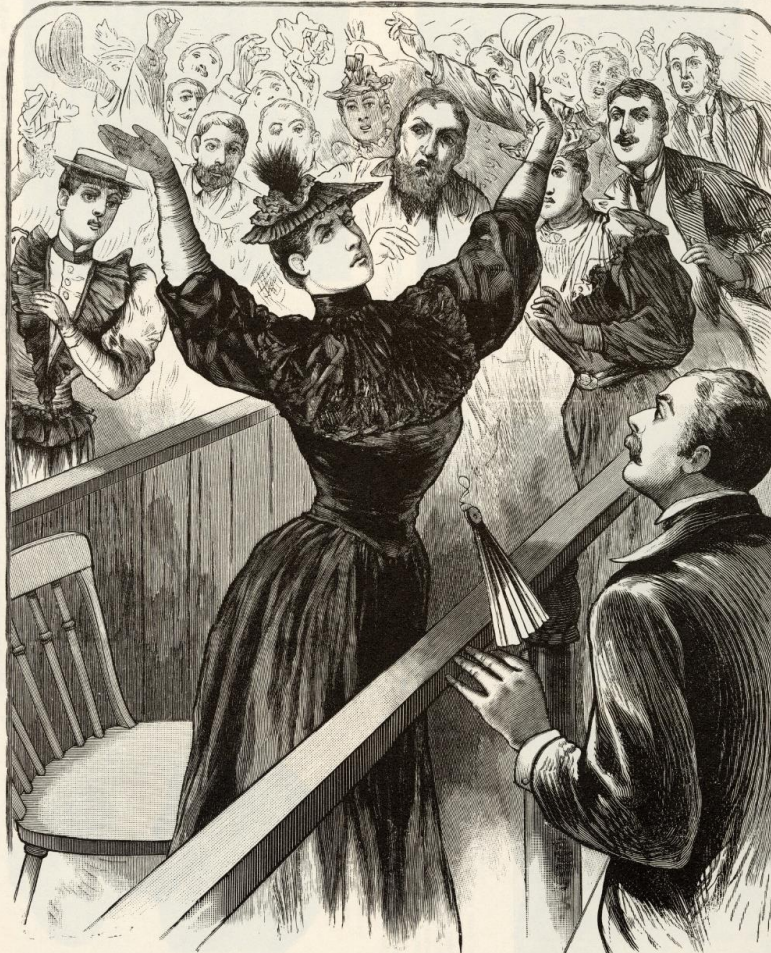
THE ILLUSTRATED LIZZIE BORDEN NOT GUILTY. POLICE NEWS LAW COURTS AND WEEKLY RECORD

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VOL. 34—NO. 1393.

FOR THE WEEK ENDING SATURDAY, JULY 1, 1893.

PRICE TEN CENTS.



LIZZIE BORDEN ACQUITTED.

"NOT GUILTY," THE JURY AT NEW BEDFORD, MASS., JUNE 30, DECIDED ON FIRST BALLOT—"THE LIBERATED PRISONER FELL INTO HER SEAT AS IF SHOT WHEN THE VERDICT WAS ANNOUNCED."

Rene_Valladares@fd.org



**FEDERAL PUBLIC
DEFENDER**
— District of Nevada —