

## THE ALABAMA RULES OF EVIDENCE: THEIR FIRST HALF-DOZEN YEARS

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In preparing this Survey and the first supplement to the third edition of WILLIAM A. SCHROEDER & JEROME A. HOFFMAN, ALABAMA EVIDENCE (3d ed. 2000), I have collected and examined every decision and opinion (1) citing one or more of the Alabama Rules of Evidence by number and (2) published in Westlaw's library of Alabama appellate decisions ("AL-CS") since the effective date of the Alabama Rules of Evidence in 1996. I have also examined other decisions coming to my attention either incidentally while pursuing this principal search or by other manifestations of serendipity. This strategy has identified roughly 200 cases. Chances are, it has recovered most of the decisions essential to our understanding of what has happened in Alabama evidence law since the Alabama Rules of Evidence came into effect. It has by no means, however, identified every decision that might justifiably arouse our interest, and it may, possibly, have missed one or two of some importance. For example, while pursuing the principal search just described, I came upon many post-Rules decisions invoking the venerable pre-Rules principle now embodied in Rule 403 without bothering to cite Rule 403. I suspect that a concerted search would have uncovered others. Upon some evidence, I feel secure in the same conclusion about other familiar pre-Rules principles. With expedition in mind, however, I have regrettably eschewed exhaustive branching searches for the time being, supposing with some justification, I hope, that when any of our appellate courts renders a significant decision affecting one of the Rules, it will cite the Rule by number. Nor, for the time being, have I undertaken an exhaustive canvass of possible changes in relevant state and federal statutes, although I have addressed statutes as they have come to my attention. When the text makes statements about what research has revealed, it presupposes the search just described but is limited to those cases published in official case reporters through volume 800 of the Southern 2d or in Westlaw's electronic database as of October 26, 2001. For the time being, readers must rely upon their own research to uncover developments occurring after that date.

On January 1, 2002, the Alabama Rules of Evidence celebrated their sixth birthday without event. Have they as yet come into their own? What should we have expected in six years?

First, there seems to exist some consensus about what we did not expect. We did not expect the Rules to mark a revolution in Alabama's state law of evidence. We did not expect them to supersede the pre-existing body of law lock, stock, and barrel. By their own terms, the Rules did not undertake to supersede existing statutory deviations from otherwise generally applicable rules, nor did they undertake to forestall future statutory deviations from otherwise generally applicable rules. They did not even undertake to catalog or integrate the subject-matter-specific statutes that limit, expand, or modify otherwise generally applicable rules.

There also seems to exist some consensus about what we did expect. We did expect the Rules to bring the main body of Alabama's law of evidence together at a known and accessible address. We did expect that the resulting collection and codification would turn out to be, in very large part, in harmony with contemporary national conceptions of good theory and practice. We did expect the Rules to emulate the Federal Rules of Evidence as a primary exemplar of that good theory and practice, insofar as they were not out of step with what we deemed worth perpetuating about the genius and culture of contemporary Alabama practice. The Rules have innovated modest changes in Alabama evidence law. It is before this backdrop that our judiciary has acted out its early role.

At last count, one or more of Alabama's three appellate courts has invoked one or more of the Rules by number on approximately 200 reported occasions.

#### THE ONE HUNDREDS (GENERAL PROVISIONS)

The Rules of Article 1 are a heterogeneous lot. Rules 101 and 102 contain the usual statutory preface concerning scope, purpose, and construction. Rules 103 through 106, or parts of them, appear related to Rules 101 and 102 and to one another only in that, logically, they do not fit better elsewhere and individually may bear upon all—or at least more than one—of the succeeding eleven articles.

Rule 101 describes the scope within which the Alabama Rules of Evidence control, saying: "These rules govern proceedings in the courts of the State of Alabama to the extent and with the exceptions stated in Rule 1101."<sup>1</sup> According to the advisory committee's notes, "The intent, except as otherwise provided in Rule 1101, is that the Alabama Rules of Evidence apply in all courts and proceedings in which the general law of evidence

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1. ALA. R. EVID. 101.

applied before these Rules were adopted.”<sup>2</sup> Rule 1101(a) provides: “Except as otherwise provided by constitutional provision, statute, this rule, or other rules of the Supreme Court of Alabama, these rules of evidence apply in all proceedings in the courts of Alabama, including proceedings before referees and masters.”<sup>3</sup>

Thus, by their own terms, the Rules do not undertake to supersede existing statutory deviations from otherwise generally applicable rules, nor do they undertake to forestall future statutory deviations from otherwise generally applicable rules. For example:

Section 32-10-11 provides that no Alabama Uniform Accident Report shall be used as evidence in any civil or criminal trial arising out of an accident. The statute does not allow for an exception that would be applicable in this case. Therefore . . . the trial court erred in admitting the police accident reports. Any discussion as to whether the reports would be admissible under the “public records” exception of the hearsay rule is irrelevant.<sup>4</sup>

As another example, “[Section] 22-21-8 makes the evidence here in question . . . inadmissible [notwithstanding the usual effect of Rule 613].”<sup>5</sup>

Rule 102 says:

These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.<sup>6</sup>

The advisory committee’s notes to Alabama Rule 102 explicitly assume “that cases interpreting the Federal Rules of Evidence will constitute authority for construction of the Alabama Rules of Evidence.”<sup>7</sup> However, “the federal interpretations are not necessarily binding on this court.”<sup>8</sup>

Rule 103 contains general provisions about rulings on evidence: a harmless error provision;<sup>9</sup> a provision requiring timely and specific objections to rulings admitting evidence;<sup>10</sup> a provision requiring offers of proof to pre-

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2. ALA. R. EVID. 101 advisory committee’s note.

3. ALA. R. EVID. 1101(a).

4. *Mainor v. Hayneville Tel. Co.*, 715 So. 2d 800, 802 (Ala. Civ. App. 1997), cited with approval in *Ex parte Burch*, 730 So. 2d 143, 149 (Ala. 1999). In dissent, Judge Crawley concluded “that the trial court properly admitted the accident reports” under Rule 803(8). *Mainor*, 715 So. 2d at 804 (Crawley, J., dissenting).

5. *Burch*, 730 So. 2d at 149 (invoking Rule 402 and not Rule 101).

6. ALA. R. EVID. 102.

7. *Huffman v. State*, 706 So. 2d 808, 813 (Ala. Crim. App. 1997).

8. *Huffman*, 706 So. 2d at 813; see also *Shoney’s, Inc. v. Barnett*, 773 So. 2d 1015, 1029 (Ala. Civ. App. 1999).

9. ALA. R. EVID. 103(a).

10. ALA. R. EVID. 103(a)(1).

serve objections to rulings excluding evidence;<sup>11</sup> a provision describing the court's role in recording offers and rulings;<sup>12</sup> a provision looking to shield the jury from hearing inadmissible evidence;<sup>13</sup> and a plain error rule.<sup>14</sup>

Rule 103(a) embodies the Alabama Rules of Evidence's harmless error rule. It says, "Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected."<sup>15</sup> One discovered case has cited Rule 103(a) by number. In *Giffin v. City of Florence*,<sup>16</sup> the Alabama Court of Criminal Appeals affirmed the circuit court's affirmance of Giffin's conviction for harassment in Florence municipal court.<sup>17</sup> The court held that the circuit court had erred *harmlessly* in excluding Giffin's testimony on direct examination about his concern regarding his ex-wife's treatment of their four-year-old daughter.<sup>18</sup> The court said: "The appellant's state of mind at the time of the incident resulting from concern for his daughter was certainly material to whether he had the intent to harass his ex-wife when he entered the drugstore."<sup>19</sup> It went on, however, to observe that the circuit court had admitted other of Giffin's testimony about his intent.<sup>20</sup> Without the record on appeal before us, we have only the court's word that Giffin's excluded testimony might not have tipped the scales in his favor. Indeed, without full access to the minds of the jurors who decided Giffin's fate, we have no assurance at all that the excluded testimony might not have tipped the scales in Giffin's favor.

Rule 103(a)(1) distinguishes effective objections from ineffective objections as follows:

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless . . .

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context . . . .<sup>21</sup>

One or more of Alabama's appellate courts has cited Rule 103(a)(1) by number in decisions reaffirming pre-Rules propositions. Thus, as a rule, a general objection to proffered evidence does not preserve for appellate review a trial court's error or abuse of discretion in admitting it.<sup>22</sup> Neverthe-

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11. ALA. R. EVID. 103(a)(2).

12. ALA. R. EVID. 103(b).

13. ALA. R. EVID. 103(c).

14. ALA. R. EVID. 103(d).

15. ALA. R. EVID. 103(a).

16. 677 So. 2d 1280 (Ala. Crim. App. 1996).

17. *Giffin*, 677 So. 2d at 1281.

18. *Id.* at 1284.

19. *Id.* at 1283.

20. *Id.* at 1284.

21. ALA. R. EVID. 103(a)(1).

22. *J.L. v. L.M.*, 805 So. 2d 729, 731 (Ala. Civ. App. 2001) (holding that appellant failed to assign

less, "As in prior Alabama practice, no specific ground of objection is required if the matter to which the objection or the motion to strike is addressed is patently illegal or irrelevant."<sup>23</sup> When an opponent does assert a specific ground of objection, a reviewing court will limit its review to the ground specified, even when the proponent's proffered evidence might have been properly excluded on some unspecified ground.<sup>24</sup>

Rule 103(a)(2) of the Alabama Rules of Evidence provides for offers of proof, in both criminal and civil cases,<sup>25</sup> as follows:

(a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless . . .

. . .

(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.<sup>26</sup>

Failing compliance with this Rule, an appellant has not preserved reviewable error.<sup>27</sup> An appellant complies with the Rule even in the absence of an offer of proof, if "the substance of the evidence [elicited by the proponent's

grounds for objection to testimony); *Brown v. State*, 705 So. 2d 871, 875 n.1 (Ala. Crim. App. 1997) (noting that the objection at issue was "too general to inform court of its error"). Compare a late pre-Rules decision stating: "[W]e are not convinced that the objection at trial was sufficient to apprise the trial court that the appellant was challenging this testimony on the grounds of materiality." *Rose v. State*, 598 So. 2d 1040, 1043 (Ala. Crim. App. 1992).

23. *Ex parte Harris*, No. 1992343, 2001 WL 367599, at \*2 (Ala. Apr. 13, 2001) (quoting ALA. R. EVID. 103 advisory committee's note). As the Alabama Supreme Court explained in *Harris*:

The prosecutor's questioning about Harris's prior bad acts ("You're a big dope dealer, aren't you?") and about Harris's associates ("Isn't that why these gentlemen are out here in the courtroom?") violated Rule 404(a)(1) by intimating to the jury that Harris had a "bad character." Harris did not offer any character evidence on his direct examination, nor did he call any character witnesses at his trial. Thus, under the holding in *Satterwhite v. State*, [364 So. 2d 359, 360 (Ala. 1978)], Harris's general objection to the questioning was sufficient to preserve the error for appellate review, because the prosecutor's questions were patently illegal and could not have been made legal.

*Harris*, 2001 WL 367599, at \*2.

24. *See Radford v. State*, 783 So. 2d 13, 15 (Ala. 2000) (holding issue not preserved for appellate review because Radford failed to object on the ground of a failure to prove a proper chain of custody); *Ritchie v. State*, 808 So. 2d 71, 77 (Ala. Crim. App. 2001) ("The statement of specific grounds of objection waives all grounds not specified [here Rule 403], and the trial court will not be put in error on grounds not assigned at trial." (citation omitted)); *Tuscaloosa County v. Henderson*, 699 So. 2d 1274, 1278 (Ala. Civ. App. 1997) ("Because Tinsley and Tuscaloosa County failed to state these grounds [*i.e.*, Rule 403 irrelevance and inadmissibility under 'the general exclusionary rule,' *i.e.*, Rule 404(b)] for their objection, the alleged error was not preserved for appeal. . . . [At trial, they] based their objection to the testimony on a relevancy argument [*i.e.*, Rules 401 and 402]."); *Minnis v. State*, 690 So. 2d 521, 525-26 (Ala. Crim. App. 1996) ("The appellant did not present as a ground a possible violation of the exclusionary rule [*i.e.*, Rule 404(b)] until he filed his motion for a new trial.").

25. *See, e.g., Poole v. State*, 710 So. 2d 497, 501 (Ala. Crim. App. 1997) ("Poole failed to make an offer of proof, after the trial court overruled his objection, of what he expected his examination to prove."); *Knight v. State*, 710 So. 2d 511, 518 (Ala. Crim. App. 1997).

26. ALA. R. EVID. 103(a)(2).

27. *Poole*, 710 So. 2d at 501 ("Poole failed to make an offer of proof, after the trial court overruled his objection, of what he expected his examination to prove."); *see also Knight*, 710 So. 2d at 518.

questions] . . . was apparent from the context within which questions were asked.”<sup>28</sup> The Alabama Court of Civil Appeals has carried over from pre-Rules law an additional qualification of the duty to make an offer of proof, saying: “[U]nder the rule in *Killingsworth*<sup>29</sup> . . . an offer of proof is not required where it would be a useless gesture. Given the trial judge’s declared decision to exclude the minor child’s testimony, an offer of proof would have been useless.”<sup>30</sup> Whether imposing this additional qualification can stand up under more careful self-criticism remains to be seen.

Must a cross-examiner make a timely offer of proof at trial to preserve an objection under Rule 611(b)? Alabama’s two intermediate courts of appeal have sent arguably conflicting, although perhaps distinguishable, signals.

In *Hyche v. Medical Center East, Inc.*,<sup>31</sup> a medical malpractice action, the Alabama Court of Civil Appeals declined the opportunity to review “[t]he issue . . . [of] whether the trial court erred in ruling that a plaintiff does not have the right to recross-examine a [defendant’s] witness after that witness has been cross-examined by a co-defendant but in the absence of redirect testimony,” where the trial court had previously allowed the plaintiffs such recross under similar circumstances.<sup>32</sup> Even though “neither [Rule 611(b) nor section 12-21-137] . . . speaks directly to the issue,” the court forbore, because “[t]he Hyches did not make an offer of proof regarding what they expected to elicit from the witnesses on recross-examination. This court, therefore, cannot review whether the Hyches were prejudiced by the exclusion of that testimony without resorting to ‘impermissible speculation.’”<sup>33</sup> Thus, finding no abuse of discretion, the court affirmed a judgment on a jury verdict for the defendant.<sup>34</sup>

Compare *Hampton v. State*,<sup>35</sup> in which the Alabama Court of Criminal Appeals quoted the United States Supreme Court as follows: “Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply.”<sup>36</sup> At his trial for unlawfully distributing a controlled substance, Hampton had “wanted to question McCrary [the prosecution’s witness] about a prior charge of theft of property and a pending charge for misdemeanor theft of property. McCrary had also written some checks for which he had insufficient funds that defense counsel wanted to question him about.”<sup>37</sup> Instead, the trial court had limited Hampton’s cross-examination to

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28. ALA. R. EVID. 103(a)(2).

29. *Killingsworth v. Killingsworth*, 217 So. 2d 57 (Ala. 1968) (citation added).

30. *Blume v. Durrett*, 703 So. 2d 986, 989 (Ala. Civ. App. 1997).

31. 711 So. 2d 1017 (Ala. Civ. App. 1997).

32. *Hyche*, 711 So. 2d at 1018.

33. *Id.* at 1019.

34. *Id.*

35. 681 So. 2d 273 (Ala. Crim. App. 1996).

36. *Hampton*, 681 So. 2d at 275 (citation omitted).

37. *Id.* at 273.

the prosecution's stipulation as to all these charges, which included the information that the first had been nolle prossed, the second had been charged but not yet prosecuted to conviction, and the third had resulted in a repayment arrangement through the bad check unit rather than arrest and conviction.<sup>38</sup> The court of criminal appeals reversed Hampton's conviction and remanded the cause to the circuit court, saying that Hampton "was denied his basic constitutional right to confront the witnesses against him."<sup>39</sup>

Time will tell whether *Hyche* and *Hampton* can stand together. One possible distinguishing argument comes to mind. The Sixth Amendment, not Alabama evidence law, required the result in *Hampton*. Left to its own devices, as in *Hyche*, one might argue that Alabama evidence law does require an offer of proof. Whether this ground of distinction ought to carry the day remains open to question. After all, not only counsel for criminal defendants, but also "[c]ounsel [for parties to civil actions] often cannot know in advance what pertinent facts may be elicited on cross-examination."<sup>40</sup>

Rule 103(b) provides:

(b) *Record of offer and ruling.* The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon .

...<sup>41</sup>

While a court may certainly do this upon the motion of a party, it may also do it on its own motion.<sup>42</sup> As the Alabama Court of Criminal Appeals has explained:

This rule "recognizes the discretionary power of the trial court to supplement an offer of proof or an objection with a clarifying statement." . . . While Garner raised his objection outside the presence of the jury, nothing precluded the judge from referring to this objection in the presence of the jury.

The trial judge informed the jury that the defense had objected to the comments the judge made at the close of the jury charge. The judge then clarified his statements in an effort to eliminate any misleading inferences that the jury may have drawn from the judge's remarks. This clarification was completely within the judge's discretion.<sup>43</sup>

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38. *Id.* at 274.

39. *Id.* at 276.

40. *Id.* at 275.

41. ALA. R. EVID. 103(b).

42. *See, e.g., Garner v. State*, 781 So. 2d 249, 252 (Ala. Crim. App. 1998).

43. *Garner*, 781 So. 2d at 252 (citation omitted).

Rule 103(b) also provides that a court “may direct the making of an offer in question and answer form.”<sup>44</sup>

Rule 103(c) provides as follows:

(c) *Hearing of jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.<sup>45</sup>

Research has revealed no appellate opinion citing Rule 103(c) by number.

Rule 103(d) provides as follows:

(d) *Plain error.* Nothing in this rule precludes taking notice of plain errors affecting substantial rights in a case in which the death penalty has been imposed, even if they were not brought to the attention of the court.<sup>46</sup>

One discovered post-Rules case has cited Rule 103(d) by number. In affirming a defendant’s conviction for capital murder in *McGriff v. State*,<sup>47</sup> the Alabama Court of Criminal Appeals refused to reverse on grounds not asserted at trial.<sup>48</sup> Drawing upon pre-Rules opinions, the court said, “‘Plain error’ has been defined as error ‘so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings.’”<sup>49</sup> The court added, “To rise to the level of plain error, the claimed error must not only seriously affect a defendant’s ‘substantial rights,’ but it must also have an unfair prejudicial impact on the jury’s deliberations.”<sup>50</sup> The court also cautioned that “the plain error exception to the contemporaneous-objection rule is to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.”<sup>51</sup> It went on to say, however, “We will review the arguments made in brief whether or not they were brought to the attention of the trial court,” but the court warned that “the failure of McGriff to object at trial to any claimed error on appeal will weigh against any claim of prejudice McGriff raises on appeal.”<sup>52</sup>

Although Rule 103(d)’s dispensation applies on its face only to capital cases, pre-Rules decisions occasionally reversed criminal convictions in non-capital cases where there was an obvious error, especially one infring-

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44. ALA. R. EVID. 103(b).

45. ALA. R. EVID. 103(c).

46. ALA. R. EVID. 103(d).

47. No. CR-97-0179, 2000 WL 1455196 (Ala. Crim. App. Sept. 29, 2000).

48. *McGriff*, 2000 WL 1455196, at \*36.

49. *Id.* at \*2 (citation omitted).

50. *Id.* (citation omitted).

51. *Id.* (citation omitted).

52. *Id.* at \*3.

ing on a defendant's constitutional rights.<sup>53</sup> In any case, an appealing defendant's failure to object at trial weighs against his assertion of prejudice on appeal.<sup>54</sup>

Rule 104, entitled "Preliminary Questions," has received few citations by number. Indeed, the only two cases found cited Rule 104(a),<sup>55</sup> which provides:

(a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of section (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.<sup>56</sup>

It goes virtually without saying that a trial court has discretion to hold a hearing before determining a preliminary question under Rule 104(a).<sup>57</sup> Of greater interest is the proposition that, in some cases, a trial court may err in deciding a preliminary question without a hearing. The Alabama Supreme Court has so held in *Ex parte Jackson*, reasoning that "[i]f the trial court had conducted a hearing, Jackson could have testified and presented evidence indicating that the statement was not voluntarily made, without being subjected to cross-examination on other issues."<sup>58</sup>

Rule 105 provides as follows:

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.<sup>59</sup>

The Alabama Supreme Court cited Rule 105 by number in *Johns v. A.T. Stephens Enterprises, Inc.*,<sup>60</sup> wherein it said, "Finally, pursuant to Rule 105 . . . [T]he trial judge properly instructed the jurors that they should consider the deposition testimony only with respect to the claims against Scott

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53. WILLIAM A. SCHROEDER & JEROME A. HOFFMAN, ALABAMA EVIDENCE § 1-3, at 24 (3d ed. 2000).

54. E.g., *McGriff v. State*, No. CR-97-0179, 2000 WL 1455196, \*3 (Ala. Crim. App. Sept. 29, 2000).

55. *Ex parte Jackson*, No. 1981723, 2001 WL 527816, at \*3 (Ala. May 18, 2001); *Cooper v. Diversy Corp.*, 742 So. 2d 1244, 1249 (Ala. Civ. App. 1998) (Crawley, J., dissenting) (arguing for the *Daubert* test and stating, "[T]he trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue" (citation omitted)).

56. ALA. R. EVID. 104(a).

57. See SCHROEDER & HOFFMAN, *supra* note 53, at § 1-4.

58. *Jackson*, 2001 WL 527816, at \*3 (remanding for evidentiary hearing).

59. ALA. R. EVID. 105.

60. 815 So. 2d 511 (Ala. 2001).

Transportation and not with respect to the claims against the other defendants."<sup>61</sup>

In *Taylor v. State*,<sup>62</sup> the Alabama Court of Criminal Appeals said, "Alabama courts have long urged judges to give such a limiting instruction when evidence of a collateral act or uncharged misconduct is admitted for a limited purpose."<sup>63</sup> The court concluded, however, that "the failure to provide a limiting instruction absent a request does not amount to plain error."<sup>64</sup>

Rule 106 does not now embody the completeness doctrine, as the Alabama Court of Criminal Appeals has mistakenly suggested.<sup>65</sup> It does not supersede the common-law completeness doctrine, which retains the scope and vigor attributed to it by Alabama caselaw.<sup>66</sup> Rather, Rule 106 provides as follows:

When a party introduces part of either a writing or recorded statement, an adverse party may require the introduction *at that time* of any other part of the writing or statement that ought in fairness to be considered contemporaneously with it.<sup>67</sup>

That is, Rule 106 supplements the completeness doctrine by adding a timing provision applicable to writings and recorded statements adduced only in favorable part by proponents. In neither Alabama nor the federal courts did pre-Rules caselaw address systematically the order of proof problem left formally unresolved under the completeness doctrine.<sup>68</sup> That is, must an opponent wait to present omitted parts until his next turn to cross-examine or offer evidence, or may he require the proponent to supply the omitted parts immediately as an unwelcome addition to the proponent's case? Rule 106 undertakes to fill this gap, but only with regard to "either a writing or recorded statement."<sup>69</sup> As to these, an opponent may "require the introduction," that is, make the proponent himself do it, "of any other part of the writing or statement that ought in fairness to be considered contemporaneously with [the more favorable parts distilled by the proponent]."<sup>70</sup> For whatever reason, this timing provision does not apply across the full length and breadth of the completeness doctrine, but only to writings and recorded statements.<sup>71</sup> Unfortunately, both the Alabama Court of Civil Appeals<sup>72</sup> and

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61. *Johns*, 815 So. 2d at 515 (citation omitted).

62. 808 So. 2d 1148 (Ala. Crim. App. 2000).

63. *Taylor*, 808 So. 2d at 1166 (citation omitted).

64. *Id.* at 1166-67.

65. *Johnson v. State*, 823 So. 2d 1, 39 (Ala. Crim. App. 2001).

66. SCHROEDER & HOFFMAN, *supra* note 53, at § 1-6(a).

67. ALA. R. EVID. 106 (emphasis added).

68. SCHROEDER & HOFFMAN, *supra* note 53, at § 1-6(a).

69. ALA. R. EVID. 106.

70. *Id.*

71. *Id.*

72. *Lambert v. Beverly Enters., Inc.*, 695 So. 2d 44, 48 (Ala. Civ. App. 1997).

the Alabama Court of Criminal Appeals<sup>73</sup> have made assertions about Rule 106 that, if taken literally, could deprive the timing provision of much of its intended effect.

The Alabama Court of Civil Appeals has rightly held that Rule 106 and the underlying completeness doctrine inure to the benefit of the opponent of an assertedly incomplete offer, not to the benefit of the proponent.<sup>74</sup>

#### THE TWO HUNDREDS (JUDICIAL NOTICE)

Article 2 contains a single Rule. Only Rule 201(b) has drawn any judicial attention by one or more of Alabama's appellate courts.

Rule 201(a) limits the scope of the Rule to "judicial notice of adjudicative facts only."<sup>75</sup> The Rule does not apply to "legislative facts."<sup>76</sup> One commentator has described adjudicative facts as those that "relate to the parties, their activities, their properties, their businesses."<sup>77</sup> As an understanding less likely to get out of hand, consider this: "*Adjudicative facts* are propositions about circumstances or occurrences "having any tendency to make the existence of any fact that is of consequence to the determination of the action more . . . or less probable than it would be without the evidence."<sup>78</sup> On the other hand, one rough-and-ready understanding of "legislative facts" characterizes them as *propositions about circumstances or occurrences relevant to choices among competing rules of law*.

Rule 201(b) defines the kinds of adjudicative facts amenable to judicial notice. It says:

(b) *Kinds of facts*. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.<sup>79</sup>

The intermediate courts of appeal have added two new examples to the list of adjudicative facts deemed judicially noticeable. In *Patton v. Werner Co.*,<sup>80</sup> the Alabama Court of Civil Appeals condoned a circuit judge's judicial notice of the likelihood that some people in the courthouse on that day were wearing deodorant or cologne as "a common-sense assumption based

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73. Johnson v. State, 823 So. 2d 1, 39 (Ala.Crim.App. 2001).

74. Lambert, 695 So. 2d at 48.

75. ALA. R. EVID. 201(a) advisory committee's note.

76. *Id.*

77. *Id.*

78. ALA. R. EVID. 401 (emphasis added).

79. ALA. R. EVID. 201(b).

80. 793 So. 2d 817 (Ala. Civ. App. 2001).

on everyday experience to help him make a credibility determination.”<sup>81</sup> In *Williams v. State*,<sup>82</sup> the Alabama Court of Criminal Appeals held that a circuit judge had not erred in taking judicial notice of the fact that trial counsel’s secretary was black.<sup>83</sup>

Rule 201(c) provides that “[a] court may take judicial notice whether requested or not.”<sup>84</sup> Rule 201(d) provides that “[a] court shall take judicial notice if requested by a party and supplied with the necessary information.”<sup>85</sup> Rule 201(e) requires a court to afford any party a hearing upon timely request concerning the propriety or impropriety of taking judicial notice of a relevant proposition.<sup>86</sup> Under Rule 201(f), a court may take judicial notice of a relevant proposition “at any stage of the proceeding.”<sup>87</sup>

Rule 201(g) provides:

(g) *Instructing jury.* In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.<sup>88</sup>

As with presumed propositions of fact,<sup>89</sup> it may, under certain substantive law and certain configurations of proof, sometimes be sufficient and appropriate to instruct the jury without calling its attention to a judicially noticed proposition of fact.

#### THE THREE HUNDREDS (PRESUMPTIONS IN CIVIL CASES)

Rule 301 of the Alabama Rules of Evidence provides:

(a) *Conclusive and rebuttable presumptions.* Except for presumptions that are conclusive under the law from which they arise, a presumption is rebuttable.

81. *Patton*, 793 So. 2d at 821.

82. 783 So. 2d 108 (Ala. Crim. App. 2000).

83. *Williams*, 783 So. 2d at 115.

84. ALA. R. EVID. 201(c).

85. ALA. R. EVID. 201(d).

86. ALA. R. EVID. 201(e).

87. ALA. R. EVID. 201(f).

88. ALA. R. EVID. 201(g).

89. Jerome A. Hoffman, *Thinking About Presumptions: The “Presumption” of Agency from Ownership as Study Specimen*, 48 ALA. L. REV. 885, 911 (1997). This article states:

The jury was told all it needed to know to reach a proper verdict. By cutting out the middle steps of the thought process, by omitting all mention of presumptions, the trial court wisely omitted a source of potential confusion without eliminating the instruction’s implicit mandate—if the jury found proposition-B, it had to find proposition-P. This mandate is, of course, the definitive property of presumptions.

*Id.*

(b) *Types of rebuttable presumptions.* Every rebuttable presumption is either:

(1) A presumption that affects the burden of producing evidence by requiring the trier of fact to assume the existence of the presumed fact, unless evidence sufficient to sustain a finding of the nonexistence of the presumed fact is introduced, in which event the existence or nonexistence of the presumed fact shall be determined from the evidence without regard to the presumption; or

(2) A presumption affecting the burden of proof by imposing upon the party against whom it operates the burden of proving the nonexistence of the presumed fact.

(c) *Procedural impact.* Unless otherwise provided by statute, a presumption established primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement public policy, is a presumption affecting the burden of producing evidence.

(d) *Inconsistent presumptions.* If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight, neither presumption applies.<sup>90</sup>

Research has revealed only one post-Rules appellate opinion citing Rule 301. In *Smith v. Atkinson*,<sup>91</sup> the Alabama Supreme Court said:

The rebuttable presumption we adopt for use in third-party spoliation cases is “[a] presumption affecting the burden of proof by imposing upon the party against whom it operates the burden of proving the nonexistence of the presumed fact.” Rule 301(b)(2) . . . . The presumed fact is that the plaintiff would have prevailed in the underlying action but for the loss or destruction of the evidence by the third-party spoliator.<sup>92</sup>

Thus, Rule 301 has not as yet, it seems, had any apparent effect upon pre-existing case and statutory law. Nor, considering its content, should we expect it to change Alabama law much, if at all.

Rule 302 “prescribes that when a federally created right is litigated in a state court, any prescribed federal presumption shall be applied.”<sup>93</sup> Research has revealed no appellate decision citing this Rule by number.

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90. ALA. R. EVID. 301.

91. 771 So. 2d 429 (Ala. 2000).

92. *Smith*, 771 So. 2d at 435 (citations omitted).

93. ALA. R. EVID. 302 advisory committee’s note.

THE FOUR HUNDREDS  
(RELEVANCY)

It should come as no surprise that Article 4 has enjoyed more judicial attention than any other article of the Alabama Rules of Evidence. Relevancy, after all, does—or should—constitute the bedrock of all rational discourse, including disputation. “Get to the point,” we have told others, or they us, and “What’s that got to do with anything?” Time, energy, and money are all limited resources. Neither the citizenry nor the government can afford to expend inordinate amounts of these resources on litigation. Rule 402 perpetuates this conventional wisdom, providing that “[a]ll relevant evidence is admissible, except as otherwise provided by [law]” and that all “[e]vidence which is not relevant is not admissible.”<sup>94</sup>

Rule 401 alone has been cited by number some twenty-six times. That Rule defines “relevant evidence” as follows:

“Relevant evidence” means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.<sup>95</sup>

Rule 401 rolls two common law concepts, relevancy and materiality, into one consolidated definition of “relevant evidence.” At common law, a proffer of information met the threshold test of admissibility, if the forum court deemed it *relevant* to a *material* proposition of fact.<sup>96</sup> Under Rule 401, a proffer of information meets the threshold test of admissibility, if the forum court deems it to have “any tendency to make . . . more probable or less probable” (that is, have any relevancy to) “the existence of any [proposition of] fact that is of consequence to [that is, material to] the determination of the action.”<sup>97</sup> To render the equation complete, we need only understand that the old “materiality” means the same thing as the new “consequentiality.” If the terms “material” and “materiality” survive in the post-Rules literature, they will do no harm, so long as we understand that.

What propositions of fact are “of consequence to” the determination of an action? Only these: (1) propositions of fact that embody the substantive law elements of a plaintiff’s claim for relief or a defendant’s affirmative defense, (2) propositions of fact that define remedies, and (3) propositions of fact that relate to the credibility or incredibility of witnesses and other sources of information that falls within categories (1) and (2).<sup>98</sup>

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94. ALA. R. EVID. 402.

95. ALA. R. EVID. 401.

96. See SCHROEDER & HOFFMAN, *supra* note 53, at § 4-1(a).

97. ALA. R. EVID. 401.

98. See Jerome A. Hoffman, *Res Gestae's Children*, 47 ALA. L. REV. 73, 79-80 (1995).

Of the some twenty-six cases citing Rule 401 by number,<sup>99</sup> several reaffirm general pre-Rules principles. Alabama courts are said to apply “a liberal test of relevancy under which evidence is admissible if it has any probative value, however slight, upon a matter in the case.”<sup>100</sup> Relevancy and sufficiency are not the same thing; in the words of the Alabama Court of Criminal Appeals:

The test of probative value or relevancy of a fact is whether it has *any tendency* to throw light upon the matter in issue . . . . [I]t is not necessary that each item of testimony, taken alone, be conclusively shown to prove the guilt of the defendant; but the question is whether each fact, in connection with all others, may be properly considered in forming a chain of circumstantial evidence tending to prove the guilt of the accused.<sup>101</sup>

The Alabama Supreme Court has made the same point.<sup>102</sup> That court has also said that Rule 401 “may permit a reasonable inference to be drawn from another reasonable inference.”<sup>103</sup> It has also reminded the bench and bar that Rule 401’s definition of relevancy applies not only to questions about admissibility at trial or on motion for summary judgment, but also to some questions that can arise during pretrial preparation.<sup>104</sup>

Many of the remaining cases emphasize or illustrate a proposition of indispensable importance to the proper understanding of the law of relevancy. The Alabama Court of Criminal Appeals has forcefully restated the maxim that all trial attorneys should hang framed on their office walls: “Fruitful inquiry into [questions of relevancy] can only begin when the objecting party succeeds in forcing the [offering party] to announce the purpose for which the evidence is being offered.”<sup>105</sup>

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99. For cases neither cited nor discussed subsequently herein, see *Liberty Nat’l Life Ins. Co. v. Sanders*, 792 So. 2d 1069, 1081 (Ala. 2000) (quoting advisory committee’s note to Rule 401 to substantially same effect as quote in *Murphy*); *Ex parte Griffin*, 790 So. 2d 351, 358 (Ala. 2000) (See, J., dissenting) (citing Rule 401 incidentally); *Murphy v. Green*, 794 So. 2d 325, 331-32 (Ala. 2000) (affirming trial court’s relevancy ruling because review of record and exhibits indicated no abuse of discretion). Concerning relevance of evidence of a procurer’s suicide in the capital murder trial of the procuree, see *Smith v. State*, No. CR-97-0069, 2000 WL 1868432, at \*15 (Ala. Crim. App. Dec. 22, 2000).

100. *Powell III v. State*, 796 So. 2d 404, 418-20 (Ala. Crim. App. 1999) (affirming capital murder conviction and reciting evidence that linked Powell to the jacket that linked its wearer to the murder).

101. *Powell III*, 796 So. 2d at 418-20 (emphasis added).

102. *Alfa Mut. Gen. Ins. Co. v. Oglesby*, 711 So. 2d 938, 943-44 (Ala. 1997) (involving a suit for declaratory judgment that insured had made a material misrepresentation when he did not disclose his prior arrests and convictions for indecent exposure on the application for fire insurance).

103. *Ex parte Coleman*, 705 So. 2d 392, 396-97 (Ala. 1997) (“[H]owever, in this case, the second inference the Court of Civil Appeals made cannot be reasonably drawn from the first inference.”).

104. *Ex parte Wal-Mart Stores, Inc.*, 729 So. 2d 294, 297 (Ala. 1999) (“A movant meets the relevancy requirement of Rule 35(a) by showing that the results of the requested examination will tend to make the existence of a fact at issue more, or will make it less, probable.”).

105. *Felder v. State*, 697 So. 2d 490, 494 (Ala. Crim. App. 1996).

To count as a purpose “of consequence to the determination of the action,”<sup>106</sup> the announced purpose must identify (1) a proposition of fact that embodies a substantive law element of a plaintiff’s claim for relief or a defendant’s affirmative defense, (2) a proposition of fact that defines a remedy, or (3) a proposition of fact that relates to the credibility or incredibility of a witness or other source of information that falls within category (1) or category (2).<sup>107</sup> Numerous post-Rules decisions and opinions by one or more of Alabama’s three appellate courts afford instructive examples of purposes “of consequence to the determination of [an] action.”

Among a universe of such purposes, the cases illustrate (1) a purpose “to prove a credible threat and intent, elements of the offense of stalking;”<sup>108</sup> (2) the lack of a purpose to prove a disabling mental state as an element of affirmative defense in a prosecution for disturbing the peace;<sup>109</sup> (3) a purpose to prove the element of identity in a criminal prosecution;<sup>110</sup> (4) a purpose to prove the element of intent in a prosecution for shoplifting by evidence tending to show a consciousness of guilt;<sup>111</sup> (5) a purpose to prove a defendant’s guilty knowledge (an element of the statutory crime of trafficking in amphetamines) by evidence of flight as circumstantial proof of defendant’s consciousness of guilt;<sup>112</sup> (6) a purpose to disprove the element of intent in a prosecution for harassment of the defendant’s former wife;<sup>113</sup> (7) a purpose to prove the element of fraudulent intent in a civil action for fraud;<sup>114</sup> (8) a purpose to prove breach of a duty on this occasion by showing that the defendant business organization had a practice and showed a pattern

106. ALA. R. EVID. 401.

107. See Hoffman, *supra* note 98, at 79-80.

108. Hayes v. State, 717 So. 2d 30, 36 (Ala. Crim. App. 1997) (“[T]he [objected-to] photographs [showing the injuries sustained in the 1988 assault by Hayes] were not offered to prove that the appellant’s present conduct conformed to his past behavior.”).

109. Hutchins v. Alexander City, 822 So. 2d 459, 464 (Ala. Crim. App. 2000) (“Because Hutchins did not claim that she was mentally ill at the time the incident occurred, her mental state was not at issue. Thus, her motivation for yelling in the police station was not relevant.”).

110. Tyson v. State, 784 So. 2d 328, 346 (Ala. Crim. App. 2000) (“Tyson’s possession of a gun used in a shooting in Union Springs that was identified, through forensic evidence, as the murder weapon ‘tended to make his participation in the double murder more probable . . . than it would be without the evidence.’” (citation omitted)); Smith v. State, 745 So. 2d 922, 929 (Ala. Crim. App. 1999) (An eyewitness testified that Smith had fired a .25 caliber pistol; an expert witness testified that *the* .25 caliber Lorcin pistol admitted in evidence was the murder weapon. “The pistol was therefore ‘of consequence’ to a material fact in the case and was properly admitted into evidence.”).

111. Ballard v. State, 767 So. 2d 1123, 1131 (Ala. Crim. App. 1999) (“[T]he questioned invoice found [by defendant’s son] in the Ballard family vehicle [which defendant rarely drove], which, had it not been fraudulent, would have corroborated Ballard’s version of the events, was sufficiently connected to Ballard to allow the jury to consider whether it tended to show a consciousness of guilt.”).

112. Lockhart v. State, 715 So. 2d 895, 900 (Ala. Crim. App. 1997) (“[A] jury could reasonably infer guilty knowledge from the fact that the appellant fled from this state prior to her first trial date”).

113. Giffin v. City of Florence, 677 So. 2d 1280, 1283 (Ala. Crim. App. 1996) (“The appellant’s state of mind at the time of the incident resulting from concern for his daughter was certainly material to whether he had the intent to harass his ex-wife when he entered the drugstore.”).

114. Moebes v. Tony Moore Buick-GMC Trucks, Inc., 709 So. 2d 475, 476 (Ala. Civ. App. 1996) (“Evidence of similar fraudulent acts is admissible to show fraudulent intent, plan, or scheme, so long as the acts sought to be proven meet the requirements of similarity in nature and proximity in time.” (citation omitted)).

of conduct amounting to such breaches on other occasions;<sup>115</sup> (9) a purpose to disprove “the element of intent in [the defendant]’s counterclaim alleging civil conspiracy;”<sup>116</sup> (10) a purpose to prove the element of defect in an action under the Alabama Extended Manufacturer’s Liability Doctrine;<sup>117</sup> (11) a purpose to disprove the element of injury in a civil action for abuse of process and malicious prosecution;<sup>118</sup> (12) a purpose to prove the amount of a plaintiff’s monetary injury;<sup>119</sup> (13) a purpose to prove the amount of child support due;<sup>120</sup> (14) a purpose to impeach or rehabilitate a witness;<sup>121</sup> and (15) the lack of any material purpose, whether proposed by the party offering the evidence or identified by the court itself, to justify admission under Rule 401.<sup>122</sup>

Occasionally, an appellate court will neglect to speak as carefully as the fulfillment of its teaching function would require. Nowhere does this failure to edify stand out more starkly than in those opinions in which a court nominates “motive” as the material purpose on which it relies. In *Grayson v. State*,<sup>123</sup> for example, the Alabama Court of Criminal Appeals affirmed a conviction for capital murder, saying: “[T]he evidence concerning the appellant’s interest in satanism was admissible as relevant to show the *motive* for this brutal and senseless killing.”<sup>124</sup>

*Motive* is not a material (in the vocabulary of Rule 401, “consequential”) element of the crime of murder. *Intent*, however, is. Evidence of *motive* may, and often does, serve as circumstantially relevant evidence of the

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115. *Lambert v. Beverly Enters., Inc.*, 695 So. 2d 44, 47 (Ala. Civ. App. 1997) (“Although pattern and practice evidence can be admissible in retaliatory discharge cases . . . Lambert’s exhibit was properly excluded because it did not tend to show that Beverly Enterprises had a pattern and practice of firing employees because of their workers’ compensation claims or that Lambert was terminated because of her claim.” (citation omitted)).

116. *Zielke v. AmSouth Bank*, 703 So. 2d 354, 361 (Ala. Civ. App. 1996) (“The testimony tended to show that AmSouth had little or no reason to engage in conspiratorial conduct regarding the sale of repossessed collateral.”).

117. *Taylor v. Gen. Motors Corp.*, 707 So. 2d 198, 203-04 (Ala. 1997) (“Because the number of parts replaced under warranty has some tendency to lead to the inference that at least some of those parts were in fact defective, the documents offered by Taylor were relevant and the circuit court could have properly ruled them admissible.”).

118. *Shoney’s, Inc. v. Barnett*, 773 So. 2d 1015, 1030 (Ala. Civ. App. 1999) (“We also fail to see the relevance of a later incarceration or conviction; it does not tend to show that Barnett did not suffer mental anguish from being placed in jail before for a burglary he did not commit.” (citation omitted)).

119. *Ex parte Vincent*, 770 So. 2d 92, 96 (Ala. 1999) (holding relevant a handwritten ledger kept by Vincent’s former wife and showing expenditures much larger than \$10,000 because it tended to show that former wife had, without authorization, withdrawn much more than \$10,000 from Vincent’s accounts with co-defendant bank).

120. *Hill v. Hill*, 730 So. 2d 248, 250 (Ala. Civ. App. 1999) (“[T]he [husband’s 1995] financial statement is relevant . . . [T]he issue of the amount of the husband’s income is relevant to the issue of the amount of child support.”).

121. *Hill*, 730 So. 2d at 250 (“[T]he [husband’s] 1995 financial statement is [not] too remote to be considered [because] his methods of calculating his income for past years and his representations of his past years’ income are relevant to the veracity of his testimony.”).

122. *DeLeon v. Kmart Corp.*, 735 So. 2d 1214, 1218 (Ala. Civ. App. 1998) (“The DeLeons’ alleged tendency to summon the police to redress injustice—real or perceived—was not a fact of any consequence to the determination of the action.”).

123. No. CR-95-1511, 1999 WL 1046427 (Ala. Crim. App. Nov. 19, 1999).

124. *Grayson*, 1999 WL 1046427, at \*14 (emphasis added).

material element, *intent*. And thus it appears to have been in *Grayson*.<sup>125</sup> As the principal thrust of Grayson's defense, his attorney presented testimony that Grayson suffered from bipolar disorder, because of which he "would not be able to respond to the rightness or wrongness of his acts."<sup>126</sup> The court might have explained that, in its view, a jury cognizant of Grayson's interest in satanism could reasonably suppose his participation in the gruesome killing and mutilation to have been driven by a rational, if deviant, pseudo-theological belief, rather than by an extreme and uncontrollable mood swing.

Suppose hypothetical facts much different than those in *Grayson* under which Grayson could have argued no substantial proof of the material element(s) constituting the *corpus delicti* ("What do you mean, I killed her? You have no body to prove she's dead."). At least, under most conceivable circumstances, no one would argue that evidence of Grayson's satanic belief as proof of motive would supply any rational proof at all that a missing person was dead. Should a court conjure circumstances under which it could argue otherwise,<sup>127</sup> it should bear a heavy responsibility to explain the disciplined, common sense thought process supporting its conclusion.

Occasionally, an appellate court will fail its readers even more starkly than the failure illustrated by the opinion in *Grayson*. In *McGriff v. State*,<sup>128</sup> for example, after a review for plain error, the Alabama Court of Criminal Appeals affirmed McGriff's conviction for capital murder, holding testimony about the victim's copious loss of blood and his gurgling for breath relevant and admissible *during the guilt phase* of McGriff's trial, because "[t]he jury did not have the aid of crime-scene photographs to establish the circumstances surrounding the [murder]."<sup>129</sup> The court nowhere explained how either this intelligence or the crime-scene photography for which it stood in was relevant at the guilt phase of McGriff's trial. McGriff did not, after all, stand at the bar accused of perpetrating "the circumstances surrounding the murder."<sup>130</sup> Proof of those circumstances might themselves have comprised a substantive law element "of consequence to" a prosecution for disturbing the peace or "of consequence to" a determination of the state's remedy *at the penalty phase* of McGriff's trial. Proof of "the circumstances surrounding the murder" did not, however, comprise a substantive law element "of consequence to" a prosecution for capital murder.<sup>131</sup> The substantive law elements of that crime are, to put them colloquially, (1) this defendant (2) killed (3) this victim (4) with requisite intent, nothing more, nothing less. For testimony about "the circumstances surrounding the mur-

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125. See *id.* at \*2.

126. *Id.*

127. See ALA. R. EVID. 104(b).

128. No. CR-97-0179, 2000 WL 1455196 (Ala. Crim. App. Sept. 29, 2000).

129. *McGriff*, 2000 WL 1455196, at \*23.

130. *Id.*

131. *Id.*

der”<sup>132</sup> to pass muster under Rule 401, it must make at least one of those material elements “more probable or less probable than it [was] without the [testimony].”<sup>133</sup> In what sense did information about gore and gurgling tend to identify McGriff as the perpetrator? In what sense did it tend to identify the victim? In what sense did it tend to show that someone had killed the victim? Indeed, testimony that the victim gurgled for breath tended to prove him still alive. Finally, in what sense did information about gore and gurgling tend to show anything about McGriff’s intent? If the court had satisfying answers to these questions, it should have shouldered its responsibility to explain them, to give good examples of the disciplined thought it should demand of the bench and bar it supervises, especially where a life hangs in the balance.

For an even starker example, consider *Williams v. State*.<sup>134</sup> Here, too, the Alabama Court of Criminal Appeals affirmed a conviction for capital murder, saying:

The testimony [*during the guilt phase*] concerning the presence of the children [*at the scene of their mother’s murder*] was relevant to explain the condition of the crime scene when Rowell [*the witness*] arrived and to explain why Rowell removed the child[ren] from the crime scene. This testimony was also relevant to explain what happened to the children after the appellant left the victim’s home.<sup>135</sup>

Williams did not stand accused of the crime of causing the children to be present in their own home, the crime of failing to lock the door to the victim’s bedroom so that her young children would not find her dead, the crime of creating the condition of the crime scene, or the crime of causing anything in particular to happen to the children after he left their home. He stood accused of capital murder, the elements of which were in this case (1) this defendant (2) killed (3) this victim (4) while intending to rape her. What was it about the presence of the children or about where their grandmother took them that made any of these elements more or less probable than any of them would have seemed had the jury not heard anything about the children?

Rule 402 provides:

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States or that of the State of Alabama, by statute, by these rules, or by other rules applicable in

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132. *Id.*

133. *Id.*

134. 795 So. 2d 753 (Ala. Crim. App. 1999).

135. *Williams*, 795 So. 2d at 766.

courts of this State. Evidence which is not relevant is not admissible.<sup>136</sup>

Research has revealed only four post-Rules cases citing Rule 402 by number.<sup>137</sup> None of them require discussion here.

Whether it makes doctrinal sense or not, courts are fond of saying that the determination of relevance is ordinarily a question within the discretion of the trial judge.<sup>138</sup> So fond, it seems, that only Sisyphus himself would have the hardihood to urge a more doctrinally disciplined view. By the letter of Rule 402, of course, irrelevant information is not admissible evidence.<sup>139</sup> And trial courts clearly never have discretion to violate the letter of the law, whether the letter of Rule 402 or otherwise. The Rule does not, however, prescribe the scope of appellate review of trial court decisions about Rule 402 relevance. In some cases, appellate courts have condemned the admission in evidence of irrelevant information as reversible error.<sup>140</sup> Likewise, they have sometimes condemned the exclusion of relevant evidence as reversible error.<sup>141</sup> Reversal for abuse of discretion and reversal for error are not the same thing.<sup>142</sup> Yet all three appellate courts employ the two formulas arbitrarily and interchangeably. The bar, one supposes, might reasonably expect the bench to employ legal terminology precisely and consistently. If cognitive precision should ever be desired, it would make better doctrinal sense to apply the clearly erroneous standard to review Rule 402 determinations of relevance (an inductive mental operation) and the abuse of discretion standard to review Rule 403 determinations of relevance (a predictive mental operation).

This Article puts off to another day at least one other matter of interest. It does not deal exhaustively, or even systematically, with the interrelationship between scope of review and precedential value. Specifically, what precedential value does a decision rendered on "plain error" review have for a subsequent decision reviewable for error in fact or reviewable for abuse of discretion? A decision reversed for plain error would, virtually by definition, one supposes, also have been reversed as a clearly erroneous factual determination, if appropriately reviewed for error in fact, or as an abuse in reaching a discretionary decision, if appropriately reviewed for abuse of

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136. ALA. R. EVID. 402.

137. *Ex parte Burch*, 730 So. 2d 143 (Ala. 1999); *Evans v. State*, 794 So. 2d 415 (Ala. Crim. App. 2000); *Broadnax v. State*, No. CR-97-0113, 2000 WL 869510 (Ala. Crim. App. June 30, 2000); *Mainor v. Hayneville Tel. Co.*, 715 So. 2d 800 (Ala. Civ. App. 1997) (cited as authoritative by the Alabama Supreme Court in *Burch*, 730 So. 2d at 149).

138. SCHROEDER & HOFFMAN, *supra* note 53, at 151.

139. "Evidence which is not relevant is not admissible." ALA. R. EVID. 402. The sentence makes no mention of "discretion"; neither does it contain the word "may." *Id.*

140. SCHROEDER & HOFFMAN, *supra* note 53, at 151.

141. *Id.*

142. See Jerome A. Hoffman, *Alabama Appellate Courts: Jurisdiction in Civil Cases*, 46 ALA. L. REV. 843, 853-54 (1995) ("An appellate court reviews some decisions of a trial court for errors of law . . . some decisions of a trial court for errors in determining propositions of historical fact . . . [and] other decisions of a trial court only for abuse of discretion.").

discretion. A decision not reversed for plain error would, one supposes, also not have been reversed as a clearly erroneous factual determination, if appropriately reviewed for error in fact. A decision not reversed for plain error might, however, nevertheless have been reversed as a garden-variety abuse of discretion, if appropriately reviewed for abuse of discretion. The foregoing propositions seem apparent without great intellectual travail. Perhaps that's all there is to it. Nevertheless, a decent concern for our stewardship of the language of law cautions us not to take that for granted. Whether there is more to it, however, must await another occasion.

Rule 403 perpetuates the first exception to Rule 402's premise that "[a]ll relevant evidence is admissible, except . . . ." It states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.<sup>143</sup>

Twenty-some post-Rules cases have cited it by number.

Alabama's pre-Rules decisional law occasionally excluded logically relevant evidence because it would confuse the issues or mislead the jury, cause unnecessary delay or waste time, or unfairly surprise a party who had no reason to expect that such evidence would be offered. Trial courts also had some discretion to exclude cumulative evidence. Nevertheless, that discretion had its limits. At the least, it was said, any doubt as to whether a particular offer of evidence was cumulative should be resolved in favor of the party offering it. With perhaps greater frequency, pre-Rules decisions excluded logically relevant evidence because its admission would unfairly prejudice an opponent. Because relevant evidence is, by definition, prejudicial to the cause of one party or another, it was said, only unfair prejudice justified exclusion. Opponents' objections on the ground of unfair prejudice were often rejected.<sup>144</sup>

Rule 403 and the first twenty-some cases citing it effect only incremental changes, if any, in this pre-Rules law. Quoting familiar language from older sources, the Alabama Supreme Court has said:

"Unfair prejudice" under Rule 403 has been defined as something more than simple damage to an opponent's case . . . . A litigant's case is always damaged by evidence that is contrary to his or her contention, but damage caused in that manner does not rise to the level of "unfair prejudice" and cannot alone be cause for exclusion .

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143. ALA. R. EVID. 403.

144. SCHROEDER & HOFFMAN, *supra* note 53, at 152.

. . . "Prejudice is 'unfair' if [it] has 'an undue tendency to suggest decision on an improper basis.'"<sup>145</sup>

Said yet another way, we expect the jury, as factfinder, to follow the logical processes of belief and inference prescribed by Anglo-American doctrine; thus we withhold from the jury's consideration evidence that would severely tempt it to abandon or abridge those processes, even though that evidence may have some probative value.

As in pre-Rules decisions, gruesome photographs continue to display virtual immunity from exclusion under Rule 403. Consider these four post-rules decisions and opinions by the Alabama Court of Criminal Appeals. In *Acklin v. State*,<sup>146</sup> that court said, "The courts of this state have repeatedly held that photographs that accurately depict the crime scene and the nature of the victim's wounds are admissible despite the fact that they be gruesome or cumulative.' . . . Photographic exhibits are admissible even though they are demonstrative of undisputed facts."<sup>147</sup>

In *Broadnax v. State*,<sup>148</sup> the court said, "[E]ven though autopsy photographs of a victim's head injuries, as viewed internally, may be gruesome, admission of such photos is sometimes necessary to demonstrate the extent of the victim's injuries."<sup>149</sup> The court did not explain why it is necessary to demonstrate the extent of a dead victim's injuries before the penalty phase in a capital trial. The reader can make substantially the same observation about the court's opinion in *Stallworth v. State*,<sup>150</sup> although the court did say that "[t]he photographs [of the repeatedly stabbed victims] were admissible to show the cause of the victims' death" in addition to the extent of their injuries.<sup>151</sup> In *Burton v. State*,<sup>152</sup> in which the court affirmed a conviction for hindering the prosecution of another for a particularly gruesome murder, the court explained its decision thus:

[T]he State has the burden of proving beyond a reasonable doubt that the person whose prosecution was hindered actually committed the felony . . . . Thus, the underlying crime is an essential element of the offense of hindering prosecution and must be adequately proved . . . . [I]f Burton saw the body depicted in these photographs [showing the dead victim cut open to remove her living infant] she knew with certainty that a terrible crime had been committed.<sup>153</sup>

145. *Ex parte Vincent*, 770 So. 2d 92, 96 (Ala. 1999) (citations omitted).

146. 790 So. 2d 975 (Ala. Crim. App. 2000).

147. *Acklin*, 790 So. 2d at 997 (affirming capital murder conviction) (citations omitted).

148. No. CR-97-0113, 2000 WL 869510 (Ala. Crim. App. June 30, 2000).

149. *Broadnax*, 2000 WL 869510, at \*11 (affirming capital murder conviction) (citation omitted).

150. No. CR-98-0366, 2001 WL 1149071 (Ala. Crim. App. Sept. 28, 2001).

151. *Stallworth*, 2001 WL 1149071, at \*17 (affirming capital murder conviction).

152. 783 So. 2d 874 (Ala. Crim. App. 1999).

153. *Burton*, 783 So. 2d at 886-87 (affirming conviction for hindering prosecution) (citation omitted); see also *Ferguson v. State*, 814 So. 2d 925, 944-45 (Ala. Crim. App. 2000) (affirming capital murder

In *Acklin*, the court did attempt to define the limits of judicial tolerance under Rule 403, saying:

Gruesomeness becomes objectionable in a photograph only where there is distortion of either of two kinds; *first*, distortion of the subject matter as where necroptic or other surgery caused exposure of nonprobative views, e.g., “massive mutilation,” . . . or *second*, focal or prismatic distortion where the position of the camera vis-a-vis the scene or object to be shown gives an incongruous result, e.g., a magnification of a wound to eight times its true size.<sup>154</sup>

The court concluded, “We find no evidence that the photographs distorted the facts or misled the jury in any way, even when they were projected onto a large screen.”<sup>155</sup>

As in pre-Rules decisions, cumulativeness,<sup>156</sup> remoteness,<sup>157</sup> and risk of confusion<sup>158</sup> remain countervailing concerns to be set off against probative value. Nothing so far suggests any post-Rules change in the calculus of these counterweights.

Alabama’s pre-Rules decisional law presented no clear and consistent guidance as to when and upon what showing trial courts should exclude logically relevant evidence in deference to countervailing concerns about fairness and efficiency. Some cases spoke in terms of probative value “outweighing” any “undue prejudice.” Others did not refer to any particular balance but said simply, for example, that the mere fact that a relevant photograph was gruesome or ghastly and might inflame the jury was no excuse to exclude it. Still others said that the proponent of any item of evidence had to show that it was not unduly prejudicial or unfair to the opposing party. Finally, some opinions suggested that courts should exclude relevant evi-

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conviction and stating, “The fact that a photograph is gruesome and ghastly is no reason to exclude it from evidence, so long as the photograph has some relevancy to the proceedings, even if the photograph may tend to inflame the jury” (citation omitted)).

154. *Acklin v. State*, 790 So. 2d 975, 997-98 (Ala. Crim. App. 2000).

155. *Acklin*, 790 So. 2d at 998.

156. *Hutchins v. Alexander City*, 822 So. 2d 459, 464 (Ala. Crim. App. 2000) (finding testimony from defense witnesses concerning Hutchins’s motivation would have been cumulative); *L.L.J. v. State*, 746 So. 2d 1052, 1059 (Ala. Crim. App. 1999) (holding letter showing juvenile defendant’s lack of remorse relevant to demeanor [one of six statutorily material elements], not cumulative, and probative value not substantially outweighed by danger of unfair prejudice).

157. *McClendon v. State*, 813 So. 2d 936, 945-46 (Ala. Crim. App. 2001) (affirming conviction for criminal solicitation for procuring a third person to murder his second wife and holding that it was not an abuse of discretion to admit evidence that some 20 years earlier McClendon had solicited the murder of his first wife); *Lockhart v. State*, 715 So. 2d 895 (Ala. Crim. App. 1997) (holding evidence of flight after indictment, arraignment, and release, and within one month after committing the crime not remote or unconnected).

158. *Evans v. State*, 794 So. 2d 415, 437 (Ala. Crim. App. 2000) (“Whether the application of the election laws was confusing to the public or to government officials has minimal relevance in Evans’s case. . . . Moreover, testimony concerning the confusion over application of the laws could have potentially confused the jury.”).

dence only when its probative value was outweighed or substantially outweighed by competing considerations.<sup>159</sup>

Rule 403 codifies the last of these variations on the theme, providing for discretionary exclusion of relevant evidence "if its probative value is substantially outweighed by" any of a short catalog of risks.<sup>160</sup> Thus, it both settles the standard and recommit to the discretion of the trial court the task of weighing probative value against countervailing considerations.<sup>161</sup>

By and large, Alabama's courts of appeals have recited Rule 403's standard correctly.<sup>162</sup> Occasionally, however, the Alabama Court of Criminal Appeals has still justified admission in the face of Rule 403 challenges by reciting an inverted standard, that is, that probative value outweighs the risk of unfair prejudice.<sup>163</sup> These deviations are probably best written off as products of harmless inadvertence, rather than design. After all, probative value deemed to outweigh the risk of substantial prejudice or other countervailing concern cannot at the same time be deemed substantially outweighed by that risk. Still, there remains room to consider whether the deviant language might reflect a judicial concern for the due process protection of persons prosecuted for the commission of heinous crimes. Four of the

159. SCHROEDER & HOFFMAN, *supra* note 53, at 152.

160. *Id.*

161. *Id.*

162. See, e.g., *Ritchie v. State*, 808 So. 2d 71, 75-76 (Ala. Crim. App. 2001) (holding probative value of prior bad acts evidence not substantially outweighed by danger of unfair prejudice because trial court carefully instructed jury to consider it only as evidence of *motive*, not as evidence of propensity); *Hunter v. State*, 802 So. 2d 265, 269 (Ala. Crim. App. 2000) ("The prejudicial impact of Crawford's testimony of the collateral robbery, particularly in light of the fact that the testimony was unnecessary, substantially outweighed any probative value."); *Griffin v. State*, 790 So. 2d 267, 299 (Ala. Crim. App. 1999) (holding evidence of Griffin's gang membership relevant and not outweighed by unfair prejudice, saying, "There was no less prejudicial means of presenting this evidence of motive"); *Estes v. State*, 776 So. 2d 206, 210 (Ala. Crim. App. 1999) (affirming conviction for second degree sexual abuse and saying, "A trial judge should exclude evidence falling within one of the exceptions [in Rule 404(b)] only if the probative value is substantially outweighed by the danger of unfair prejudice"); *L.L.J. v. State*, 746 So. 2d 1052, 1059 (Ala. Crim. App. 1999) (holding letter showing juvenile defendant's lack of remorse relevant to demeanor [one of six statutorily material elements], not cumulative, and probative value not substantially outweighed by danger of unfair prejudice); *Gipson v. Younes*, 724 So. 2d 530, 533 (Ala. Civ. App. 1998) (holding any possible relevance of evidence that medical malpractice defendant had twice failed certification exams was substantially outweighed by potential prejudice).

163. See *McClendon v. State*, 813 So. 2d 936, 943 (Ala. Crim. App. 2001) ("The evidence of another similar crime must not only be relevant, it must also be reasonably necessary to the government's case, and it must be plain, clear, and conclusive, before its probative value will be held to outweigh its potential prejudicial effects."); *Ward v. State*, 814 So. 2d 899, 916 (Ala. Crim. App. 2000) (affirming capital murder conviction and stating "Even though we have concluded that the evidence [of Ward's prior abuses of baby's mother, another suspect in the child's death] was relevant [and admissible under Rule 404(b)], we are ever mindful of the importance of conducting an analysis pursuant to Rule 403. . . . We conclude, as did the trial court, that the probative value of the evidence of collateral acts of physical abuse against Milner outweighs its prejudicial effect."); *Grayson v. State*, No. CR-95-1511, 1999 WL 1046427, at \*14 (Ala. Crim. App. Nov. 19, 1999) (finding probative value of evidence of capital murder defendant's interest in satanism outweighed its potential prejudicial effects); *Wilson v. State*, 777 So. 2d 856, 877 (Ala. Crim. App. 1999) (affirming capital murder conviction and stating, "Before its probative value will be held to outweigh its potential prejudicial effect, the evidence of a collateral crime must not only be relevant, it must also be reasonably necessary to the state's case, and it must be plain and conclusive"); *Ballard v. State*, 767 So. 2d 1123, 1131 (Ala. Crim. App. 1999) (holding probative value of falsified invoice outweighed danger of unfair prejudice and that trial court properly admitted it as evidence of Ballard's consciousness of guilt).

five opinions reciting the deviant standard appear in such cases.<sup>164</sup> The fifth, however, does not.<sup>165</sup> Likewise, while three of the opinions weighing Rule 404(b) evidence in the Rule 403 balance invert the standard,<sup>166</sup> two others do not.<sup>167</sup> Both of these samples of apparent inconsistency leave the argument for inadvertence strong.

Courts probably most often strike the Rule 403 balance against the admission of otherwise admissible evidence when the probative value of that evidence weighs very lightly in the balance.<sup>168</sup> Of course, the more heavily Rule 403's countervailing concerns weigh in the balance,<sup>169</sup> the more probative value can rest in the opposite pan without tipping the balance decisively towards admissibility. Evidence of little inherent probative value can take on additional weight when crucial to the proponent's case. Although Rule 403 nowhere mentions necessity as a weight or non-necessity as a counterweight, courts do, it appears, weigh necessity<sup>170</sup> or lack thereof<sup>171</sup> in the bal-

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164. See *McClendon*, 813 So. 2d at 943 ("The evidence of another similar crime must not only be relevant, it must also be reasonably necessary to the government's case, and it must be plain, clear, and conclusive, before its probative value will be held to outweigh its potential prejudicial effects."); *Ward*, 814 So. 2d at 916 (affirming capital murder conviction and stating, "Even though we have concluded that the evidence [of Ward's prior abuses of baby's mother, another suspect in the child's death] was relevant [and admissible under Rule 404(b)], we are ever mindful of the importance of conducting an analysis pursuant to Rule 403. . . . We conclude, as did the trial court, that the probative value of the evidence of collateral acts of physical abuse against Milner outweighs its prejudicial effect."); *Grayson*, 1999 WL 1046427, at \*14 (holding probative value of evidence of capital murder defendant's interest in satanism outweighed its potential prejudicial effects); *Wilson*, 777 So. 2d at 877 (affirming capital murder conviction and stating, "Before its probative value will be held to outweigh its potential prejudicial effect, the evidence of a collateral crime must not only be relevant, it must also be reasonably necessary to the state's case, and it must be plain and conclusive").

165. See *Ballard*, 767 So. 2d at 1131 (holding probative value of falsified invoice outweighed danger of unfair prejudice and that trial court properly admitted it as evidence of Ballard's consciousness of guilt).

166. See *McClendon*, 813 So. 2d at 943 ("The evidence of another similar crime must not only be relevant, it must also be reasonably necessary to the government's case, and it must be plain, clear, and conclusive, before its probative value will be held to outweigh its potential prejudicial effects."); *Ward*, 814 So. 2d at 916 (affirming capital murder conviction and stating, "Even though we have concluded that the evidence [of Ward's prior abuses of baby's mother, another suspect in the child's death] was relevant [and admissible under Rule 404(b)], we are ever mindful of the importance of conducting an analysis pursuant to Rule 403. . . . We conclude, as did the trial court, that the probative value of the evidence of collateral acts of physical abuse against Milner outweighs its prejudicial effect"); *Wilson*, 777 So. 2d at 877 (affirming capital murder conviction and stating, "Before its probative value will be held to outweigh its potential prejudicial effect, the evidence of a collateral crime must not only be relevant, it must also be reasonably necessary to the state's case, and it must be plain and conclusive").

167. See *Ritchie*, 808 So. 2d at 75-76 (holding probative value of prior bad acts evidence was not substantially outweighed by danger of unfair prejudice because trial court carefully instructed jury to consider it only as evidence of  *motive*, not as evidence of propensity); *Hayes v. State*, 717 So. 2d 30, 37 (Ala. Crim. App. 1997) (holding evidence admissible under Rule 404(b) was properly admitted over Rule 403 objection).

168. See, e.g., *Hutchins v. Alexander City*, 822 So. 2d 459, 464 (Ala. Crim. App. 2000) (finding testimony from defense witnesses concerning Hutchins's motivation would have been cumulative); *Gipson v. Younes*, 724 So. 2d 530, 533 (Ala. Civ. App. 1998) (finding any possible relevance of evidence that medical malpractice defendant had twice failed certification exams substantially outweighed by potential prejudice).

169. See, e.g., *Hunter v. State*, 802 So. 2d 265, 269 (Ala. Crim. App. 2000) ("The prejudicial impact of Crawford's testimony of the collateral robbery, particularly in light of the fact that the testimony was unnecessary, substantially outweighed any probative value.").

170. See, e.g., *McClendon*, 813 So. 2d at 943 ("The evidence of another similar crime must not only

ance. Sometimes a court can, by giving an antidotal instruction, reduce the risk of unfair prejudice enough to tip the balance towards admissibility.<sup>172</sup>

Rule 404 addresses the relevancy of “character evidence.” That catchy, common law sobriquet continues to make it easy for the casual thinker to suppose that the admissibility *vel non* of information about the past behavior of a party or other relevant actor occupies its own unique and free-standing room in the house of evidence. Its place among the 400s should remind us, however, that it actually occupies merely a somewhat untidy corner of one room of that house.

Rule 404(a) has attracted little appellate attention. As expected,<sup>173</sup> Rule 404(b) has attracted more appellate attention than any other Rule.

Rule 404(a)(1), which addresses the admissibility of evidence about the character of an “accused,” reads as follows:

(a) *Character evidence generally.* Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) CHARACTER OF ACCUSED. Evidence of character offered by an accused, or by the prosecution to rebut the same;<sup>174</sup>

As the most instructive post-Rules example of an appellate court’s application of Rule 404(a)(1), consider *Ex parte Harris*,<sup>175</sup> in which the Alabama Supreme Court said:

The prosecutor’s questioning about Harris’s prior bad acts (“You’re a big dope dealer, aren’t you?”) and about Harris’s associates (“Isn’t that why these gentlemen are out here in the courtroom?”) violated Rule 404(a)(1) by intimating to the jury that Harris had a “bad character.” Harris did not offer any character evidence on his direct examination, nor did he call any character witnesses at his trial. Thus, under the holding in *Satterwhite*[, 364 So. 2d 359, 360 (Ala. 1978)], Harris’s general objection to the questioning was suf-

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be relevant, it must also be reasonably necessary to the government’s case, and it must be plain, clear, and conclusive, before its probative value will be held to outweigh its potential prejudicial effects.”); *Wilson*, 777 So. 2d at 877 (affirming capital murder conviction and stating “Before its probative value will be held to outweigh its potential prejudicial effect, the evidence of a collateral crime must not only be relevant, it must also be reasonably necessary to the state’s case, and it must be plain and conclusive.”).

171. See, e.g., *Hunter*, 802 So. 2d at 269 (“The prejudicial impact of Crawford’s testimony of the collateral robbery, particularly in light of the fact that the testimony was unnecessary, substantially outweighed any probative value.”).

172. See, e.g., *Ritchie*, 808 So. 2d at 75-76 (holding probative value of prior bad acts evidence was not substantially outweighed by danger of unfair prejudice because trial court carefully instructed jury to consider it only as evidence of motive, not as evidence of propensity). *Ritchie* does demonstrate the proposition asserted in the text, but it presents a doubtful example of sound judicial reasoning.

173. *Hoffman*, *supra* note 98, at 85.

174. ALA. R. EVID. 404(a)(1).

175. No. 1992343, 2001 WL 367599 (Ala. Apr. 13, 2001).

ficient to preserve the error for appellate review, because the prosecutor's questions were patently illegal and could not have been made legal."<sup>176</sup>

Other cases having cited Rule 404(a)(1) by number are *Ex parte Lawrence*<sup>177</sup> and *Seay v. State*.<sup>178</sup>

Rule 404(a)(2) addresses the admissibility of evidence about the character of a "victim." Unlike its federal counterpart, Alabama Rule 404(a)(2) devotes separate subparts to the Rule's applicability in criminal cases and civil cases, respectively. Rule 404(a)(2)(A), which applies in criminal cases, has received some appellate attention. It says:

(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: . . .

(2) CHARACTER OF VICTIM.

(A) In criminal cases. (i) Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or (ii) evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor . . . .<sup>179</sup>

In *Battles v. City of Mobile*,<sup>180</sup> the Alabama Court of Criminal Appeals said: "The doctrine that evidence of a victim's character is admissible in homicide or assault cases involving claims of self-defense has been significantly broadened with the adoption of Rule 404(a)(2)."<sup>181</sup>

The advisory committee's notes agree with that assertion at least in this regard: "Unlike preexisting Alabama law, however, Rule 404(a)(2) contains no requirement that, as a condition precedent to admitting proof of the victim's character for a pertinent trait, other evidence in the case must tend to show that the accused acted in self-defense."<sup>182</sup>

176. *Harris*, 2001 WL 367599, at \*2 (quoting the advisory committee's note to Rule 103(a)(1), which states, "As in prior Alabama practice, no specific ground of objection is required if the matter to which the objection or the motion to strike is addressed is patently illegal or irrelevant").

177. 776 So. 2d 50 (Ala. 2000) (affirming conviction for second-degree theft and holding that prosecution's evidence of unprosecuted instances of negotiating worthless checks adduced on re-cross-examination of Lawrence did not qualify for admission under Rule 404(a)(1)). The opinion apparently concluded that Lawrence's explanation on redirect of her nine convictions for negotiating worthless checks revealed on cross-examination did not count as an attempt to prove her good character as permitted by Rule 404(a)(1). As a fallback, the opinion invoked Rule 405(a)'s proscription against evidence of specific acts, rather than reputation or opinion. *Lawrence*, 776 So. 2d at 52-53.

178. 751 So. 2d 32 (Ala. Crim. App. 1999) (reversing manslaughter conviction because the trial court refused to admit Seay's evidence of good general character and of the specific trait of peaceableness).

179. ALA. R. EVID. 404(a)(2)(A).

180. 771 So. 2d 498 (Ala. Crim. App. 1998).

181. *Battles*, 771 So. 2d at 503 (citing ALA. R. EVID. 404(a)(2) advisory committee's note).

182. ALA. R. EVID. 404(a)(2) advisory committee's note.

In *Battles*, however, the accused did not assert self-defense, and the court deemed the exclusion of the defendant's proffered character evidence harmless.<sup>183</sup> We must, therefore, await further developments to know whether the judicial assessment of Rule 404(a)(2)(A) goes beyond the advisory committee's acknowledgment.

Research has revealed no Alabama appellate opinion glossing Rule 404(a)(2)(B),<sup>184</sup> which applies in civil cases.

Regarding Rule 404(a)(3),<sup>185</sup> which addresses the character of witnesses and incorporates Rules 607, 608, 609, and 616 by reference, the Alabama Court of Criminal Appeals has reminded the bench and bar that "[t]he credibility of a witness . . . is not at issue until the witness actually takes the stand to testify."<sup>186</sup>

Alabama Rule 404(b) has been cited by number at least forty-one times in post-Rules decisions, ten times more than the next most often cited Rule.<sup>187</sup> Indeed, the Alabama Court of Criminal Appeals anticipated it twice in pre-Rules decisions.<sup>188</sup> This shows early promise of fulfilling a prophecy made for Rule 404(b) in 1995.<sup>189</sup> Seven of the forty-one discovered citations appear in civil cases, all of them actions to recover damages for civil fraud.<sup>190</sup> Not surprisingly, the other thirty-four appear in criminal cases.<sup>191</sup>

183. *Battles*, 771 So. 2d at 503.

184. The Rule states, in pertinent part:

a) *Character evidence generally*. Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: . . .

(2) CHARACTER OF VICTIM. . . .

(B) In civil cases. Evidence of character for violence of the victim of assaultive conduct offered on the issue of self-defense by a party accused of assaultive conduct, or evidence of character for peacefulness to rebut the same;

ALA. R. EVID. 404(a)(2)(B).

185. Rule 404(a)(3) states:

(a) *Character evidence generally*. Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except: . . .

(3) CHARACTER OF WITNESS. Evidence of the character of a witness, as provided in Rules 607, 608, 609, and 616.

ALA. R. EVID. 404(a)(3).

186. *Shelton v. State*, No. CR-97-1313, 1999 WL 339284, at \*5 (Ala. Crim. App. May 28, 1999).

187. The second most cited rule was Rule 801.

188. *Pace v. State*, 714 So. 2d 320, 330 (Ala. Crim. App. 1996) (reversing capital murder conviction on other grounds and stating, "In any subsequent proceeding the new rule governing the admission of collateral crimes contained in Rule 404(b) . . . must be followed"); *Long v. State*, 615 So. 2d 114, 117 (Ala. Crim. App. 1992) ("[Following North Carolina's interpretation of its Rule 404(b), we] . . . hold that testimony regarding the appellant's alleged previous cocaine use was admissible to show his predisposition [to rebut an entrapment defense] to commit the offense of trafficking in marijuana and cocaine.").

189. *Hoffman*, *supra* note 98, at 85 ("One can expect the same [prolificacy] of Alabama Rule 404(b), which tracks Federal Rule 404(b) word for word. Pitched battles over the admissibility of evidence of a defendant's 'other crimes, wrongs, or acts' have generated the largest single fraction of cases containing *res gestae* verbiage in Alabama's pre-Rules practice.").

190. *Morris v. Laster*, 794 So. 2d 1094 (Ala. 2001); *Ex parte First Nat'l Bank*, 730 So. 2d 1160 (Ala. 1999); *Ex parte Union Sec. Life Ins. Co.*, 723 So. 2d 34 (Ala. 1998); *Bama's Best Party Sales, Inc. v. Tupperware, U.S., Inc.*, 723 So. 2d 29 (Ala. 1998); *Life Ins. Co. of Ga. v. Smith*, 719 So. 2d 797 (Ala. 1998); *Ex parte Horton*, 711 So. 2d 979 (Ala. 1998); *Moebes v. Tony Moore Buick-GMC Trucks, Inc.*, 709 So. 2d 475, 476 (Ala. Civ. App. 1996), *rev'd sub nom. Ex parte Moebes*, 709 So. 2d 477 (Ala.

Rule 404(b) begins with a bright-line exclusion of evidence offered only for one specified purpose: "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."<sup>192</sup> That is, evidence that a defendant has done something like this before is not admissible solely to show his propensity to do things like this as the basis for inferring that he did it this time.

Rule 404(b) goes on to say that evidence of other crimes, wrongs, or acts "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."<sup>193</sup> That is, although never admissible for the purpose of showing a defendant's propensity to do bad things, evidence of other crimes, wrongs, or acts may be admissible, under the terms prescribed by Rules 401 and 403, when offered in good faith for any other purpose "of consequence to the determination of the action."<sup>194</sup>

In our Alabama evidence book, Bill Schroeder and I have said, "It is *possible* that the Alabama courts may be somewhat more willing to allow evidence of collateral crimes in drug and homicide cases than in other cases."<sup>195</sup> That statement probably underestimates the extent to which Alabama courts, as well as courts nationwide, reach to admit evidence of "other crimes, wrongs, or acts" in the prosecution of heinous and other revolting crimes. As the text in the main volume suggests, alleged drug pushers and murderers do, to some extent, bear the brunt of this permissiveness, but probably nowhere near the extent to which alleged child molesters do.<sup>196</sup>

The "other purpose" most often invoked or misinvoked to accomplish this sometimes profligate admission of more or less bald-faced propensity evidence has been, and continues to be, "motive." In nine discovered post-Rules decisions, the Alabama Court of Criminal Appeals has invoked "motive" as the "other purpose."<sup>197</sup> In three of these nine, the court has invoked "motive" in a more or less disciplined way as a surrogate for "intent"<sup>198</sup> or "identity."<sup>199</sup> In the others, it has invoked "motive" alone, leaving it to a

1997).

191. "[I]n many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused." Hoffman, *supra* note 98, at 85.

192. ALA. R. EVID. 404(b).

193. *Id.*

194. ALA. R. EVID. 401. For an elaboration of this proposition, see Hoffman, *supra* note 98, at 86-91.

195. SCHROEDER & HOFFMAN, *supra* note 53, at 171 n.90.

196. See, e.g., Ritchie v. State, 808 So. 2d 71 (Ala. Crim. App. 2001); Proctor v. City of Prattville, No. CR-99-1768, 2001 WL 429278 (Ala. Crim. App. Apr. 27, 2001); Estes v. State, 776 So. 2d 206 (Ala. Crim. App. 1999); Campbell v. State, 718 So. 2d 123 (Ala. Crim. App. 1997).

197. Ritchie, 808 So. 2d at 71; Proctor, 2001 WL 429278, at \*1; McClendon v. State, 813 So. 2d 936 (Ala. Crim. App. 2001); Baker v. State, No. CR-95-0292, 2001 WL 32832 (Ala. Crim. App. Jan. 12, 2001); Ward v. State, 814 So. 2d 899 (Ala. Crim. App. 2000); Griffin v. State, 790 So. 2d 267 (Ala. Crim. App. 1999); Estes, 776 So. 2d at 206; Campbell, 718 So. 2d at 123; Minnis v. State, 690 So. 2d 521 (Ala. Crim. App. 1996).

198. Baker, 2001 WL 32832, at \*1; McClendon, 813 So. 2d at 936.

199. Ward, 814 So. 2d at 899.

justifiably bewildered readership to make the logical connection, if any, between “motive” and a material element of the crime under prosecution.<sup>200</sup>

In prosecutions for sexual crimes against children, the Alabama Court of Criminal Appeals misinvokes “motive” with distressing frequency as an excuse for admitting damning evidence of other sexual acts.<sup>201</sup> This it justifies in one or more of several spurious ways. First, it may recite one form or another of the bromide that evidence of motive is always admissible.<sup>202</sup> This proposition is patently false. Although “motive” is one of the other purposes listed in Rule 404(b), motive is rarely, if indeed ever, itself an element of a crime. Thus, evidence of motive is only admissible when circumstantially relevant to some designated other proposition of fact that is an element of the crime charged. Never, under these modern Alabama Rules of Evidence, is it admissible willy-nilly for its own sake. Second, the court of criminal appeals is fond of saying that evidence of other sexual trespasses against children reveals a defendant’s “unnatural desire” for such intercourse with children.<sup>203</sup> What the court never explains is just how “unnatural desire” (a supposedly permissible “other purpose” under Rule 404(b)) differs from “propensity” (the forbidden purpose under Rule 404(b)). Indeed, in a moment of remarkable candor, the court has said, “[T]he City offered evidence of the collateral offense[s] in order to establish that the appellant *acted in conformity on this occasion*, and therefore, to establish his motive in committing the charged offenses.”<sup>204</sup> Lest we forget, Rule 404(b) provides: “Evidence of other crimes wrongs, or acts is not admissible to prove the character of a person in order *to show action in conformity therewith*.”<sup>205</sup>

Actions speak louder than words. By its actions, that is, by its dispositions of real cases, the Alabama Court of Criminal Appeals has effectively adopted Rule 414(a) of the Federal Rules of Evidence, which says:

In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant’s commission of another offense or offenses of child molestation is admissible, and

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200. *Griffin*, 790 So. 2d at 267 (arguably identity); *Minnis*, 690 So. 2d at 521 (arguably identity). For the five decisions in child sexual abuse cases which also belong here, see the discussion in the following paragraph in the main text.

201. *See, e.g., Estes*, 776 So. 2d at 210; *Campbell*, 718 So. 2d at 132.

202. *See, e.g., Estes*, 776 So. 2d at 210; *Campbell*, 718 So. 2d at 132.

203. *See, e.g., Ritchie*, 808 So. 2d at 75 (“unnatural desire for young children”) (citation omitted); *Estes*, 776 So. 2d at 210 (“motivated by an unnatural sexual desire for young girls”); *Campbell*, 718 So. 2d at 132 (“unnatural lust for young female students under his authority”). Although the Alabama Court of Criminal Appeals is the most recent and most frequent transgressor, its judges can say, with justification, that the devil has made them do it. *See, e.g., Register v. State*, 680 So. 2d 225, 227 (Ala. 1994) (“The question presented is whether evidence that a defendant has a passion or *propensity* for sexual misconduct is material and relevant as tending to establish the defendant’s motive for perpetrating the crime for which he or she is being tried. We answer the question in the affirmative.”) (emphasis added). Once again, showing *propensity* is the purpose forbidden by Rule 404(b). *See id.*

204. *Proctor*, 2001 WL 429278, at \*2 (emphasis added).

205. ALA. R. EVID. 404(b) (emphasis added).

may be considered for its bearing on any matter to which it is relevant.<sup>206</sup>

If evidence of other sexual trespasses against children must come in, the intellectually honest course would be to acknowledge this *fait accompli*, as federal Rule 414 does, by declaring that Rule 404(b)'s bright-line exclusion of propensity evidence simply does not apply in prosecutions for the sexual abuse of children.<sup>207</sup>

In their post-Rules opinions, Alabama's three appellate courts have done better in identifying "other purposes" other than "motive."

In *Ex parte Baker*,<sup>208</sup> the Alabama Supreme Court taught well when it reminded the bench and bar that "[c]ollateral act evidence is admissible to prove *identity only* when the identity of the person who committed the charged offense is in issue *and* the charged offense is committed in a novel or peculiar manner [i.e., "signature crime"]."<sup>209</sup> "In this case," said the court, "the circumstances of the collateral act and the charged offense are not similar in any substantial degree of detail and are not novel or peculiar."<sup>201</sup> It also taught well in *Morris v. Laster*,<sup>211</sup> wherein it reminded the bench and bar that there are limits to the legitimate admissibility of pattern-and-practice evidence. In reviewing a judgment on a jury verdict for fraud, the court cautioned that the trial court's "liberal interpretation of the pattern-or-practice evidentiary standard permits the admission of far too much extraneous and potentially highly prejudicial testimony, and such an interpretation would defeat the fundamental purpose of [Rule] 404(b) by allowing an unbridled exception."<sup>212</sup> The court reversed and remanded for error in admitting the testimony of two pattern-and-practice witnesses who reported prior conduct not sufficiently similar to the conduct complained of by the plaintiffs.<sup>213</sup>

The Alabama Court of Criminal Appeals has taught well when, on two occasions, it has reminded the bench and bar that a material element of claim or defense counts as an "other purpose" only if that element is *actually at issue* in the case at hand.<sup>214</sup> That court has also rendered post-Rules decisions addressing "intent"<sup>215</sup> and "identity"<sup>216</sup> as "other purposes" ap-

206. FED. R. EVID. 414(a).

207. *See id.*

208. 780 So. 2d 677 (Ala. 2000).

209. *Baker*, 780 So. 2d at 679 (emphasis added).

210. *Id.* at 680.

211. 821 So. 2d 923 (Ala. 2001).

212. *Morris*, 821 So. 2d at 927.

213. *Id.* at 931.

214. *Hunter v. State*, 802 So. 2d 265, 269 (Ala. Crim. App. 2000) ("The State contends that Crawford's testimony was admissible to prove intent. However, there was no genuine dispute regarding the issue of criminal intent in the assault and robbery of Gamble."); *Campbell v. State*, 718 So. 2d 123, 129 (Ala. Crim. App. 1997) ("The issue of identity was not presented in the instant case. Therefore, the common plan, scheme, or design exception to the general exclusionary rule is inapplicable in this case.")

215. *McClendon v. State*, 813 So. 2d 936 (Ala. Crim. App. 2001); *Baker v. State*, No. CR-95-0292,

pearing in Rule 404(b)'s exemplary list. The court has also demonstrated that the exemplary list does not limit the universe of "other purposes," affording the ordinary pre-Rules example of proof of escape to show consciousness of guilt to show an element of the crime charged<sup>217</sup> and the extraordinary example of a purpose to discover relationships during voir dire examination of the venire.<sup>218</sup> As under pre-Rules law, a permissible "other purpose" may exist already at the beginning of the direct examination of a witness, or it may arise during cross-examination, becoming exploitable either then or upon redirect examination or during rebuttal.<sup>219</sup>

The Alabama Court of Civil Appeals has rendered one post-Rules decision citing Rule 404(b) by number. In *Moebes v. Tony Moore Buick-GMC Trucks, Inc.*,<sup>220</sup> an action to recover damages for the dealer's fraudulent misrepresentation that the car purchased by the plaintiff had never been in a wreck, the trial court had excluded the testimony of seven witnesses who claimed to have been similarly defrauded.<sup>221</sup> The plaintiff appealed from a verdict and judgment for \$4,500 compensatory damages and \$24,500 in punitive damages, asserting inadequate punitive damages.<sup>222</sup> The Alabama Court of Civil Appeals reversed and remanded for a new trial, saying:

Evidence of similar fraudulent acts is admissible to show fraudulent intent, plan, or scheme, so long as the acts sought to be proven meet the requirements of similarity in nature and proximity in time. . . . The evidence, although different from Moebes's allegations in one respect, was similar in another and, therefore, properly admissible for a limited purpose.<sup>223</sup>

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2001 WL 32832, 40 (Ala. Crim. App. Jan. 12, 2001); *Hayes v. State*, 717 So. 2d 30, 36 (Ala. Crim. App. 1997).

216. *Johnson v. State*, 820 So. 2d 842 (Ala. Crim. App. 2001); *Ward v. State*, 814 So. 2d 899 (Ala. Crim. App. 2000); *Tyson v. State*, 784 So. 2d 328 (Ala. Crim. App. 2000) (affirming capital murder conviction where purpose was to establish the defendant's connection with the weapon used in another murder as circumstantial evidence of his identity as the murderer in this case); *Biles v. State*, 715 So. 2d 878, 883-84 (Ala. Crim. App. 1997); *Moore v. State*, 709 So. 2d 1324, 1325 (Ala. Crim. App. 1997); *Dozier v. State*, 706 So. 2d 1287, 1288-89 (Ala. Crim. App. 1997); *Gagliardi v. State*, 695 So. 2d 206, 208 (Ala. Crim. App. 1996).

217. *Brown v. State*, 821 So. 2d 219 (Ala. Crim. App. 2000).

218. *Taylor v. State*, 808 So. 2d 1148, 1185 (Ala. Crim. App. 2000) (affirming capital murder conviction and stating, "The fact that Taylor may have pawned and sold jewelry to a member of the venire is not evidence of collateral bad acts").

219. *Moore v. State*, 709 So. 2d 1324, 1325 (Ala. Crim. App. 1997) ("On cross-examination, Moore's attorney attacked the victim's identification and succeeded in eliciting conflicting testimony from the victim. . . . The testimony from Detective Miller was correctly received into evidence to rehabilitate the victim's identification testimony.").

220. 709 So. 2d 475 (Ala. Civ. App. 1996), *rev'd sub nom. Ex parte Moebes*, 709 So. 2d 477 (Ala. 1997).

221. *Moebes*, 709 So. 2d at 476.

222. *Id.*

223. *Id.* at 477.

The Alabama Supreme Court reversed on another ground and remanded for reinstatement of the trial court's judgment, reiterating that a plaintiff could not appeal for inadequacy a judgment for punitive damages.<sup>224</sup>

In sharp contrast to the foregoing, mostly good examples, "res gestae" continues to die hard.<sup>225</sup> Its remnant, however, reminds one of Paul Harvey's "The Rest of the Story." Buried somewhere in that idea, perhaps, lies a compelling kernel of common sense worth preserving. Whether it needs to memorialize the checkered history of "res gestae" is another matter.

As *McCormick on Evidence*, a venerable national source of commentary, has put it, evidence of other crimes, wrongs, or acts may occasionally be admissible:

[t]o complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings. . . . The phrases "same transaction" or, less happily "res gestae" often are used to denote evidence introduced to complete the story. [It] should be applied only when reference to the other crimes is essential to a coherent and intelligible description of the offense at bar.<sup>226</sup>

Of Alabama's three post-Rules appellate decisions citing Rule 404(b) by number and addressing this purpose "[t]o complete the story of the crime," the most recent one<sup>227</sup> quite arguably failed completely to appreciate the force of the commentator's caveat that admitting Rule 404(b) evidence for this purpose is only justified "when reference to the other crimes is essential to a coherent and intelligible description of the offense at bar."<sup>228</sup> The least recent one did better, but spoiled its performance by unnecessarily invoking "res gestae."<sup>229</sup> The third decision arguably got it right and for the right reasons.<sup>230</sup>

In *Centobie v. State*,<sup>231</sup> the Alabama Court of Criminal Appeals affirmed Centobie's conviction for capital murder, explaining:

224. *Id.*

225. *Hall v. State*, 820 So. 2d 113, 134 (Ala. Crim. App. 1999) (affirming capital murder conviction, where trial occurred before effective date of Rule 404(b), and stating, "[I]n a prosecution for homicide, evidence of connected acts and transactions leading up to and explanatory of the killing is admissible. . . . [T]he collateral crimes involved were all part of one continuous criminal transaction, or *res gestae*, and the evidence relating to each offense was inseparable from evidence relating to the others); *see also Centobie v. State*, No. CR-98-2056, 2001 WL 996129, at \*8 (Ala. Crim. App. Nov. 21, 2001) (where the word formula "part of this action . . . part of this same transaction" stood in for the superannuated "res gestae"); *Griffin v. State*, 790 So. 2d 267, 299 (Ala. Crim. App. 1999) (affirming capital murder conviction). Recall *Hoffman*, *supra* note 98, at 76-77, stating, "[A]t this very moment—within a stone's throw of the Twenty-First Century—*res gestae* flourishes like kudzu."

226. 1 MCCORMICK ON EVIDENCE § 190 at 345 (4th ed. 1992) (emphasis added).

227. *Centobie*, 2001 WL 996129, at \*8.

228. MCCORMICK, *supra* note 226, at 799-800.

229. *Hall v. State*, 820 So. 2d 113 (Ala. Crim. App. 1999).

230. *Griffin v. State*, 790 So. 2d 267 (Ala. Crim. App. 1999).

231. 2001 WL 996129 (Ala. Crim. App.).

The appellant argues that the trial court erred in admitting evidence of his actions from the time he escaped from Sheriff Hooks's custody in Mississippi until he was taken into custody on July 5, 1998. More particularly, he argues that the trial court erred in admitting evidence of uncharged collateral robberies because, he says, these offenses bore no relevance to the charged crime, were highly prejudicial, and did not fall under any of the recognized exceptions to Rule 404(b).<sup>232</sup>

The trial court had admitted the testimony as "part of this action . . . part of this same transaction."<sup>233</sup> "In this case," the reviewing court concluded, "the evidence of the uncharged crimes was material and logically relevant to show that all of the criminal acts committed by the appellant were part of one continuous criminal adventure."<sup>234</sup>

The difficulty with that easy conclusion lies in this: Centobie stood charged with committing capital murder, not with committing "one continuous criminal adventure." Indeed, research has revealed no such crime codified in Alabama. Perhaps in deciding as it did, and certainly in explaining as it did, the Alabama Court of Criminal Appeals ignored a federal appellate court's well-taken admonition that courts should not "subscribe to the broad proposition that evidence of other offenses may be introduced simply because it recounts events temporally related to the commission of a crime for which the accused is on trial."<sup>235</sup> If, in the appellate court's view, testimony that Centobie broke into houses to steal food while on the run made it more or less likely that Centobie had committed the murder he denied, its opinion should have told its readership how. At least the court did not invoke "res gestae."

In *Hall v. State*,<sup>236</sup> wherein the same court had earlier affirmed another conviction for capital murder, it said:

"[I]n a prosecution for homicide, evidence of connected acts and transactions leading up to and explanatory of the killing is admissible . . . . [T]he collateral crimes involved were all part of one continuous criminal transaction, or *res gestae*, and the evidence relating to each offense was inseparable from evidence relating to the others."<sup>237</sup>

The court's invocation of "res gestae" was gratuitous, and its reliance upon the concept of "one continuous criminal transaction" labored under the

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232. *Centobie*, 2001 WL 996129, at \*7.

233. *Id.* at \*8.

234. *Id.* at \*9.

235. *United States v. Childs*, 598 F.2d 169, 173 (D.C. Cir. 1979), cited in *MCCORMICK*, *supra* note 226, at 800.

236. 820 So. 2d 113 (Ala. Crim. App. 1999).

237. *Hall*, 820 So. 2d at 134 (citations omitted).

same difficulty as it later did in *Centobie*: Hall did not stand accused of committing “one continuous criminal transaction.”<sup>238</sup> If, however, as the court said, “the evidence relating to each offense was inseparable from evidence relating to the others,”<sup>239</sup> then it not only decided well, but explained the decision well.

The Alabama Court of Criminal Appeals arguably did its best, however, in *Griffin v. State*,<sup>240</sup> another affirmance of a capital murder conviction, when it held evidence of Griffin’s membership in the gang called “Crew”<sup>241</sup> relevant to a purpose other than propensity and not outweighed by unfair prejudice. It explained:

According to the state’s theory, this homicide centered around Davis[’s, the victim’s,] alleged refusal to return drugs to Bimbo, a distributor for the Crew. Griffin’s membership in the Crew played a key role in his participation in Davis’s murder. It was alleged that Griffin, because he was a “security” man for the Crew, was paid to come to Alabama to kill Davis. *To omit this crucial affiliation would have fragmented the presentation of the evidence and confused the jury.*<sup>242</sup>

Readers who conclude that the record supports this reasoning and conclusion will most likely also credit the court with a sound decision well explained. Indeed, taken together, the thoughtful passages in *Griffin* and *Hall* contribute useful elaboration to McCormick’s formula.<sup>243</sup> *Hall*’s gratuitous invocation of “res gestae” added nothing but a label, and a thoroughly discredited one at that.<sup>244</sup>

Sometimes circumstantial evidence can so strongly imply the commission of another crime, wrong, or act that admitting it would transgress Rule 404(b).<sup>245</sup> At other times courts may reject that argument.<sup>246</sup> When a witness

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238. *Id.*

239. *Id.* (citation and internal quotation marks omitted).

240. 790 So. 2d 267 (Ala. Crim. App. 1999).

241. The court correctly tested the admissibility of this evidence of gang membership under Rule 404(b), because the jury might have supposed this knowledge to support an inference that Griffin had committed “other crimes, wrongs, or acts” suggesting his propensity to commit acts such as the murder with which he was charged.

242. *Griffin*, 790 So. 2d at 299 (emphasis added).

243. Under Rule 404(b), a court appropriately invokes the “rest of the story” purpose only when reference to the other crimes is essential to a coherent and intelligible description of the offense at bar, when the evidence relating to each offense is inseparable from evidence relating to the others, or when omitting crucial information would fragment the prosecution’s presentation of its evidence and confuse the jury.

244. See, e.g., Hoffman, *supra* note 98, at 73.

245. See, e.g., *Ritchie v. State*, 763 So. 2d 992, 996 (Ala. Crim. App. 2000) (reversing conviction for first degree sexual abuse and stating, “In the present case, the prosecutor’s intent in calling the appellant’s wife to gain testimony concerning why she had advised her children not to talk to the police was clearly an attempt to introduce, through improper impeachment, otherwise inadmissible evidence of prior bad acts by the appellant”); *Rowell v. State*, 666 So. 2d 825, 828 (Ala. Crim. App. 1993) (reversing conviction for possession of controlled substance and stating, “[T]he evidence in question, while having little probative value in regard to a charge of possession, was highly prejudicial because it implied that

gives inadmissible testimony about other crimes, wrongs, or acts, the trial judge can sometimes save the proceeding from mistrial by taking prompt curative action.<sup>247</sup> At other times, the prejudice may be deemed incurable, especially when the prosecutor connived in the disclosure.<sup>248</sup>

Among other ways to establish a defendant's commission of another crime (often called "a collateral crime" in the cases),<sup>249</sup> the prosecution can do so by proof of the defendant's extrajudicial admission.<sup>250</sup>

Rule 404(b) concludes with this notice requirement:

[U]pon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.<sup>251</sup>

Counsel for criminal defendants should, one supposes, routinely file well before trial a request for the notice contemplated by Rule 404(b).<sup>252</sup> Concerning what suffices as notice, the Alabama Court of Criminal Appeals has given us this example:

Because defense counsel had knowledge of the existence of the tapes for approximately a week before trial and because he was given the opportunity to hear the tapes before the trial actually commenced and, furthermore, because the prosecutor explained that he did not have possession of his file or the tapes until the times previously indicated, there was no violation of Rule 404(b)[s notice requirement].<sup>253</sup>

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the appellant might be guilty of another offense").

246. See, e.g., *Griffin*, 790 So. 2d at 299 ("To omit this crucial affiliation [i.e., Griffin's gang membership] would have fragmented the presentation of the evidence and confused the jury."); *Tyson v. State*, 784 So. 2d 328, 345 (Ala. Crim. App. 2000) (affirming capital murder conviction and stating, "[T]he government sought to introduce the gun as intrinsic, direct evidence of the charged crime—not as Rule 404(b) evidence. . . . [T]he handgun was not [offered as] Rule 404(b) evidence at all, i.e., not offered to show that defendant also did the other robbery"); *Wilson v. State*, 777 So. 2d 856 (Ala. Crim. App. 1999) (affirming capital murder conviction and rejecting Wilson's argument that policeman's testimony that he and his partner kept a photograph of Wilson in their patrol car invited the jury to infer that he had committed prior bad acts); *Pressley v. State*, 770 So. 2d 115 (Ala. Crim. App. 1999) (affirming capital murder conviction and finding that statement that defendant liked big guns did not imply the commission of another crime); *Moore v. State*, 709 So. 2d 1324 (Ala. Crim. App. 1997) (affirming conviction for one count of first-degree robbery and rejecting Moore's argument that permitting testimony that victim had identified him from photographic array invited jury to infer that he had committed prior bad acts).

247. See, e.g., *Huffman v. State*, 706 So. 2d 808 (Ala. Crim. App. 1997).

248. See, e.g., *Sparks v. City of Weaver*, 730 So. 2d 113 (Ala. 1998).

249. See SCHROEDER & HOFFMAN, *supra* note 53, at 168 & n.17.

250. *Dozier v. State*, 706 So. 2d 1287, 1289 (Ala. Crim. App. 1997).

251. ALA. R. EVID. 404(b).

252. See, e.g., *Ex parte Lawrence*, 776 So. 2d 50, 51 (Ala. 2000).

253. *Myrick v. State*, 787 So. 2d 713, 717 (Ala. Crim. App. 2000) (affirming conviction for unlawful distribution of controlled substance).

Regarding the scope of the notice requirement, the Alabama Supreme Court has said, in *Ex parte Lawrence*:<sup>254</sup> “Rule 404(b) . . . requires that the prosecution ‘provide notice, regardless of how it intends to use the extrinsic-act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal.’”<sup>255</sup> In that case, the court held that evidence of other acts offered without notice should have been excluded, but that the trial court’s “prompt and thorough” curative instruction, plus the cumulative nature of evidence improperly admitted, had justified the trial court’s denial of the defendant’s motion for a mistrial.<sup>256</sup>

Rule 13.3(c) of the Alabama Rules of Criminal Procedure permits the consolidation of separate indictments for trial in one proceeding “if the offenses 1) share the same or similar characteristics, or 2) involve the same conduct or connection in their commission, or 3) are part of a common scheme.”<sup>257</sup> The Alabama Court of Criminal Appeals has said, “[P]erhaps the most important consideration is the answer to the following question: If the offense[s] were tried separately, would evidence of each offense be admissible in the trial for the other offense?”<sup>258</sup> This brings Rule 404(b) into the Rule 13.3(c) calculus.

Rule 404(a) tells *when* a court may admit some kind of proof “of a person’s character or a trait of character . . . for the purpose of proving action in conformity therewith.”<sup>259</sup> Rule 405 then tells *what kind* of proof the court may admit.<sup>260</sup> Rule 405(a) provides:

(a) *Reputation or opinion.* In all cases in which evidence of character or a trait of character is admissible, except under Rule 404(a)(1), proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.<sup>261</sup>

Research has revealed only one post-Rules opinion citing Rule 405(a) by number. In *Seay v. State*,<sup>262</sup> the Alabama Court of Criminal Appeals reversed Seay’s conviction for manslaughter on Rule 404(a)(1) grounds. Counsel for the defendant had mistakenly cited Rule 405(a) to the trial court, but the court of appeals saved his bacon.

Rule 405(b) expands:

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254. 776 So. 2d 50 (Ala. 2000).

255. *Lawrence*, 776 So. 2d at 53 (Ala. 2000) (citation omitted).

256. *Id.* at 56.

257. *Campbell v. State*, 718 So. 2d 123, 127 (Ala. Crim. App. 1997) (internal quotation marks omitted).

258. *Id.*; see also *Stallworth v. State*, No. CR-98-0366, 2001 WL 1149071, at \*17 (Ala. Crim. App. Sept. 28, 2001); *Gagliardi v. State*, 695 So. 2d 206 (Ala. Crim. App. 1996).

259. See ALA. R. EVID. 404(a).

260. See ALA. R. EVID. 405.

261. See *id.*

262. 751 So. 2d 32 (Ala. Crim. App. 1999).

(b) *Specific instances of conduct.* In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.<sup>263</sup>

Research has revealed only two post-Rules opinions, both in decisions by the Alabama Supreme Court, that have cited Rule 405(b) by number.

In *Ex parte HealthSouth Corp.*,<sup>264</sup> a nonprofit hospital (the Lloyd Noland Foundation) sued HealthSouth and one Scrusby for defamation. The trial court refused to order part of the discovery of documents sought by the defendants.<sup>265</sup> The Alabama Supreme Court granted their petition for a writ of mandamus.<sup>266</sup> In doing so, the court apparently agreed with the defendants' contentions:

that Lloyd Noland, a nonprofit hospital, by alleging defamation, has put its business reputation and character in issue generally, and that, therefore, the additional five sets of items should be produced . . . [and] that because the alleged [defamatory] statements characterize Lloyd Noland's plan as a scam, evidence indicating whether Lloyd Noland's plans and its corresponding CON application were in any way dishonest or deceptive would clearly be admissible under Rule 405(b).<sup>267</sup>

The court concluded, "[T]he trial judge abused his discretion in limiting discovery."<sup>268</sup>

In *Ex parte Lawrence*,<sup>269</sup> the Alabama Supreme Court affirmed Lawrence's conviction for second-degree theft. Although the trial court's curative instruction absolved the error, it had, the court held, erred in admitting, under Rule 404(b), the prosecution's evidence of unprosecuted instances of negotiating worthless checks adduced on re-cross-examination of Lawrence, because the prosecution had not given pre-trial or intra-trial notice of intention to adduce it.<sup>270</sup> The court distinguished a federal case cited by the state, because therein the defendant had asserted an entrapment defense (not so in this case), which made evidence of specific acts admissible under Rule 405(b).<sup>271</sup>

Should it come as a surprise that Rule 406,<sup>272</sup> Rule 404(a)'s antipode, has received only two post-Rules citations by number? In the more impor-

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263. ALA. R. EVID. 405(b).

264. 712 So. 2d 1086 (Ala. 1997).

265. *HealthSouth*, 712 So. 2d at 1087.

266. *Id.*

267. *Id.* at 1088.

268. *Id.* at 1089.

269. 776 So. 2d 50 (Ala. 2000).

270. *Lawrence*, 776 So. 2d at 52-54.

271. *Id.* at 52-53.

272. That rule states:

tant of the two, the Alabama Court of Civil Appeals suggested that some kinds of repetitious conduct may not fall within the definition of habit.<sup>273</sup> The other cited the Rule only incidentally.<sup>274</sup>

No discovered appellate opinion has cited Alabama Rule 407 by number.

Rule 408<sup>275</sup> addresses the admissibility *vel non* of evidence of compromises and offers to compromise. Rule 408's bright-line exclusion of such evidence when offered solely for the purpose of "prov[ing] liability for or invalidity of the claim or its amount" has been said "to rest upon a policy of encouraging the extrajudicial compromise and settlement of disputes, as well as upon the notion that evidence of a compromise or offer to compromise is simply not relevant to the issue of culpability."<sup>276</sup>

The first of these two suggested purposes for Rule 408 rests upon a concern extrinsic to (although certainly not unrelated to) and at least potentially in conflict with the purpose aspired to in Rule 102.<sup>277</sup> The second rests upon a concern intrinsic to Rule 102's aspiration, as well as to the purposes of Rules 401, 402, and 403. The following two paragraphs elaborate these two purposes for Rule 408.

In its extrinsic policy purpose, Rule 408 bears kinship to Rule 68 of the Alabama Rules of Civil Procedure<sup>278</sup> and Rule 11 of the Alabama Civil Court Mediation Rules.<sup>279</sup> With regard to Rule 408's interplay with Rule 11,

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

ALA. R. EVID. 406.

273. *DeLeon v. Kmart Corp.*, 735 So. 2d 1214, 1218 (Ala. Civ. App. 1998) ("We doubt that the challenged testimony [that plaintiffs often called the police with trivial complaints] constitutes evidence of habit.").

274. *Ryan's Family Steakhouses, Inc. v. Brooks-Shades*, 781 So. 2d 215 (Ala. 2000).

275. That rule provides:

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

ALA. R. EVID. 408.

276. *SCHROEDER & HOFFMAN*, *supra* note 53, at 216.

277. "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." ALA. R. EVID. 102.

278. That rule states:

[A] party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property or to the effect specified in the offer, with costs then accrued. . . . An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

ALA. R. CIV. P. 68.

279. "The court shall neither inquire into, nor receive information about, [1] the positions of the parties taken in mediation proceedings; [2] the facts elicited or presented in mediation proceedings; or

consider the Alabama Court of Civil Appeals' recent decision and dissent in *Cain v. Saunders*.<sup>280</sup> In affirming the circuit court's rendition of judgment incorporating terms of the parties' settlement agreement after mediation, the majority agreed with the circuit court that evidence of mutual mistake occurring during the mediation proceedings was not admissible under Rule 11 of the Alabama Civil Court Mediation Rules.<sup>281</sup> In response, the dissent said:

Rule 11 [of the Alabama Civil Court Mediation Rules] contemplates that the views and admissions exchanged in the course of attempting to negotiate a mediated settlement will not be disclosed when that negotiation is *unsuccessful*. . . . In this regard, Rule 11 . . . is comparable to Rule 408. . . . Rule 408 does not preclude admission, in a subsequent judicial proceeding, of a compromise offer or a related statement proffered for some purpose other than the one specifically precluded (proof of validity or invalidity of the underlying claim). If the settlement agreement, itself, is being sued upon or asserted as a defense to a claim, Rule 408 does not apply.<sup>282</sup>

As to Rule 408's intrinsic policy purpose, that is, to exclude nonrelevant information from the factfinder's deliberations, the emphasis of a comprehensive analysis would fall, it seems, upon discretionary exclusion under Rule 403 rather than inferential exclusion under Rules 401 and 402.

Although Alabama precedents still do not afford examples even of the "such as" purposes elaborated in Rule 408's final sentence, post-Rules decisions have contributed two examples to the universe of permissible purposes imaginable, though not listed. In *HealthSouth Rehabilitation Corp. v. Falcon Management Co.*,<sup>283</sup> the Alabama Supreme Court held a letter contended without dispute to constitute an offer of compromise or settlement that occurred before trial properly admitted, not as an offer of compromise or settlement, but as impeachment evidence that directly refuted a statement made by a HealthSouth witness. In *Harris v. Aronov Realty Co., Inc.*,<sup>284</sup> the court implicitly held Aronov's letter offering to buy back the Harrises' allegedly haunted house admissible as proof of the Harrises' failure to mitigate damages. Three dissenters argued that the Harrises had no legal duty to mitigate damages and that the letter was concocted for the purpose of prejudicing the jury against the Harrises.<sup>285</sup>

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[3] the cause or responsibility for termination or failure of the mediation process." ALA. R. CIV. CT. MED. 11.

280. 813 So. 2d 891 (Ala. Civ. App. 2001).

281. *Cain*, 813 So. 2d at 893-95.

282. *Id.* at 904 (Murdock, J., dissenting).

283. 799 So. 2d 610 (Ala. 2001).

284. 723 So. 2d 610 (Ala. 1998).

285. *Harris*, 723 So. 2d at 610-17 (Cook, J., dissenting).

As an encore, consider the Alabama Supreme Court's tantalizing decision in *Ex parte The Water Works & Sewer Board of the City of Birmingham*.<sup>286</sup> In that case, the attorney general and one Wallace, a customer of the Board, intervened in the Board's declaratory judgment action and were aligned against the Board.<sup>287</sup> The attorney general and the Board negotiated a settlement and moved the circuit court for a consent order.<sup>288</sup> The court denied the consent order and granted Wallace's motion for the production of all communications between the attorney general and the Board with regard to the negotiations.<sup>289</sup> The Supreme Court granted the Board's petition for a writ of mandamus ordering the circuit court to set aside its discovery order, holding, *inter alia*, that Rule 408 proscribed the forced disclosure of those communications.<sup>290</sup>

The wisdom *vel non* of the decision and the cogency *vel non* of the opinion merit closer examination. Rule 408 appears among the relevancy rules, not among the privilege rules. It regulates admissibility at trial, not discoverability during pretrial. Even had the Board asserted its objection as one against admissibility at trial, it is not self-evident from the court's opinion (although it might be from the record on appeal) that the Board should have prevailed under Rule 408. From aught that appears, Wallace, a co-party of the attorney general, was not a party to the settlement negotiations. It seems unlikely that he would have offered evidence of the communications between others for Rule 408's forbidden purpose, that is, "to prove liability for or invalidity of [the Board's declaratory judgment] claim or its amount."<sup>291</sup> It seems more likely that he would have offered it to show how the settlement from which he had been excluded prejudiced his rights. However, the opinion shows no evidence that Wallace suggested a purpose for which even a redacted version of the settlement or communications leading to it might be admissible under Rule 408 as for "another purpose."<sup>292</sup> If hard pressed, the court would probably have fallen back on the old the-record-doesn't-show maneuver.

Rule 409<sup>293</sup> addresses the admissibility *vel non* of evidence showing payment of medical and similar expenses. Rule 409's bright-line exclusion is distinguished from Rule 408's bright-line exclusion in that the offer, promise, or payment here involved is not made during compromise negotiations, but is perceived to spring from the humane impulse to make another whole whether or not the Good Samaritan might be held legally liable.<sup>294</sup> Although it seems most natural for a sympathetic potential defendant to help

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286. 723 So. 2d 41 (Ala. 1998).

287. *Water Works*, 723 So. 2d at 42.

288. *Id.*

289. *Id.* at 43.

290. *Id.* at 44-45.

291. ALA. R. EVID. 408.

292. *Water Works*, 723 So. 2d at 41-45.

293. "Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury." ALA. R. EVID. 409.

294. SCHROEDER & HOFFMAN, *supra* note 53, at 219.

out with medical expenses, the common-law exclusion was not strictly limited to such expenses.<sup>295</sup> Time will define the limits of Rule 409's application to "similar expenses." For now, we have *Great Coastal Express, Inc. v. Atlantic Mutual Companies*.<sup>296</sup> Therein, "[a] truck stop and its insurer brought [a] negligence action against [a] truck driver's employer" for spilling diesel fuel at the truck stop.<sup>297</sup> After a bench trial, the circuit court rendered judgment for the plaintiffs.<sup>298</sup> In affirming that judgment, the Alabama Court of Civil Appeals said, "Moreover, the trial court could have considered the evidence that Great Coastal paid for certain clean-up expenses directly flowing from the act causing the rupture as an admission of liability."<sup>299</sup> The court explained, "Nothing in Rule 409 . . . disallows [evidence of] the payment of . . . expenses [other than medical, hospital, or similar expenses] arising out of an injury, *even if offered as probative of underlying liability*."<sup>300</sup>

No discovered appellate opinion has cited Alabama Rule 410 or 411 by number.

As was true of the rape-shield statute it absorbed, Rule 412 remains "lightly interpreted."<sup>301</sup> Research has revealed two post-Rules decisions. Both the Alabama Supreme Court<sup>302</sup> and the Alabama Court of Criminal Appeals<sup>303</sup> have reconfirmed the "Scottsboro exception."<sup>304</sup> In the same cases, both have reconfirmed the importance of following the procedure set out in Rule 412(d).<sup>305</sup>

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295. *Id.*

296. 790 So. 2d 966 (Ala. Civ. App. 2000).

297. *Great Coastal Express*, 790 So. 2d at 966.

298. *Id.* at 967.

299. *Id.* at 970.

300. *Id.* (citation omitted).

301. SCHROEDER & HOFFMAN, *supra* note 53, at 228.

302. *Ex parte D.L.H.*, 806 So. 2d 1190, 1192 (Ala. 2001) (but noting that evidence was properly excluded, "because the [defendant's] proffer was insufficient").

303. *Sherman v. State*, 778 So. 2d 859, 860 (Ala. Crim. App. 2000) (but noting that evidence was properly excluded, because defendant "failed to follow the procedure set out in Rule 412(d), in that he did not notify the court of his intent to introduce the testimony regarding the prior rape before he attempted to cross-examine the victim" and failed to lay a sufficient foundation).

304. SCHROEDER & HOFFMAN, *supra* note 53, at 228-29.

305. The Rule provides:

(d) The procedure for introducing evidence, as described in section (c) of this rule, shall be as follows:

(1) At any time before the defense shall seek to introduce evidence which would be covered by section (c) of this rule, the defense shall notify the court of such intent, whereupon the court shall conduct an in camera hearing to examine into the defendant's offer of proof. All in camera proceedings shall be included in their entirety in the transcript and record of the trial and case;

(2) At the conclusion of the hearing, if the court finds that any of the evidence introduced at the hearing is admissible under section (b) of this rule, the court shall by order state what evidence may be introduced by the defense at the trial of the case and in what manner the evidence may be introduced; and

(3) The defense may then introduce evidence pursuant to the order of the court.

ALA. R. EVID. 412(d).

THE FIVE HUNDREDS  
(PRIVILEGES)

Courts forego certain evidence or sources of evidence for reasons either intrinsic or extrinsic to the adjudicative process. The intrinsic reasons revolve chiefly around concerns for budgeting judicial time, accommodating the uneven rational capabilities of fact finders, and fostering the adversary system. The Rules regulating relevancy and hearsay afford ready examples of rules driven largely, if not solely, by intrinsic policy reasons. The extrinsic reasons are enforced by rules generally called privileges. Speaking broadly, courts enforce privileges because to do so is thought to encourage or reinforce certain extrajudicial behavior, or because it is thought immoral, indecent, or impolitic for courts to condone, reinforce, or participate in official invasions of personal privacy or other official wrongdoing. Because they promote policies that have nothing to do with juries, rules of privilege must be applied just as rigorously in judge-tried cases as they are in jury-tried cases. Because they promote policies, generally speaking, that have nothing to do with the merits of the controversies in which they are invoked, they are often disfavored or said to be so.

Only a party to the adjudication in which the evidence is offered may assert objections to evidence or sources of evidence based upon intrinsic reasons. Objections based upon extrinsic reasons (e.g., upon privileges) may be asserted only by the privilege holder, who may or may not be a party or a witness. The judge, however, may protect the privilege of an absent holder, and any party, witness, or other person may invite the judge to do so.

Rule 501 reads as follows:

Except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of Alabama, no person has a privilege to:

- (1) refuse to be a witness;
- (2) refuse to disclose any matter;
- (3) refuse to produce any object or writing; or
- (4) prevent another from being a witness or disclosing any matter or producing any object or writing.<sup>306</sup>

Research has revealed no post-Rules opinion citing Rule 501 by number.

Rule 502 embodies Alabama's contemporary attorney/client communications privilege.<sup>307</sup> Seven post-Rules opinions have cited Rule 502 by number. For expediency's sake, the following examination of those cases will set out in full only those sections of Rule 502 touched by one or more of the cases.

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306. ALA. R. EVID. 501.

307. See ALA. R. EVID. 502.

Rule 502(a)(1) establishes the following definition of the term "client":

(1) "CLIENT" is a person, public officer, or corporation, association, or other organization or entity, either public or private, that is rendered professional legal services by an attorney, or that consults an attorney with a view to obtaining professional legal services from the attorney.<sup>308</sup>

In *Ex parte City of Leeds*,<sup>309</sup> Miller sued the City of Leeds to recover damages sustained in a one-car accident on a city road. In preparation for trial, Miller deposed Courson, the former mayor of Leeds, who refused to disclose certain communications with Porter, attorney for the City of Leeds.<sup>310</sup> He asserted that he had sought Porter's legal advice in order to prepare for the deposition.<sup>311</sup> After a post-deposition hearing, the circuit court judge ordered Courson to answer questions about the communications.<sup>312</sup> Upon petition by Courson and the City, the supreme court issued a writ of mandamus ordering the circuit court to withdraw its order compelling disclosure, holding that Courson fell within Rule 502(a)'s definition of "client."<sup>313</sup> For aught that appears in the report, Courson was not a party to Miller's suit.<sup>314</sup> *Quaere* whether Courson and Porter thought Porter advised Courson as Courson's attorney or as attorney for the City of Leeds?

Rule 502(a)(4) establishes the following definition of the term "representative of the attorney":

(4) "REPRESENTATIVE OF THE ATTORNEY" is a person employed by the attorney to assist the attorney in rendering professional legal services.<sup>315</sup>

Is a person employed by a representative of the attorney also a "representative of the attorney"? The advisory committee's notes to Alabama Rule 502(a)(4) say: "Under preexisting Alabama case law and statutory law, the only representative held within the scope of the privilege was the attorney's clerk. . . . Rule 502 applies the privilege to any person employed by the attorney to assist in rendering professional legal services."<sup>316</sup>

In *Grimsley v. State*,<sup>317</sup> the Alabama Court of Criminal Appeals considered whether Rule 502 protected from disclosure "a communication made by [Grimsley] to an investigator who was employed by the paralegal, who

308. ALA. R. EVID. 502(a)(1).

309. 677 So. 2d 1171 (Ala. 1996).

310. *City of Leeds*, 677 So. 2d at 1172.

311. *Id.*

312. *Id.*

313. *Id.* at 1173.

314. *See id.* at 1172-74.

315. ALA. R. EVID. 502(a)(4).

316. ALA. R. EVID. 502(a)(4) advisory committee's note.

317. 678 So. 2d 1197 (Ala. Crim. App. 1996) (affirming first-degree robbery conviction).

worked for the attorney [whom Grimsley never retained] and who also had his own investigating firm.”<sup>318</sup> In holding it did not, the court quoted the passage from the advisory committee’s notes set out just above and elaborated: “Here, the investigator was the agent of the paralegal, who was the agent of the attorney. There was no showing that the attorney had any knowledge that his paralegal was using an investigator to make the initial contact with a potential client.”<sup>319</sup> This apparently settled the matter for the court, because “[t]he burden of establishing the privilege rests with the client or with the party objecting to the disclosure of the communication.”<sup>320</sup> Would Grimsley have made the communication had he known that the investigator did not have the prospective attorney’s authorization to act for the attorney on Grimsley’s behalf?

Rule 502(a)(5) establishes the following definition of the term “confidential communication”:

(5) A communication is “confidential” if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those to whom disclosure is reasonably necessary for the transmission of the communication.<sup>321</sup>

The Alabama Court of Criminal Appeals has said that Rule 502(a)(5)’s definition of the term “confidential” applies to Rule 505 as well.<sup>322</sup>

Pre-Rules decisions had established the following propositions. Whether a communication by a client to his attorney is privileged is a question of fact. The party objecting to the evidence must establish the relationship of attorney and client as well as other facts demonstrating the claim of privileged information.<sup>323</sup> In *Ex parte Cummings*,<sup>324</sup> the Alabama Supreme Court reconfirmed those propositions.

Rule 502(d)(1) establishes the following exception to the Rule’s protection:

318. *Grimsley*, 678 So. 2d at 1202.

319. *Id.* at 1202-03.

320. *Id.* at 1203 (citation omitted).

321. ALA. R. EVID. 502(a)(5).

322. *Tankersley v. State*, 724 So. 2d 557, 561 (Ala. Crim. App. 1998).

323. SCHROEDER & HOFFMAN, *supra* note 53, at 239.

324. 776 So. 2d 771, 775 (Ala. 2000) (“Martin has not established that those files contain privileged attorney-client communications . . .”). Concurring specially, Justice Lyons gave attorneys opposing discovery some advice about how to make a sufficient factual showing. *Cummings*, 776 So. 2d at 775-77 (Lyons, J., concurring); see also *Grimsley v. State*, 678 So. 2d 1197, 1202-03 (Ala. Crim. App. 1996). The *Grimsley* opinion states:

There was no showing that the attorney had any knowledge that his paralegal was using an investigator to make the initial contact with a potential client. . . . The burden of establishing the privilege rests with the client or with the party objecting to the disclosure of the communication.

*Grimsley*, 678 So. 2d at 1202-03 (citation omitted). Cf. *Darwin Dobbs Co. v. Wesson*, 714 So. 2d 989 (Ala. Civ. App. 1997).

(d) *Exceptions*. There is no privilege under this rule:

(1) FURTHERANCE OF CRIME OR FRAUD. If the services of the attorney were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud . . . .<sup>325</sup>

The Alabama Court of Criminal Appeals has said that Rule 502(d)(1)'s exception for communications seeking or giving advice about committing or furthering a crime applies to Rule 505 as well.<sup>326</sup>

Rule 502(d)(3) establishes the following exception to the Rule's protection:

(d) *Exceptions*. There is no privilege under this rule: . . .

(3) BREACH OF DUTY BY AN ATTORNEY OR CLIENT. As to a communication relevant to an issue of breach of duty by an attorney to the client or by a client to the client's attorney . . . .<sup>327</sup>

The Alabama Court of Criminal Appeals has invoked this exception in its post-Rules decision in *State v. Click*.<sup>328</sup>

Rule 503 sets out Alabama's current psychotherapist-patient privilege.<sup>329</sup> Two post-Rules opinions have cited Rule 503 by number. Neither of those decisions, however, focuses sharply upon any specific provision of Rule 503 or, indeed, upon the Rule itself.<sup>330</sup> An explanation for this apparent lack of judicial focus on the Rule begins to emerge in the following paragraph.

Pre-Rules Alabama law included a statutory privilege for communications between patients or clients and their licensed psychiatrists, licensed psychologists, or licensed psychological technicians.<sup>331</sup> That statute, which apparently now coexists with Rule 503, placed (and apparently still places) communications between licensed psychiatrists, licensed psychologists, or licensed psychological technicians and their patients or clients upon the same privileged basis as communications between attorneys and clients.<sup>332</sup>

325. ALA. R. EVID. 502(d)(1).

326. *Tankersley*, 724 So. 2d at 561.

327. ALA. R. EVID. 502(d)(3).

328. 768 So. 2d 417, 421 (Ala. Crim. App. 1999) The court stated:

Click raised a multitude of allegations in his postconviction petition that his attorney's conduct, both at trial and on appeal, was ineffective. . . . A postconviction petitioner who raises a Sixth Amendment claim of ineffective assistance of counsel "waives the attorney-client privilege as to matters reasonably related to the claim of inadequate representation."

*Click*, 768 So. 2d at 421 (citing federal precedent and ALA. R. EVID. 502(d)(3)).

329. ALA. R. EVID. 503.

330. For that reason, neither the text of the Rule nor specific passages thereof are set out here.

331. ALA. CODE § 34-26-2 (1997).

332. *See id.* ("confidential relations and communications . . . are placed upon the same basis as those provided by law between attorney and client"); *Ex parte Pepper*, 794 So. 2d 340 (Ala. 2001) (acknowledging Rule 503, but relying principally upon ALA. CODE § 34-26-2); *Ex parte Etherton*, 773 So. 2d 431 (Ala. 2000) (four justices arguing that courts must interpret Rule 503 in light of ALA. CODE § 34-26-2); *see also Crawford v. State*, 377 So. 2d 145, 157 (Ala. Crim. App. 1979) (noting that by analogy to the

True, the advisory committee's notes to Rule 503 do, at one point, refer to "the preexisting statute to which Rule 503 is the successor."<sup>333</sup> Read whole, however, the Notes seem ambivalent about whether Rule 503 succeeds or coexists with the statute and its gloss.<sup>334</sup> As the two post-Rules judicial pronouncements have done,<sup>335</sup> this essay supposes, at least for the time being, that the Rule and the statute plus its judicial gloss co-exist on terms deferential to the statute.

Pre-Rules interpretations of the statute recognized that it existed for the benefit of the patient, not the professional, but accommodated assertions by either the patient or the professional. In either event, however, the privilege could be asserted only on the patient's behalf. Courts acknowledged the importance of the statutory privilege. The Alabama Supreme Court declined to create an exception to the privilege's coverage even where a plaintiff put his mental condition at issue in a civil action for damages against someone other than his psychotherapist.<sup>336</sup>

Nevertheless, pre-Rules interpretations did not deem the statutory privilege absolute. It did not apply to prevent disclosure of the fact of treatment itself by a psychologist. Moreover, in the context of child custody actions, the Alabama Court of Civil Appeals held that the privilege had to yield "where the issue of the mental state of a party to a custody suit is clearly in controversy, and a proper resolution of the custody issue requires disclosure of privileged medical records."<sup>337</sup>

The pre-Rules statutory privilege could, it was said, be waived but only the client could do so and, should the client choose to do so, the consent of the professional was not required.<sup>338</sup> The waiver could be implicit, as where the privilege-holder commenced a civil action putting his mental state at issue or signed an order of probation in which psychological counseling was a condition of probation.<sup>339</sup> However, in order to impliedly waive the privilege, it was said, the privilege holder had to have objectively manifested a clear intent not to rely upon the privilege.<sup>340</sup> Similarly, although a plea of not guilty by reason of insanity did not, in itself, constitute a waiver, the

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attorney-client privilege, a court ordered mental examination whose results were to be reported to the court is not encompassed within the patient-psychiatrist privilege), *aff'd*, 377 So. 2d 159 (Ala. 1979). And finally, see ALA. CODE § 10-4-391 (1999) (privilege is preserved where psychotherapist belongs to a professional corporation and privilege is extended to a professional corporation of which an individual psychotherapist is a member). Medical records created during the existence of the psychiatrist-patient relationship are encompassed within the privilege. *Ex parte* Rudder, 507 So. 2d 411, 413 (Ala. 1987).

333. ALA. R. EVID. 503 advisory committee's note.

334. *See id.*

335. *See Pepper*, 794 So. 2d at 340 (acknowledging Rule 503, but relying principally upon ALA. CODE § 34-26-2); *Etherton*, 773 So. 2d at 431 (four justices arguing that courts must interpret Rule 503 in light of ALA. CODE § 34-26-2).

336. SCHROEDER & HOFFMAN, *supra* note 53, at 246.

337. *Id.* at 247.

338. *Id.*

339. *Id.*

340. *Id.*

presentation of evidence of insanity could raise a question of waiver.<sup>341</sup> By actively pursuing an insanity defense and introducing testimony by qualified psychologists and psychiatrists as defense witnesses, a defendant waived any potential psychotherapist privilege he may have had.<sup>342</sup> In addition, by the letter of the Alabama Crime Victim's Compensation Act, any person filing a claim thereunder thereby waives any privilege as to any communications or records relevant to his physical, mental, or emotional condition. And where a physician voluntarily relayed privileged information to a third person, the privilege holder could prevent that person from disclosing it in a judicial proceeding.<sup>343</sup>

The word "waiver" nowhere appears in Rule 503.<sup>344</sup> Nor does it appear in Rule 502, the Rule whose terms Alabama Code section 34-26-2 incorporates by reference.<sup>345</sup> Rule 510, however, provides as follows:

A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.<sup>346</sup>

Thus, even without the good offices of section 34-26-2's provision that waiver occurs thereunder "upon the same basis . . . provided by law between attorney and client,"<sup>347</sup> a Rule 503 privilege-holder may waive the privilege on terms applied in common to all the privileges conferred by "these rules," including Rule 502.<sup>348</sup>

Rule 510 and section 34-26-2 are not the only sources of law bearing upon waiver under Rule 503. First, there is Alabama Code section 15-23-11(a): "Any person filing a claim under the provisions of this article [the Alabama Crime Victim's Compensation Act] shall be deemed to have waived any physician-patient privilege as to communications or records relevant to an issue of the physical, mental or emotional conditions of the claimant."<sup>349</sup>

Second, there is the pre-Rules caselaw surveyed in preceding paragraphs. Finally, there are the two post-Rules cases next examined.

The Alabama Supreme Court has left little wiggle room for recognizing an implied waiver of the psychotherapist-patient privilege embodied by

341. Schroeder & Hoffman, *supra* note 53, at 247.

342. *Id.*

343. *Id.*

344. See ALA. R. EVID. 503.

345. See ALA. R. EVID. 502.

346. ALA. R. EVID. 510.

347. ALA. CODE § 34-26-2 (1995).

348. See ALA. R. EVID. 510.

349. ALA. CODE § 15-23-11(a) (1995). This Article leaves aside for the time being the neo-textualist quibble that this statute has no field of operation because Alabama has no physician-patient privilege.

Rule 503 and section 34-26-2. In *Ex parte Pepper*,<sup>350</sup> Smith sued Pepper to recover damages for personal injuries allegedly sustained when Pepper's vehicle rear-ended Smith's vehicle. Before bringing suit, Smith had consulted Dr. Berke, an orthopedic surgeon, about neck and back pain and headaches.<sup>351</sup> Dr. Berke had referred Smith to Dr. Meneese, a neuropsychologist.<sup>352</sup> His report back to Dr. Berke suggested that Smith's complaints had causes antedating her collision with Pepper.<sup>353</sup> During pretrial preparation, Pepper noticed Dr. Meneese's deposition.<sup>354</sup> At the last minute, Smith asserted the psychotherapist-patient privilege.<sup>355</sup> The circuit court denied Pepper's motion to compel the deposition.<sup>356</sup> Pepper petitioned for mandamus.<sup>357</sup> A panel of the supreme court denied the petition on the ground that "Pepper has failed to meet his burden of showing 'a clear legal right' to depose Dr. Meneese."<sup>358</sup> The court routinely recited the so-called burden of showing a clear legal right to this or that kind of judicial action as a requirement of mandamus procedure, not of the law of privilege.<sup>359</sup> As to the privilege itself, the court declined to recognize an exception "to be applied where a party seeks information relevant to the issue of the proximate cause of another party's injuries."<sup>360</sup> The opinion acknowledged Rule 503, but relied principally upon Alabama Code section 34-26-2, which provides that the confidential relations and communications protected by it "are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed."<sup>361</sup>

In *Ex parte Etherton*,<sup>362</sup> a dental malpractice action, Plaintiff subpoenaed all records related to the treatment of Dr. Etherton for drug dependency. The circuit court refused to quash the subpoena, ruling that Etherton had waived the psychotherapist-patient privilege by disclosing, on deposition, "significant parts of the matters he now claims are privileged."<sup>363</sup> The supreme court denied Etherton a writ of mandamus.<sup>364</sup> Four Justices thought Etherton had not waived the privilege, saying:

[A] "client does not waive the attorney-client privilege . . . by disclosing the subject discussed without revealing the substance of the

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350. 794 So. 2d 340 (Ala. 2001).

351. *Pepper*, 794 So. 2d at 341.

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Pepper*, 794 So. 2d at 342.

357. *Id.*

358. *Id.* at 345.

359. *Id.* at 343-45.

360. *Id.* at 344.

361. ALA. CODE § 34-26-2 (1997).

362. 773 So. 2d 431 (Ala. 2000).

363. *Etherton*, 773 So. 2d at 434.

364. *Id.* at 436.

discussion itself." Likewise, here, Dr. Etherton's acknowledging the fact that he has a chemical-dependency problem and that he has been treated for it, even to the extent of acknowledging the chemical substances involved but "without revealing the substance of the discussion itself," should not be viewed as a waiver of the privilege of nondisclosure of the confidential communications between the psychotherapist and the patient.<sup>365</sup>

The same four, however, saying that "the records in issue here are perhaps [the plaintiff's] only source of relevant evidence," qualified the privilege and suggested that the circuit court review the records *in camera* for "anything contained in the disputed records [that] is discoverable."<sup>366</sup> Four other judges concurred in the result, but did not agree, "to adopt a qualification of the psychotherapist-patient privilege, because § 34-26-2 . . . requires that that privilege be placed on the same basis as the attorney-client privilege."<sup>367</sup> The ninth Justice joined neither camp, concurring only in the result.

Rule 503A, embodying Alabama's client-counselor privilege, has been cited by number in one post-Rules opinion. In *Slaton v. Slaton*,<sup>368</sup> a divorce proceeding, the Alabama Court of Civil Appeals affirmed the circuit court's judgment, concluding that "the psychologist or counselor's privilege must yield when questions of visitation are raised in a divorce proceeding."<sup>369</sup> Saying that the "husband put his mental state at issue by seeking visitation,"<sup>370</sup> the court held the trial court had not erred "when it admitted into evidence and considered the records and testimony of his licensed professional counselor [which, husband had contended,] was privileged under [Alabama Code section] 15-23-40 [one progenitor of Rule 503A]."<sup>371</sup>

Rule 504, which perpetuates Alabama's husband/wife communications privilege,<sup>372</sup> can boast only one post-Rules citation by number. In *Hall v.*

365. *Id.* at 435.

366. *Id.* at 436.

367. *Id.*

368. 682 So. 2d 1056 (Ala. Civ. App. 1996).

369. *Slaton*, 682 So. 2d at 1058.

370. *Id.* at 1056.

371. *Id.*

372. The Rule provides:

(a) *Definition of "confidential" communication.* A communication is "confidential" if it is made during marriage privately by any person to that person's spouse and is not intended for disclosure to any other person.

(b) *General rule of privilege.* In any civil or criminal proceeding, a person has a privilege to refuse to testify, or to prevent any person from testifying, as to any confidential communication made by one spouse to the other during the marriage.

(c) *Who may claim the privilege.* The privilege may be claimed by either spouse, the lawyer for either spouse in that spouse's behalf, the guardian or conservator of either spouse, or the personal representative of a deceased spouse. The authority of those named to claim the privilege in the spouse's behalf is presumed in the absence of evidence to the contrary.

(d) *Exceptions.* There is no privilege under this rule:

(1) **PARTIES TO A CIVIL ACTION.** In any civil proceeding in which the spouses are adverse parties.

*State*,<sup>373</sup> the Alabama Court of Criminal Appeals reversed Hall's conviction for murder for error in admitting his former wife's testimony relating a communication Hall had made to her during the marriage. The court first examined the circuit court's reasoning, saying "[T]he trial court found that Hall had made the [incriminating] statement [to his then-wife] in anticipation of the murder being discussed when Wesley and Singleton arrived and that, therefore, Hall had not intended the statement to remain confidential."<sup>374</sup> It then corrected the circuit court's mistake, concluding, "Hall's statement to [his then-wife] was made in the confidence of the marital relationship, without any intention that it be disclosed."<sup>375</sup>

The court did reject "Hall's contention that the trial court also erred in allowing [his former wife] to testify that she had seen Hall in possession of 'large amounts of money' [during the marriage and shortly after the murder.]"<sup>376</sup> The court said:

[O]ur review of the record reveals that no evidence was presented to indicate the circumstances under which [Hall's then-wife] allegedly came to observe the money in Hall's possession. Although the husband-wife privilege for confidential communications applies not only to statements but, in appropriate circumstances, also to knowledge acquired by one spouse's observation of an act of the other in private, there is nothing to indicate that Hall's act of having the money in [his then-wife's] presence grew out of the confidence inspired by their marital relationship. . . . Thus, we cannot say that the trial court erred in allowing [Hall's former wife] to testify concerning her observations.<sup>377</sup>

"Moreover," said the court, "Hall waived the protection of that privilege when he . . . voluntarily disclosed a 'significant part' of the matter he claims was [privileged]," when he told an investigator after the murder and testified again at trial that another had killed the victim and given Hall a large part of the money stolen from the victim."<sup>378</sup> Finally, any error there might have been was harmless for the same reason.<sup>379</sup>

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(2) FURTHERANCE OF CRIME. In any criminal proceeding in which the spouses are alleged to have acted jointly in the commission of the crime charged.

(3) CRIMINAL ACTION. In a criminal action or proceeding in which one spouse is charged with a crime against the person or property of (A) the other spouse, (B) a minor child of either, (C) a person residing in the household of either, or (D) a third person if the crime is committed in the course of committing a crime against any of the persons previously named in this sentence.

ALA. R. EVID. 504.

373. 720 So. 2d 1043 (Ala. Crim. App. 1998).

374. *Hall*, 720 So. 2d at 1046.

375. *Id.* at 1048.

376. *Id.* at 1049.

377. *Id.*

378. *Id.* at 1049-50.

379. *Hall*, 720 So. 2d at 1050.

Rule 505 perpetuates Alabama's privilege for communications to clergymen in the following words:

(a) *Definitions.* As used in this rule:

(1) A "clergyman" is any duly ordained, licensed, or commissioned minister, pastor, priest, rabbi, or practitioner of any bona fide established church or religious organization; the term "clergyman" includes, and is limited to, any person who regularly, as a vocation, devotes a substantial portion of his or her time and abilities to the service of his or her church or religious organization.

(2) A communication is "confidential" if it is made privately and is not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) *General rule of privilege.* If any person shall communicate with a clergyman in the clergyman's professional capacity and in a confidential manner, then that person or the clergyman shall have a privilege to refuse to disclose, and to prevent another from disclosing, that confidential communication.

(c) *Who may claim the privilege.* The privilege may be claimed by the communicating person, by that person's guardian or conservator, or by that person's personal representative if that person has died, or by the clergyman.<sup>380</sup>

In *Tankersley v. State*,<sup>381</sup> the Alabama Court of Criminal Appeals said that Rule 502's definition of the term "confidential" and Rule 502(d)(1)'s exception for communications seeking or giving advice about committing or furthering a crime apply to Rule 505 as well.<sup>382</sup> The court went on:

Because we agree that a privilege should not be used where to do so would allow the commission of future violent crimes, we hold that threats of violence toward third parties that are revealed to clergy are not covered by the "communications to clergyman" privilege and that clergy may testify to those threats in subsequent proceedings. . . . The policy of preventing violence from occurring strongly outweighs the value of confidentiality.<sup>383</sup>

The court, in *Tankersley*, also suggested another kind of factual showing that could strip a communication of its protection under Rule 505. It said, "If the statements are 'conversational' in that they were made to the other

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380. ALA. R. EVID. 505.

381. 724 So. 2d 557 (Ala. Crim. App. 1998).

382. *Tankersley*, 724 So. 2d at 561.

383. *Id.* at 562.

person as a friend regardless of that person's status as clergy, then the statements were not subject to privilege."<sup>384</sup>

Rule 506 perpetuates the pre-Rules protection against discovery of a person's lawfully cast vote. Research has revealed no post-Rules opinion citing Rule 506 by number.

Rule 507 establishes a privilege protecting trade secrets from disclosure.<sup>385</sup> It reads as follows:

A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and the interests of justice require.<sup>386</sup>

In the action underlying *Ex parte Warrior Lighthouse, Inc.*,<sup>387</sup> Warrior sued Drummond on numerous theories for "damage caused to [its] property [a marina] by Drummond's [longwall] coal [mining] operations at its Shoal Creek mine."<sup>388</sup> Warrior sought discovery of a copy of a contract for the sale of coal between Alabama Power and Drummond. The circuit court declined to order discovery. On Warrior's petition, the Alabama Supreme Court issued a writ of mandamus with alternative instructions:

First, Drummond is entitled to insist on a confidentiality agreement limiting disclosure only to parties essential to the litigation. Alternatively, Drummond could be permitted to defer disclosure while discovery proceeds on all matters without disclosing the terms of the contract, and be allowed thereafter to contend, in light of a more developed record, that compelling justification exists to reexamine this Court's conclusion that, at this stage of the proceedings, the contract is relevant.<sup>389</sup>

At least arguably, this first application of Rule 507 appropriately reflects the spirit of the Rule.

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384. *Id.* at 561.

385. "While no trade secret privilege, assertable at trial, has been recognized under preexisting Alabama law, such a privilege is consistent with the policy found in other, related principles." ALA. R. EVID. 507 advisory committee's note.

386. ALA. R. EVID. 507.

387. 789 So. 2d 858 (Ala. 2001).

388. *Warrior Lighthouse*, 789 So. 2d at 859.

389. *Id.* at 861.

Research has revealed no post-Rules opinion citing Rule 508 (secrets of state and other official information: governmental privileges)<sup>390</sup> or Rule 509 (identity of informer)<sup>391</sup> by number.

Rule 510 provides for waiver by voluntary disclosure of any article 5 privilege, saying:

A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.<sup>392</sup>

Judicial interpretation of Rule 510's words "any significant part" begins to take shape. In *Ex parte Etherton*,<sup>393</sup> a dental malpractice action, the plaintiff subpoenaed all records related to the treatment of Dr. Etherton for drug dependency. The circuit court refused to quash the subpoena, ruling that Etherton had waived the psychotherapist-patient privilege by disclosing, on deposition, "significant parts of the matters he now claims are privileged."<sup>394</sup> The supreme court denied Etherton a writ of mandamus, holding that Etherton had not waived the privilege.<sup>395</sup> Speaking for a unanimous court on this point, the first opinion said:

[A] "client does not waive the attorney-client privilege . . . by disclosing the subject discussed without revealing the substance of the discussion itself." . . . [H]ere, Dr. Etherton's acknowledging the fact that he has a chemical-dependency problem and that he has been treated for it, even to the extent of acknowledging the chemical substances involved but "without revealing the substance of the discussion itself," should not be viewed as a waiver of the privilege of nondisclosure of the confidential relations and communications between the psychotherapist and the patient.<sup>396</sup>

In *Hall v. State*,<sup>397</sup> the Alabama Court of Criminal Appeals said:

As to Hall's contention that the trial court erred in allowing [Hall's former wife] to testify that she had seen Hall in possession of 'large amounts of money' [during the marriage and shortly after the murder]. . . . Hall waived the protection of that privilege when he . . .

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390. See ALA. R. EVID. 508.

391. See ALA. R. EVID. 509.

392. ALA. R. EVID. 510.

393. 773 So. 2d 431 (Ala. 2000).

394. *Etherton*, 773 So. 2d at 434.

395. *Id.* at 434-35.

396. *Id.* at 435.

397. 720 So. 2d 1043 (Ala. Crim. App. 1998).

voluntarily disclosed a “significant part” of the matter he claims was [privileged.]<sup>398</sup>

He did so by telling an investigator after the murder and testifying again at trial that another person had killed the victim and given Hall a large part of the money stolen from the victim.<sup>399</sup> Furthermore, the court concluded, any error there might have been was harmless for the same reason.<sup>400</sup> Notwithstanding these conclusions against Hall, the court reversed his conviction for murder on other grounds.<sup>401</sup>

Research has revealed no opinion citing, by number, Rule 511 (privileged matter disclosed under compulsion or without opportunity to claim privilege),<sup>402</sup> Rule 512 (comment upon or inference from claim of privilege in criminal cases; instruction),<sup>403</sup> or Rule 512A (comment upon or inference from claim of privilege in civil cases).<sup>404</sup>

#### THE SIX HUNDREDS (WITNESSES)

Rule 601 reiterates the theme established by Rule 102 and sets the tone for the 600s. It says, “Every person is competent to be a witness except as otherwise provided in these rules.”<sup>405</sup>

These words establish a general rule of competency. By fair implication, Rule 601 sweeps away with one stroke the remnant testimonial incompetencies of the common law. Whether Alabama’s “Dead Man Statute” has survived the stroke awaits determination by the Alabama Supreme Court, which—at last look—had not yet addressed the question. True, in *Beddingfield v. Central Bank of Alabama*,<sup>406</sup> a pre-Rules decision, the court did decline to declare Alabama’s statute unconstitutional, but it went on to say, “Additionally, the court takes notice of the fact that Rule 601 of the Federal Rules of Evidence completely rejects the principle of dead man statutes, as does Rule 601 of the Uniform Rules of Evidence, which has been adopted by at least twenty jurisdictions.”<sup>407</sup> Whether this pre-Rules signal foreordains the statute’s ultimate fate remains to be seen. The best argument in support of the old remnant’s present viability, any elaboration of which must await another occasion, would seem to entail characterizing the statute as substantive, characterizing Rule 601 as procedural, and then standing

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398. *Hall*, 720 So. 2d at 1049-50.

399. *Id.*

400. *Id.* at 1050.

401. *Id.*

402. See ALA. R. EVID. 511.

403. See ALA. R. EVID. 512.

404. See ALA. R. EVID. 512A.

405. ALA. R. EVID. 601.

406. 440 So. 2d 1051 (Ala. 1983).

407. *Beddingfield*, 440 So. 2d at 1052.

upon the proposition that the Alabama Supreme Court had, and has, no authority to repeal a substantive rule of law by promulgating a procedural rule.

In one of the two discovered post-Rules opinions citing Rule 601 by number, *Drinkard v. State*,<sup>408</sup> the Alabama Court of Criminal Appeals seems to have supposed that that Rule, rather than Rule 609(a), which it did not cite, effected the repeal of Alabama's pre-Rules "moral turpitude" standard.<sup>409</sup> That standard, of course, defined the crimes, evidence of conviction for which would be admitted for the purpose of attacking the credibility of a witness.

In the other, *Blume v. Durrett*,<sup>410</sup> the Alabama Court of Civil Appeals addressed a question which, according to anecdotal reports, has been much mooted among Alabama's circuit court judges. That is, does Rule 601 leave trial judges no discretion to exclude as incompetent the testimony of very young children? That court reversed the trial court's order changing child custody from the former wife to the former husband for error in limiting testimony to that testimony reporting events occurring during a prescribed period of time.<sup>411</sup> In the appellate court's opinion, the trial judge had not transgressed the Rule 601 presumption that all witnesses are competent by excluding testimony by one of the couple's two children.<sup>412</sup> The court said:

The trial judge should have examined the child to determine the child's maturity and competency to testify because of the presumption of competency of witnesses. However, during a custody proceeding, a child is a ward of the court and the trial judge has wide discretion in protecting the child. . . . It was within the discretion of the trial judge to protect the minor from any trauma associated with testifying in open court. [The mother had objected to *in camera* examination].<sup>413</sup>

The court concluded: "A determination on the issue of competency or a more clear designation of the reason that the judge disallowed the minor's testimony is advisable on remand."<sup>414</sup>

Rule 602 requires that witnesses have personal knowledge of the propositions of fact to which they testify. It says:

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. This rule is sub-

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408. 777 So. 2d 225 (Ala. Crim. App. 1998).

409. ALA. CODE § 12-21-162(b) (1995).

410. 703 So. 2d 986 (Ala. Civ. App. 1997).

411. *Blume*, 703 So. 2d at 989-90.

412. *Id.* at 989.

413. *Id.* at 989-90.

414. *Id.* at 990.

ject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.<sup>415</sup>

Research has revealed two post-Rules opinions citing Rule 602 by number. In *Griffin v. State*,<sup>416</sup> the Alabama Court of Criminal Appeals demonstrated an easy textbook example of Rule 602's application. In addressing one of several reasons for affirming Griffin's conviction for capital murder, that court said: "[T]he state laid the proper foundation for Spragg's testimony by establishing that Spragg had personal knowledge of Bimbo's beeper number."<sup>417</sup> In *Allen v. Hill*,<sup>418</sup> on the other hand, the Alabama Court of Civil Appeals explored the lower limits of Rule 602's sufficiency requirement. In affirming a judgment for money damages allegedly sustained in an automobile accident, the court found occasion to say, "Because Bass's testimony [about what happened before Hill's vehicle entered the intersection] is rationally based on his own perceptions of the accident as it happened, it also satisfies the personal knowledge requirement of Rule 602," even though "other testimony by Bass indicated that he saw Hill's automobile only after it had entered the intersection."<sup>419</sup> On this state of the proofs, of course, the jurors could have rejected Bass's testimony about what happened before Hill's vehicle entered the intersection. That is, they could have concluded that Bass's testimony about what happened before Hill's vehicle entered the intersection rested not upon his own sense impressions, but upon inferences therefrom, which the jurors preferred to assess for themselves.

Research has revealed no post-Rules opinion citing by number Rule 603 (oath or affirmation),<sup>420</sup> Rule 604 (interpreters),<sup>421</sup> or Rule 605 (competency of judge as witness).<sup>422</sup>

Rule 606 addresses the competency *vel non* of jurors as witnesses. It has been only lightly interpreted.

Rule 606(a) provides:

(a) *At the trial.* A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party shall be afforded an opportunity to object out of the presence of the jury.<sup>423</sup>

Research has revealed no post-Rules opinion citing Rule 606(a) by number. According to the advisory committee's notes, Rule 606(a) supersedes Ala-

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415. ALA. R. EVID. 602.  
 416. 790 So. 2d 267 (Ala. Crim. App. 1999).  
 417. *Griffin*, 790 So. 2d at 296.  
 418. 758 So. 2d 574 (Ala. Civ. App. 1999).  
 419. *Allen*, 758 So. 2d at 576.  
 420. See ALA. R. EVID. 603.  
 421. See ALA. R. EVID. 604.  
 422. See ALA. R. EVID. 605.  
 423. ALA. R. EVID. 606(a).

bama Code section 12-16-7 "insofar as it is interpreted as rendering jurors qualified to be witnesses during the trials in which they sit."<sup>424</sup>

Rule 606(b) provides:

(b) *Inquiry into validity of verdict or indictment.* Upon an inquiry into the validity of a verdict or indictment, a juror may not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. Nothing herein precludes a juror from testifying in support of a verdict or indictment.<sup>425</sup>

Research has revealed three post-Rules opinions citing Rule 606(b) by number. Two of the three acknowledge in whole or in part the reasons underlying Rule 606(b)'s prohibition.

In *Jones v. State*,<sup>426</sup> the Alabama Court of Criminal Appeals affirmed Jones's conviction for capital murder and the circuit court's denial of post-judgment relief. It found "no merit to Jones's claim [that a juror's statement . . . improperly persuaded others to sentence him to death] because it was based on prohibited testimony," saying, "A consideration of the claim would destroy the integrity of the jury system, encourage the introduction of unduly influenced juror testimony after trial, and discourage jurors from freely deliberating, and inhibit their reaching a verdict without fear of post-trial harassment, publicity, or scrutiny."<sup>427</sup>

On the same theme, the Alabama Supreme Court has rejected an appealing party's argument "that the four affidavits attacking the verdict also prove that the verdict was not unanimous[]" on the ground that "[t]hese affidavits provoke the 'swearing match' to which Rule 606(b) . . . is directed."<sup>428</sup>

The third of the three decisions addresses, though not too helpfully, Rule 606(b)'s exception permitting proof of "extraneous prejudicial information" in an inquiry into the validity of a verdict or indictment. In *Sharrief*

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424. ALA. R. EVID. 606(a) advisory committee's note.

425. ALA. R. EVID. 606(b).

426. 753 So. 2d 1174 (Ala. Crim. App. 1999).

427. *Jones*, 753 So. 2d at 1204.

428. *Lance, Inc. v. Ramanauskas*, 731 So. 2d 1204, 1214 (Ala. 1999) (conditionally affirming judgment for wrongful death rendered on jury verdict).

*v. Gerlach*,<sup>429</sup> a medical malpractice action, the Alabama Supreme Court affirmed a judgment on a jury verdict for the defendant, Dr. Gerlach. The court said, "The trial court did not abuse its discretion in denying the plaintiffs' posttrial motions seeking discovery regarding the jury's deliberations."<sup>430</sup> The opinion explained:

Nothing contained in the affidavits indicates the jury considered any extraneous facts. All the statements in the affidavits relate to evidence that was presented at trial or to information that was otherwise brought to the attention of the jury during the trial. The affidavits provide no evidence that the jury consulted any outside sources of information regarding the definition of "standard of care," or regarding any other matter. Nothing in either of the affidavits indicates that the jury, or any particular juror, was influenced by any outside source.<sup>431</sup>

The opinion does perhaps reflect the legal community's general understanding of the bounds-in-gross defined by the term "extraneous." Without help from the record itself, however, the readership cannot assess how well the court's conclusory assertions fit the facts actually before it.

Rule 607 provides, "The credibility of a witness may be attacked by any party, including the party calling the witness."<sup>432</sup> Of Rule 607 one might well say it has worked the greatest of changes, it has worked the least of changes. Pre-Rules Alabama law started from the premise that the party calling a witness could not attack that witness's credibility. Rule 607 starts from the premise that any party, including the party who called the witness, can attack a witness's credibility. On its face, this looks like a sea change. But the pre-Rules "general rule" had become, over time, so riddled with exceptions and qualifications that it remained only a veritable Swiss cheese of a rule at the end.

At common law and under Alabama's pre-Rules practice, a party who called a witness thereby vouched for that witness's credibility and, therefore, in the absence of surprise or other unusual circumstances could not impeach that witness by showing that the witness was unworthy of belief or by proving through other witnesses that the first witness had made contradictory statements.<sup>433</sup> However, for purposes of showing surprise or for refreshing his witness's recollection, a party could ask his witness if he had made prior statements contrary to his instant testimony, and could elicit the contents of the statement, and this was permissible even though its incidental effect was to impeach the witness's testimony.<sup>434</sup> The statements in ques-

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429. 798 So. 2d 646 (Ala. 2001).

430. *Sharrief*, 798 So. 2d at 653.

431. *Id.*

432. ALA. R. EVID. 607.

433. SCHROEDER & HOFFMAN, *supra* note 53, at 303.

434. *Id.*

tion were neither treated as evidence of the facts in the case nor received for purposes other than contradicting the witness, and if the witness denied making the prior inconsistent statements, the party could not call other witnesses to prove the contents of the prior statements.<sup>435</sup>

A party could impeach his own witness if the trial court determined that the witness was hostile or adverse. It remained unclear whether "surprise" was also required when hostility or adverseness was the theory upon which a party chose to proceed. Whether to label a witness as adverse rested largely in the discretion of the trial court. However, there had to be some evidence before the court that would permit such a finding, and the "simple fact that a witness's statements at trial [were] not the same as those previously made [did] not create adverseness."<sup>436</sup> If a witness was found to be hostile or adverse, the party could call other witnesses to prove the contents of prior inconsistent statements. Presumably, a party could also use any other proper method of impeachment.<sup>437</sup>

The rule barring impeachment of one's own witness did not bar a party from correcting or contradicting the testimony of his own witness, and such contradiction could be made without laying a foundation or showing surprise.<sup>438</sup> Thus, a party was not precluded by his witness's unexpectedly adverse or hostile testimony from proving that the facts in issue were not as stated by that witness.<sup>439</sup>

A special rule applied to depositions. The Alabama Supreme Court held that "any party can use a deposition to impeach any witness at any time," however, a proper foundation first had to be laid, and the evidence had to relate to a material issue.<sup>440</sup>

Any party could impeach a witness called by the court.<sup>441</sup> A witness called by a second party after having been previously called became the second party's witness and could not be impeached by that party.<sup>442</sup> However, the trial court had discretion to allow a witness to be recalled to lay a foundation for his impeachment, and an adverse witness thus recalled did not thereby become the witness of the party recalling him.<sup>443</sup>

After all the exceptions and qualifications had nibbled away most of the old voucher rule, this much still remained. A party could not contradict his own witness where the only effect of the contradiction was to impeach the witness and not to provide any material evidence upon any issue in the case. A party could not call a witness whom he knew would not give useful evi-

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435. *Id.*

436. *Id.*

437. *Id.*

438. SCHROEDER & HOFFMAN, *supra* note 53, at 303.

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

443. SCHROEDER & HOFFMAN, *supra* note 53, at 303.

dence for the sole purpose of introducing otherwise inadmissible evidence in the guise of impeachment.<sup>444</sup>

That much still remains under Rule 607. Post-Rules judicial decisions make this clear.

In two cases, the Alabama Court of Criminal Appeals has found attorneys guilty of abusing Rule 607's new dispensation. In *Ritchie v. State*,<sup>445</sup> that court reversed a conviction for first degree sexual abuse, saying, "In the present case, the prosecutor's intent in calling the appellant's wife to gain testimony concerning why she had advised her children not to talk to the police was clearly an attempt to introduce, through improper impeachment, otherwise inadmissible evidence of prior bad acts by the appellant."<sup>446</sup>

In *Smith v. State*,<sup>447</sup> the court recognized that it is not always or only prosecutors whose bad-faith use of Rule 607 needs policing. It began with the acknowledged thumb-rule "Impeachment is improper when employed as a guise to present substantive evidence to the jury that would be otherwise inadmissible."<sup>448</sup> However, it went on to say:

The rules limiting the prosecution's ability to impeach prosecution witnesses are equally applicable to the defense. . . . [T]he defense's sole purpose for calling Cottrell to testify was to have him deny making the statement so that the defense could then seek to introduce the statement into evidence under the guise of impeachment.<sup>449</sup>

Having thus spoken, it affirmed Smith's conviction for capital murder.<sup>450</sup>

In two other cases, the Alabama Court of Criminal Appeals has found prosecutors not guilty of abusing Rule 607's new dispensation.

In a different *Smith v. State*,<sup>451</sup> also a prosecution for capital murder, the prosecutor had called an unwilling witness, the mother of Smith's co-defendant girlfriend. On the stand, she repeated part of her extrajudicial report of Smith's incriminating statement to her but said it was not Smith, but her daughter, who had told her other things incriminating Smith.<sup>452</sup> Upon the prosecutor's claim of surprise, the trial court permitted impeachment of the witness as a hostile witness.<sup>453</sup> Affirming Smith's conviction, the Alabama Court of Criminal Appeals said:

[W]e find no error in the trial court's allowing the prosecution to treat Lavoris Smith as a hostile witness and allowing it to impeach

444. *Id.* at 303-04.

445. 763 So. 2d 992 (Ala. Crim. App. 2000).

446. *Ritchie*, 763 So. 2d at 996.

447. 745 So. 2d 922 (Ala. Crim. App. 1999).

448. *Smith*, 745 So. 2d at 935.

449. *Id.*

450. *Id.* at 940.

451. No. CR-97-1258, 2000 WL 1868419 (Ala. Crim. App. Dec. 22, 2000).

452. *Smith*, 2000 WL 1868419, at \*34.

453. *Id.*

her testimony by use of prior inconsistent statements. The record does not support a conclusion that the prosecutor cross-examined and impeached the witness for the purpose of placing before the jury inadmissible substantive evidence.<sup>454</sup>

In *Burgin v. State*,<sup>455</sup> the Alabama Court of Criminal Appeals held that the prosecutor did not act in bad faith when he called Burgin's girlfriend and then impeached her unfavorable testimony with evidence of a prior statement that Burgin had confessed to her. The court said:

Surprise is not a necessary prerequisite to impeaching one's own witness under Rule 607. . . . Even if the prosecution had reason to believe that a witness would be reluctant to testify, it should not be bound by that knowledge when deciding to call a witness, because "an attorney is entitled to assume that a witness will testify truthfully" once the witness is in a court of law and is under oath.<sup>456</sup>

The court affirmed Burgin's conviction for capital murder.<sup>457</sup>

Rule 608 addresses the admissibility *vel non* of character evidence to impeach the truthfulness of witnesses.<sup>458</sup> Structurally, it reflects the plan of Rule 405, of which it constitutes a special application.<sup>459</sup>

Rule 608(a) provides:

(a) *Opinion and reputation evidence of character.* The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.<sup>460</sup>

Research has revealed only one opinion, *Baxter v. State*,<sup>461</sup> citing Rule 608(a) by number. As that case demonstrates, much can turn upon the meaning of the word "attacked" in the last line of Rule 608(a). A court will not admit evidence of a witness's good character for truthfulness until an opponent has "attacked" that character "by opinion or reputation evidence or otherwise."<sup>462</sup> In *Baxter*, the Alabama Court of Criminal Appeals affirmed Baxter's conviction for illegally distributing a controlled sub-

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454. *Id.*

455. 747 So. 2d 916 (Ala. Crim. App. 1999).

456. *Burgin*, 747 So. 2d at 919.

457. *Id.* at 921.

458. See ALA. R. EVID. 608.

459. See ALA. R. EVID. 405, 608.

460. ALA. R. EVID. 608(a).

461. 723 So. 2d 810 (Ala. Crim. App. 1998).

462. ALA. R. EVID. 608(a).

stance.<sup>463</sup> Over the defense's objection of impermissible bolstering, the trial court had let in evidence of the good character for truthfulness of one of the prosecution's witnesses.<sup>464</sup> In affirming the trial court's decision on the point, the appellate court said:

During cross-examination of . . . the investigating officer by defense counsel, the defense attorney attempted to elicit testimony that the informant would not be paid if he did not bring back useful information to the officer; moreover, defense counsel questioned the officer on several occasions concerning the amount of money the informant was being paid. He further alluded to the fact that the witness's testimony was based solely on information that he gained from the confidential informant who, defense said "could have lied." Defense counsel also asked the witness if the informant had ever been convicted of a crime.<sup>465</sup>

This, the court said, satisfied Rule 608(a)'s requirement of "attack" and justified rehabilitation by reputation or opinion evidence.<sup>466</sup>

Rule 608(b) provides:

(b) *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in Rule 609, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.<sup>467</sup>

Research has revealed two post-Rules opinions citing Rule 608(b) by number.

In *Hathcock v. Wood*,<sup>468</sup> a motor vehicle personal injury action against the driver of a following vehicle, the Alabama Supreme Court affirmed a judgment on a jury verdict for the plaintiff. In doing so, the court held that "the trial court [had not] erred by not allowing defense counsel to cross-examine . . . one of the Woods' expert witnesses, as to the probationary status of his professional license."<sup>469</sup> Acknowledging that "[t]he Alabama Rules of Evidence clearly allow cross-examination as to 'matters affecting

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463. *Baxter*, 723 So. 2d at 821.

464. *Id.* at 818-19.

465. *Id.* at 819.

466. *Id.* at 820.

467. ALA R. EVID. 608(b).

468. 815 So. 2d 502 (Ala. 2001).

469. *Hathcock*, 815 So. 2d at 507.

the credibility of the witness.' Rule 611(b)," the court continued, "Rule 608, however, requires the trial judge to keep a watchful eye on evidence concerning the character or conduct of a witness."<sup>470</sup> Observing that "specific evidence bearing on a witness's reputation for veracity is forbidden by Rule 608(b)," the court concluded: "The excluded evidence in this case . . . is rather specific in that it pertains to certain events that led to [the doctor]'s being placed on probation by his licensing board."<sup>471</sup> Notice that the court stretched Rule 608(b)'s prohibition to include proof of status by inferring the specific instances of conduct that brought on that status.

In *Griffin v. State*,<sup>472</sup> the Alabama Court of Criminal Appeals, affirming a conviction for capital murder, held that permitting a line of questioning inquiring into specific instances of a witness's conduct for the purpose of attacking his credibility did not rise to the level of plain error and, therefore, did not create reversible error in the absence of a contemporaneous objection.<sup>473</sup>

Unlike Rule 609, Rule 608(b) contains no express temporal restriction upon the admissibility of evidence within its purview.<sup>474</sup> Nevertheless, in *McClendon v. State*,<sup>475</sup> the Alabama Court of Criminal Appeals tacitly acknowledged that courts properly consider timeliness in reaching their decisions under Rule 608(b). In affirming McClendon's conviction for criminal solicitation for procuring a third person to murder his second wife, the appellate court held the trial court to have acted within its discretion in admitting evidence that, some twenty years earlier, "McClendon had [had] several discussions with others regarding schemes to murder his first wife."<sup>476</sup> Drawing by analogy upon Rule 609(b), the court said, "The trial judge's determination of this issue [remoteness in time] will be reversed only when the judge has abused that discretion."<sup>477</sup>

As foreshadowed by Rule 608(b)'s cross-reference to it, Rule 609 addresses a special category of the specific instances of conduct admissible to prove bad character for truthfulness. That is, it addresses the admissibility *vel non* of evidence of convictions of crime to impeach a witness's character for truthfulness.

Rule 609(a) provides as follows:

(a) *General rule.* For the purpose of attacking the credibility of a witness,

(1)(A) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the

470. *Id.* at 508.

471. *Id.*

472. 790 So. 2d 267 (Ala. Crim. App. 1999), *rev'd on other grounds*, 790 So. 2d 351 (Ala. 2000).

473. *Id.* at 331-32.

474. *See* ALA. R. EVID. 608(b).

475. 813 So. 2d 936 (Ala. Crim. App. 2001).

476. *McClendon*, 813 So. 2d at 945.

477. *Id.*

crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and

(B) evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

(2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.<sup>478</sup>

Before the effective date of Rule 609 in 1996, Alabama Code section 12-21-162 provided that a witness may be examined as to his conviction “for a crime involving moral turpitude.”<sup>479</sup> Rule 609 has abandoned that standard and replaced it with the alternative standards in the quoted portions of the Rule set out just above.

Alabama appellate courts have already addressed Rule 609(a) on several occasions.

Reversing a conviction for capital murder and remanding for a new trial, the Alabama Supreme Court has held, as a matter of first impression, that even “absent a request or an objection by the [capital murder] defendant, the trial court has a duty to instruct the jury that evidence of prior convictions [even when presented by the defendant’s own testimony] is not to be considered as substantive evidence of guilt,” and the failure to so instruct amounts to plain error.<sup>480</sup> On the same theme, the court has reversed a conviction for DUI because the prosecutor’s improper cross-examination of the defendant about a previous DUI conviction was so prejudicial to the defendant’s case that the circuit court’s corrective jury instruction was not sufficient to ensure the defendant a fair trial.<sup>481</sup> As the court explained, “Because Sparks[’s] . . . being impeached by questioning about that offense was clearly not allowed under any part of Rule 609 . . . the prosecutor’s question was . . . improper.”<sup>482</sup>

In *Shelton v. State*,<sup>483</sup> a prosecution for assault, the convicted appellant complained that the trial court had not allowed him to tell the jury on opening statement about the victim’s prior conviction for possession of marijuana.<sup>484</sup> In affirming the conviction, the Alabama Court of Criminal Ap-

478. ALA. R. EVID. 609(a).

479. ALA. CODE § 12-21-162 (1975) (pre-1996 version).

480. *Ex parte Minor*, 780 So. 2d 796, 800 (Ala. 2000); see also *Snyder v. State*, No. CR-99-1356, 2001 WL 307092 (Ala. Crim. App. Mar. 30, 2001) (reversing and remanding capital murder conviction, following *Ex parte Minor*), *rev'd*, No. 1001539, 2001 WL 1591328 (Ala. Dec. 14, 2001).

481. See *Ex parte Sparks*, 730 So. 2d 113 (Ala. 1998).

482. *Sparks*, 730 So. 2d at 115 n.2.

483. No. CR-97-1313, 1999 WL 339284 (Ala. Crim. App., May 28, 1999), *rev'd in part on other grounds sub nom. Ex parte Shelton*, No. 1990031, 2000 WL 1603806 (Ala. May 19, 2000).

484. *Shelton*, 1999 WL 339284, at \*5.

peals said, "The credibility of a witness . . . is not at issue until the witness actually takes the stand to testify."<sup>485</sup>

The boundaries of the term "crime . . . involv[ing] dishonesty or false statement" in Alabama Rule 609(a)(2) have begun to take shape in the intermediate courts of appeals. In *Huffman v. State*,<sup>486</sup> the Alabama Court of Criminal Appeals said, "[T]he commission of theft necessarily involves 'dishonesty' so as to bring a conviction for that offense within the scope of [Alabama] Rule 609(a)(2) . . . [although] this interpretation of the rule differs from the construction by . . . [every federal circuit] of identical language contained in [Federal Rule] 609(a)(2)."<sup>487</sup> And in *Sullivan v. State*,<sup>488</sup> the same court reversed and remanded a conviction for unlawful distribution of a controlled substance, saying, "[S]econd-degree possession of marijuana [a misdemeanor] can[not] be considered a crime involving 'dishonesty or false statement . . . .' Therefore, evidence of Sullivan's prior conviction for second-degree possession of marijuana was inadmissible to impeach Sullivan."<sup>489</sup> The court concluded that the trial court's "curative instruction came too late . . . and was insufficient to eradicate the prejudicial nature of the evidence of Sullivan's prior conviction."<sup>490</sup>

In *Shoney's, Inc. v. Barnett*,<sup>491</sup> the Alabama Court of Civil Appeals said, "None of the elements of the crime [of sexual abuse in the second degree] involve dishonesty or false statement."<sup>492</sup> It concluded, therefore, that "the trial court did not err by excluding evidence of Barnett's conviction under Rule 609."<sup>493</sup>

Whether a comprehensive, principled critique can square *Sullivan* and *Barnett* with *Huffman*, or indeed with each other, remains to be seen.

So far as research has revealed, none of Alabama's appellate courts has yet had the opportunity to invite its readership's attention to an important difference between the treatment of "a witness other than an accused" under Rule 609(a)(1)(A) and the treatment of a witness who is also "an accused" under Rule 609(a)(1)(B). Evidence that a witness other than an accused has been convicted of a crime will be admitted "subject to Rule 403."<sup>494</sup> That is, it will be admitted unless "its probative value is substantially outweighed by the danger of" the kinds of undue prejudice enumerated in Rule 403.<sup>495</sup> On the other hand, evidence that a witness/accused has been convicted of such a crime will be admitted only if "the probative value of admitting this evi-

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485. *Id.*

486. 706 So. 2d 808 (Ala. Crim. App. 1997).

487. *Huffman*, 706 So. 2d at 813.

488. 742 So. 2d 202 (Ala. Crim. App. 1999).

489. *Sullivan*, 742 So. 2d at 205.

490. *Id.*

491. 773 So. 2d 1015 (Ala. Crim. App. 1999).

492. *Shoney's*, 773 So. 2d at 1030.

493. *Id.*

494. ALA. R. EVID. 609(a)(1)(A).

495. See ALA. R. EVID. 403.

dence outweighs its prejudicial effect to the accused.”<sup>496</sup> Imagine an old-fashioned scale of justice, its left pan weighing probative value, its right pan weighing risk of prejudice. Under Rule 609(a)(1)(A), evidence of a non-party witness’s conviction of a qualifying crime comes in unless the right pan is way down. Under Rule 609(a)(1)(B), evidence of a witness/accused’s conviction of a qualifying crime comes in only if the left pan is way down. That is, assuming an even balance, evidence of a conviction of a qualifying crime comes in under 609(a)(1)(A), but does not come in under 609(a)(1)(B).

Rule 609(b) provides as follows:

(b) *Time limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction, more than ten years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.<sup>497</sup>

Research has revealed only two post-Rules decisions citing Rule 609(b) by number, neither of which seems particularly significant. In both *McClendon v. State*<sup>498</sup> and *Cooley v. State*,<sup>499</sup> the Alabama Court of Criminal Appeals invoked Rule 609(b) by analogy to resolve an issue of timeliness/remoteness arising under Rule 608(b).<sup>500</sup>

Research has revealed no post-Rules decision citing Rule 609(c) by number.

Rule 609(d) provides:

(d) *Juvenile or youthful offender adjudications.* Evidence of juvenile or youthful offender adjudications is not admissible under this rule.<sup>501</sup>

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496. See ALA. R. EVID. 609(a).

497. ALA. R. EVID. 609(b).

498. 813 So. 2d 936 (Ala. Crim. App. 2001) (holding evidence of bad conduct 20 years ago not too remote).

499. 686 So. 2d 546 (Ala. Crim. App. 1996) (holding evidence implying bad conduct 11 years ago not too remote).

500. See *McClendon*, 813 So. 2d at 944-45; *Cooley*, 686 So. 2d at 549-50.

501. ALA. R. EVID. 609(d).

Research has revealed four opinions citing Rule 609(d) by number. Among them, these cases make two important points. First, Rule 609(d)'s prohibition extends only to evidence offered for the purpose of showing a witness's bad character for truthfulness. Evidence of juvenile or youthful offender adjudications offered for any other relevant purpose can be admissible.<sup>502</sup> Second, even when evidence is offered for the purpose of showing a witness's bad character for truthfulness, the Confrontation Clause of the Sixth Amendment can override Rule 609(d)'s prohibition.<sup>503</sup>

Research has revealed no post-Rules opinion citing Rule 609(e) (pendency of appeal) by number.

Research has revealed no post-Rules opinion citing Rule 610 (religious beliefs or opinions) by number.

Rule 611 bears the title "Mode and Order of Interrogation and Presentation." What this mouthful means becomes at least somewhat clearer upon consulting the Rule's three sections.

Rule 611(a) provides:

(a) *Control by court.* The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.<sup>504</sup>

Research has revealed one post-Rules opinion citing this Rule by number, *Maxwell v. State*.<sup>505</sup> On appeal from his conviction for capital murder, Maxwell quoted Rule 611(a) and "argue[d] that 'in order to promote the truth, any nonresponsive answer that is allowed into the record jeopardizes the goal of the court' and, therefore, the court has a 'duty to exclude any answer which is unresponsive to the question asked.'"<sup>506</sup> The Alabama Court of Criminal Appeals did not respond to this expansive contention, affirming Maxwell's conviction on other grounds.<sup>507</sup>

Rule 611(b) provides:

(b) *Scope of cross-examination.* The right to cross-examine a witness extends to any matter relevant to any issue and to matters affecting the credibility of the witness, except when a party calls an adverse party or an officer, a director, or a managing agent of a public or private corporation or a partnership or association that is an

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502. Cf. *May v. State*, 710 So. 2d 1362, 1371 (Ala. Crim. App. 1997).

503. See *Ex parte McCorvey*, 686 So. 2d 425 (Ala. 1996); *Smith v. State*, 795 So. 2d 788 (Ala. Crim. App. 2000); *Bone v. State*, 706 So. 2d 1291 (Ala. Crim. App. 1997).

504. ALA. R. EVID. 611(a).

505. No. CR-97-2150, 2000 WL 681038 (Ala. Crim. App. May 26, 2000).

506. *Maxwell*, 2000 WL 681038, at \*12.

507. See *id.* at \*12, \*21.

adverse party, or a witness identified with an adverse party. In those excepted situations, cross-examination by the adverse party may be only upon the subject matter of the witness's examination-in-chief or upon the witness's credibility.<sup>508</sup>

Research has revealed three post-Rules opinions citing Rule 611(b) by number.

In *Tyson v. State*,<sup>509</sup> the Alabama Court of Criminal Appeals reaffirmed that it does "not condone curtailing cross-examination," but expressed confidence, "after reviewing the record, that Tyson's right to cross-examination was not limited in any respect."<sup>510</sup>

Must a cross-examiner make a timely offer of proof at trial to preserve an objection under Rule 611(b)? Alabama's two intermediate courts of appeals have sent arguably conflicting, although perhaps distinguishable, signals.

In *Hyché v. Medical Center East, Inc.*,<sup>511</sup> a medical malpractice action, the Alabama Court of Civil Appeals forewent the opportunity to review "[t]he issue . . . whether the trial court erred in ruling that a plaintiff does not have the right to recross-examine a [defendant's] witness after that witness has been cross-examined by a co-defendant but in the absence of redirect testimony," the trial court having previously allowed the plaintiffs such recross under similar circumstances.<sup>512</sup> Even though "neither [Rule 611(b) nor Alabama Code section 12-21-137] [spoke] directly to the issue," the court forebore, because "[t]he Hyches did not make an offer of proof regarding what they expected to elicit from the witnesses on recross-examination. This court, therefore, cannot review whether the Hyches were prejudiced by the exclusion of that testimony without resorting to 'impermissible speculation.'"<sup>513</sup> Thus, finding no abuse of discretion, the court affirmed a judgment on a jury verdict for the defendant.<sup>514</sup>

Compare *Hampton v. State*,<sup>515</sup> in which the Alabama Court of Criminal Appeals quoted the United States Supreme Court as follows: "Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply."<sup>516</sup> At his trial for unlawfully distributing a controlled substance, Hampton had "wanted to question McCrary [the prosecution's witness] about a prior charge of theft of property and a pending charge for misde-

508. ALA. R. EVID. 611(b).

509. 784 So. 2d 328 (Ala. Crim. App. 2000) (affirming capital murder conviction), *aff'd*, 784 So. 2d 357 (Ala. 2000).

510. *Tyson*, 784 So. 2d at 343; *see also* ALA. CODE § 12-21-137 (1975).

511. 711 So. 2d 1017 (Ala. Civ. App. 1997).

512. *Hyché*, 711 So. 2d at 1018.

513. *Id.* at 1019.

514. *Id.*

515. 681 So. 2d 273 (Ala. Crim. App. 1996).

516. *Hampton*, 681 So. 2d at 275 (citation and quotation marks omitted).

meanor theft of property. McCrary had also written some checks for which he had insufficient funds that defense counsel wanted to question him about.<sup>517</sup> Instead, the trial court had limited Hampton to the prosecution's stipulation as to all these charges, which included the information that the first had been nol prossed, the second had been charged but not yet prosecuted to conviction, and the third had resulted in a repayment arrangement through the bad check unit rather than arrest and conviction.<sup>518</sup> The Court of Criminal Appeals reversed Hampton's conviction and remanded the cause to the circuit court, saying that Hampton "was denied his basic constitutional right to confront the witnesses against him."<sup>519</sup>

Time will tell whether *Hyche* and *Hampton* can stand together. One possible distinguishing argument comes to mind. The Sixth Amendment, not Alabama evidence law, required the result in *Hampton*. Left to its own devices, as in *Hyche*, one might argue that Alabama evidence law does require an offer of proof. Whether this ground of distinction ought to carry the day remains open to question. After all, not only counsel for criminal defendants, but also "[c]ounsel [for parties to civil actions] often cannot know in advance what pertinent facts may be elicited on cross-examination."<sup>520</sup>

It has been suggested "that recross as to new matters brought out on redirect [would seem to be] a matter of right."<sup>521</sup> How about a right to recross when new matters have been brought out not on redirect, but on cross-examination by a co-party? In *Hyche v. Medical Center East, Inc.*,<sup>522</sup> a medical malpractice action, the Alabama Court of Civil Appeals forewent the opportunity to review "[t]he issue . . . whether the trial court erred in ruling that a plaintiff does not have the right to recross-examine a [defendant's] witness after that witness has been cross-examined by a co-defendant but in the absence of redirect testimony," the trial court having previously allowed the plaintiffs such recross under similar circumstances.<sup>523</sup> Even though "neither [Rule 611(b) nor Alabama Code section 12-21-137] [spoke] directly to the issue," the court forebore, because the Hyches had failed to make an offer of proof preserving the point.<sup>524</sup>

Rule 611(c) provides:

(c) *Leading questions.* Leading questions should not be used on the direct examination of a witness, except when justice requires that they be allowed. Leading questions are permitted on cross-examination. When a party calls a hostile witness, an adverse party,

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517. *Id.* at 273.

518. *Id.* at 274.

519. *Id.* at 276.

520. *Hampton*, 681 So. 2d at 275.

521. SCHROEDER & HOFFMAN, *supra* note 53, at 340.

522. 711 So. 2d 1017 (Ala. Civ. App. 1997).

523. *Hyche*, 711 So. 2d at 1018.

524. *Id.* at 1019.

or a witness identified with an adverse party, interrogation may be by leading questions.<sup>525</sup>

Research has revealed one post-Rules opinion citing Rule 611(c) by number. In *Evans v. State*,<sup>526</sup> the Alabama Court of Criminal Appeals affirmed in pertinent part Evans's conviction for second-degree possession of a forged instrument, illegal absentee voting, and second-degree forgery.<sup>527</sup> It rejected Evans's contention that the trial court had erred in permitting the prosecution to ask leading questions of a prosecution witness.<sup>528</sup> In the court's own words:

The prosecutor then informed the trial court that the witness was unable to read and write, and he requested that he be permitted to ask the witness leading questions. The trial court gave the prosecution 'some latitude' in questioning the witness. . . . [A]lthough the prosecutor's questions were in the form of leading questions, the questions did not substantially assume material facts. After the direct examination, the defense was given an opportunity to cross-examine the witness and to clarify any inconsistencies in his testimony.<sup>529</sup>

The court did not explain what it was about the subject matter of the case or nature of the witness's testimony that justified a dispensation ordinarily reserved for the direct examination of very young children and mentally impaired persons.

Just as Rule 106 does not embody the entire common law doctrine of completeness, Rule 612 does not embody the entire common law doctrine of refreshing recollection. "Anything may in fact revive a memory: a song, a scent, a photograph, an[] allusion, even a past statement known to be false."<sup>530</sup> Rule 612 concerns itself only with writings as triggers of renewed memory.<sup>531</sup> Rule 612(a) restates that part of the common law doctrine concerning writings.<sup>532</sup> Rule 612(b) sets out the procedures surrounding the production of writings used to refresh memory.<sup>533</sup>

Rule 612(a) provides:

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525. ALA. R. EVID. 611(c).

526. 794 So. 2d 415, 433 (Ala. Crim. App. 2000).

527. *Evans*, 794 So. 2d at 433.

528. *Id.*

529. *Id.*

530. *United States v. Rappy*, 157 F.2d 964, 967 (2d Cir. 1946); see also JOHN H. WIGMORE, A STUDENT'S TEXTBOOK OF THE LAW OF EVIDENCE § 118, at 146 (1935) ("Anything whatever may serve to revive one's memory,—a button, a bunch of keys, a word, a sound, a face."); GRAHAM C. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE § 4.7, at 106 (3d ed. 1996) ("Although the item used to aid the witness with a faltering memory is frequently a writing, anything, including 'a song, a scent, or a photograph,' may be used to revive her present memory.").

531. See ALA. R. EVID. 612.

532. See ALA. R. EVID. 612(a).

533. See ALA. R. EVID. 612(b).

(a) *General rule.* Any writing may be used to refresh the memory of a witness.<sup>534</sup>

Research has revealed two post-Rules opinions citing Rule 612(a) by number.

The writing used to refresh a witness's recollection need not be admissible in evidence. Indeed, it may even have been excluded. Consider, for example, the Alabama Supreme Court's recent decision in *Southern Energy Homes, Inc. v. Washington*,<sup>535</sup> an action by a mobile home purchaser against the manufacturer for breach of warranties. The trial court had "permitt[ed] Washington to use a telephone bill that had been excluded from evidence to refresh his wife's testimony about telephone calls she claimed to have made to Southern."<sup>536</sup> In affirming a judgment on a jury verdict for the purchaser, the court held that the trial court had not abused its discretion.<sup>537</sup> True, the court said, "the [trial] court has an obligation to prevent witnesses from "putting into the record the contents of an otherwise inadmissible writing under the guise of refreshing recollection."<sup>538</sup> However, it continued:

[A]s long as "there is careful supervision by the [trial] court, the testimony elicited through refreshing recollection may be proper, even though the document used to refresh the witness[']s memory [has been excluded from evidence]." . . . "[T]he evidence that [comes] in [is] not the [excluded] document but rather, the recollection of the witness[]." <sup>539</sup>

On an interesting collateral point, the court said, "[W]hen a memorandum used to refresh memory has an extensive number of items, it is proper for the memo to go to the jury, not as evidence, but as an aid to their own recollection."<sup>540</sup> Accordingly, the court held that the trial court had not abused its discretion in sending the writing to the jury either.<sup>541</sup>

According to traditional doctrine, "[o]nce a witness[']s recollection is revived, the witness must testify from personal knowledge and may not read from the writing or tell what it states."<sup>542</sup> In *Ex parte Scott*,<sup>543</sup> the Alabama Supreme Court demonstrated for all to see the relaxed manner in which courts have sometimes applied this traditional doctrine. On the stand at trial, after having seen the transcript, the witness had answered four substantive questions apparently without looking at the transcript, but he could not re-

534. ALA. R. EVID. 612(a).

535. 774 So. 2d 505 (Ala. 2000).

536. *S. Energy Homes*, 774 So. 2d at 515.

537. *Id.*

538. *Id.* (citation omitted).

539. *Id.* (citation omitted).

540. *Id.* (citation omitted).

541. *See id.*

542. SCHROEDER & HOFFMAN, *supra* note 53, at 345.

543. 728 So. 2d 172 (Ala. 1998).

member the answer to a fifth question.<sup>544</sup> Thereupon, the prosecutor showed him the transcript again, and he had answered the fifth question.<sup>545</sup> On appeal, the court held this a not impermissible pretense for refreshing the witness's recollection.<sup>546</sup>

Some years ago, the United States Court of Appeals for the Third Circuit contributed a casebook-quality example of this same phenomenon in *United States v. Riccardi*.<sup>547</sup> At Riccardi's trial for feloniously transporting certain chattels in interstate commerce, the witness, Doris Farid es Sultaneh, who had owned the chattels, could not remember completely what items Riccardi had obtained and transported.<sup>548</sup> She had made a longhand list of the chattels as they were removed from her house, but only one page of that list could be produced at trial.<sup>549</sup> That page was admitted in evidence as past recollection recorded.<sup>550</sup> Over objection, the trial court permitted the prosecutor to show Ms. Farid es Sultaneh lists which had been copied from the indictment.<sup>551</sup> She testified that seeing these lists refreshed her recollection, and she was thereupon permitted, over objection, to read the lists aloud and confirm that she remembered each item and remembered that it had been taken by Riccardi.<sup>552</sup> On appeal, the court of appeals affirmed, concluding rather lamely, "In the instant case, the learned trial judge determined that both Farid and the expert, Berlow, testified from present recollection. On the record, we cannot say that it was plainly not so."<sup>553</sup> Earlier in the opinion, it had said more stoutly, "Of course, the categories, present recollection revived and past recollection recorded, are clearest in their extremes, but they are, in practice, converging rather than parallel lines; the difference is frequently one of degree."<sup>554</sup>

In support of decisions such as those in *Scott* and *Riccardi*, one national authority has said:

[T]he statement that a witness once refreshed must speak independently of the writing seems too inflexible, and it is believed that the matter is discretionary and that the trial judge may properly permit the witness to consult the memorandum as she speaks, especially

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544. *Scott*, 728 So. 2d at 185.

545. *Id.*

546. *Id.*

547. 174 F.2d 883 (3d Cir. 1949), *cert. denied*, 337 U.S. 941 (1949). See OLIN GUY WELLBORN III, CASES AND MATERIALS ON THE RULES OF EVIDENCE 350 (2000).

548. *Riccardi*, 174 F.2d at 885.

549. *Id.*

550. *Id.*

551. *Id.*

552. *Id.*

553. *Riccardi*, 174 F.2d at 889.

554. *Id.*

where it is so lengthy and detailed that even a fresh memory would be unable to recite all the items unaided.<sup>555</sup>

Extending the doctrine in this manner, if indeed it amounts to that as a matter of legal history, also finds support in educational psychology's distinction between recall and recognition.

Rule 612(b) addresses questions concerning the production and admissibility in evidence of a writing used to refresh memory.<sup>556</sup> Research has revealed no post-Rules opinion citing Rule 612(b) by number. For that reason—and because the text of Rule 612(b) is quite long—this account does not set it out at length.

Rule 613 regulates the practice and procedure surrounding the admissibility of prior statements made by witnesses now on the stand (Rule 613(a)) or now down from the stand in the present proceeding (Rule 613(b)).<sup>557</sup>

Rule 613(a) provides:

(a) *Examining witness concerning prior statement.* In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.<sup>558</sup>

Research has revealed one opinion that implicates both Rule 613(a) and 613(b). In *Smith v. State*,<sup>559</sup> the Alabama Court of Criminal Appeals held, in effect, that Rule 607 trumps, or can trump, Rule 613 where the calling and impeaching party are one.<sup>560</sup> The court said, "Impeachment is improper when employed as a guise to present substantive evidence to the jury that would be otherwise inadmissible."<sup>561</sup> It went on to say that "[t]he rules limiting the prosecution's ability to impeach prosecution witnesses are equally applicable to the defense."<sup>562</sup>

Rule 613(b) provides:

(b) *Extrinsic evidence of prior inconsistent statement of witness.* Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness has been confronted with the circumstances of the statement with sufficient particularity to enable the witness to identify the statement and is afforded an opportunity

555. MCCORMICK, *supra* note 226, at 34.

556. See ALA. R. EVID. 612(b).

557. See ALA. R. EVID. 613.

558. ALA. R. EVID. 613(a).

559. 745 So. 2d 922 (Ala. Crim. App. 1999) (affirming capital murder conviction).

560. See *Smith*, 745 So. 2d at 935.

561. *Id.*

562. *Id.* ("[T]he defense's sole purpose for calling Cottrell to testify was to have him deny making the statement so that the defense could then seek to introduce the statement into evidence under the guise of impeachment.").

to admit or deny having made it. This provision does not apply to admissions of a party opponent as defined in Rule 801(d)(2).<sup>563</sup>

Research has revealed six post-Rules opinions citing or implicating Rule 613(b) by number. Several illustrate the textbook point that courts will read Rule 613(b) with other Rules and that another Rule may sometimes require the exclusion of inconsistent statements otherwise admissible under Rule 613(b).<sup>564</sup> Four reiterate the predicate upon which the admissibility of prior inconsistent statements depends.<sup>565</sup>

Read with Rule 102, Rule 104(a), and Rule 611(a), Rule 614 pieces out a trial court's authority and responsibility to participate in the trial process. According to the Alabama Supreme Court, "Rule 614 expresses the law as it existed in Alabama before the adoption of the Rules of Evidence . . . ."<sup>566</sup>

Rule 614(a) provides:

(a) *Calling by court.* The court may, on its own motion or at the suggestion of a party, call witnesses, and all parties are entitled to cross-examine witnesses thus called.<sup>567</sup>

Research has revealed no post-Rules opinion citing Rule 614(a) by number.

Rule 614(b) provides:

(b) *Interrogation by court.* The court may interrogate witnesses, whether they were called by the court or by a party.<sup>568</sup>

Research has revealed seven post-Rules opinions citing Rule 614(b) by number.

In *Smith v. State*,<sup>569</sup> the Alabama Court of Criminal Appeals emphasized:

[Another court] has recognized three situations in which a trial court may have reason to interject itself into the trial proceedings. . . . "First, judicial intervention may be necessary for clarification in a

563. ALA. R. EVID. 613(b).

564. See *Ex parte Burch*, 730 So. 2d 143, 149 (Ala. 1999) ("[W]hile we agree that in the normal case prior inconsistent statements of a witness are admissible, see Rule 613, . . . , we must also apply the provisions of Rule 402."); *Snyder v. State*, No. CR-99-1356, 2001 WL 307092, at \*7 (Ala. Crim. App. Mar. 30, 2001) ("Should this issue arise on retrial, the trial court should evaluate the admissibility of such evidence under Rules 801(d)(1)(A) and 613(b) . . . ."); *Smith*, 745 So. 2d at 935 (Rule 607 trumps Rule 613 where calling and impeaching party are the same).

565. See *Tyson v. State*, 784 So. 2d 328, 353 (Ala. Crim. App. 2000), *aff'd*, 784 So. 2d 357 (Ala. 2000); *Ritchie v. State*, 763 So. 2d 992, 996 (Ala. Crim. App. 2000); *Hagood v. State*, 777 So. 2d 162, 189 (Ala. Crim. App. 1998), *aff'd in part*, 777 So. 2d 214 (Ala. 1999); *Rutledge v. State*, 680 So. 2d 997, 1000 (Ala. Crim. App. 1996).

566. *Kmart Corp. v. Kyles*, 723 So. 2d 572, 576 (Ala. 1998).

567. ALA. R. EVID. 614(a).

568. ALA. R. EVID. 614(b).

569. 797 So. 2d 503 (Ala. Crim. App. 2000).

lengthy and complex trial. Second, it may be necessary for clarification where attorneys are unprepared or obstreperous or if the facts are becoming confused and neither side is able to resolve the confusion. Third, judicial intervention may be necessary if a witness is difficult or if the witness's testimony is not credible and the attorney fails to adequately probe the witness or if the witness becomes inadvertently confused."<sup>570</sup>

Not always, of course, but too often nonetheless, excessive participation by a judge and inadequate participation by someone's lawyer seem to go hand in hand.

In *Kmart Corp. v. Kyles*,<sup>571</sup> the Alabama Supreme Court cautioned that a trial judge's unquestioned authority to interrogate witnesses must be exercised with "fairness and impartiality."<sup>572</sup> In *Ward v. State*,<sup>573</sup> the trial court had responded to Ward's objection to prosecution testimony for lack of a proper predicate by itself asking the expert witness "whether he was licensed to practice medicine in the State of Alabama, whether he had completed a residency internship, and whether he was board-certified," and did the same with another expert witness.<sup>574</sup> In affirming Ward's conviction for capital murder, the Alabama Court of Criminal Appeals characterized these as "neutral questions" and concluded, "[W]e cannot say that the trial court disregarded its duty of impartiality."<sup>575</sup>

A trial judge may sometimes avert reversal for excessive participation by giving a "proper curative instruction."<sup>576</sup> More often, perhaps, the reviewing court will avert reversal for excessive participation by finding the trial judge's abuse of discretion harmless<sup>577</sup> or not plain error.<sup>578</sup>

Rule 614 (c) provides:

(c) *Objections.* Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.<sup>579</sup>

570. *Smith*, 797 So. 2d at 533 (citation omitted).

571. *Kmart Corp. v. Kyles*, 723 So. 2d 572 (Ala. 1998).

572. *Kyles*, 723 So. 2d at 576 (affirming judgment on jury verdict for Kyles).

573. 814 So. 2d 899 (Ala. Crim. App. 2000) (affirming capital murder conviction).

574. *Ward*, 814 So. 2d at 918.

575. *Id.*

576. *See, e.g., Cooper & Co., Inc. v. Lester*, No. 1981368, 2001 WL 1868433, at \*6 (Ala. Dec. 22, 2000) ("This trial judge gave the proper curative instruction and did not abuse his discretion in this case.").

577. *See, e.g., Vrocher v. State*, 813 So. 2d 799, 805 (Ala. Crim. App. 2001) (holding error was "at worst, harmless based on the overwhelming evidence of the appellant's guilt").

578. *Wynn v. State*, 804 So. 2d 1122, 1142 (Ala. Crim. App. 2000) ("[W]e do not find any error, much less plain error, in the trial court's questioning of Brown."); *Smith v. State*, 795 So. 2d 788, 811 (Ala. Crim. App. 2000) (holding reassertion that question was not relevant during the guilt phase not plain error).

579. ALA. R. EVID. 614(c).

Research has revealed no post-Rules opinion citing Rule 614(c) by number.

Rule 615 authorizes the exclusion of witnesses from the courtroom when not testifying.<sup>580</sup> Other sources of Alabama law authorize or regulate the exclusion of persons other than witnesses from the courtroom.

Rule 615 provides:

At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause, or (4) a victim of a criminal offense or the representative of a victim who is unable to attend, when the representative has been selected by the victim, the victim's guardian, or the victim's family.<sup>581</sup>

Rule 9.3(a) of the Alabama Rules of Criminal Procedure provides:

(a) WITNESSES. Prior to or during any proceeding, the court, on its own motion or at the request of any party, may exclude witnesses from the courtroom and direct them not to communicate with each other, or with anyone other than the attorneys in the case, concerning any testimony until all witnesses have been released by the court.<sup>582</sup>

Lawyers and judges alike refer to the procedure embodied by these two provisions simply as "the Rule." They know an order granting a motion to sequester a certain witness as "putting the witness under the Rule."<sup>583</sup>

With certain exceptions, a trial court may, in its discretion, exclude a witness-to-be from the courtroom until called to testify. Likewise, it may exclude or re-exclude a witness it has directed to step down but has not yet excused from the proceeding. By thus excluding a witness, a court protects the witness's testimony-to-come from the possibly corrupting or educating influences of whatever the witness might have seen or heard in the courtroom, whether from the mouths or behavior of other witnesses, the attorneys, the judge, other participants, or even spectators.<sup>584</sup>

A trial court cannot exclude a party, even though also a witness-to-be.<sup>585</sup> Nor can it exclude a corporate party's designated representative.<sup>586</sup> As to

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580. ALA. R. EVID. 615.

581. *Id.*

582. ALA. R. CRIM. P. 9.3(a).

583. See, e.g., *Hodges v. State*, No. CR-98-1988, 2001 WL 306937, at \*7 (Ala. Crim. App. Mar. 30, 2001) (granting defense's motion to invoke "the Rule").

584. SCHROEDER & HOFFMAN, *supra* note 53, at 356.

585. *Id.*

this proposition, Rule 615 stands alone, with no consideration of Rule 9.3(a) of the Alabama Rules of Criminal Procedure behind it. Unlike Alabama Code section 15-14-54's provision that "a judge may remove a victim from the trial or hearing or any portion thereof for the same causes and in same manner as the rules of court or law provides for the exclusion or removal of the defendant,"<sup>587</sup> Rule 615 contains no provision to preserve the authority of judges to maintain order and decorum in their courtrooms.<sup>588</sup> Notwithstanding the apparently absolute ring of Rule 615's language, it would seem an essential part of a court's inherent authority to exclude other disruptive parties on terms analogous to those provided for the exclusion or removal of criminal defendants from the courtroom.

A trial court also cannot exclude "a person whose presence is shown by a party to be essential to the presentation of the party's cause."<sup>589</sup> A recent decision in the Alabama Court of Criminal Appeals, *Hodges v. State*,<sup>590</sup> illustrates this exemption. In *Hodges*, as the participants settled in to begin the trial, the prosecutor asked the court, "Would it be okay if Detective Robertson sits here and finds exhibits for me as we go?"<sup>591</sup> The defense asserted no objection. The court said it would be okay.<sup>592</sup> When, on appeal, the defense objected to the trial court's decision to allow Detective Robertson to testify later in the trial, the court of criminal appeals said, "The trial court properly exercised its discretion in excluding Detective Ronald Robertson from 'the Rule.' There is no plain error here."<sup>593</sup>

Finally, a trial court cannot exclude the victim of a crime or that victim's representative.<sup>594</sup> Alabama Code section 15-14-55 provides, "A victim of a criminal offense shall be exempt from the operation of rule of court, regulation, or statute or other law requiring the separation or exclusion of witnesses from court in criminal trials or hearings."<sup>595</sup>

To preserve the authority of judges to maintain order and decorum in their courtrooms, Alabama Code section 15-14-54 provides that "a judge may remove a victim from the trial or hearing or any portion thereof for the same causes and in same manner as the rules of court or law provides for

586. *Id.*

587. ALA. CODE § 15-14-54 (1995). Section 15-14-54's provision dovetails with Rule 9.3(a).

588. *See* ALA. R. EVID. 615.

589. *Id.*

590. No. CR-98-1988, 2001 WL 306937 (Ala. Crim. App. Mar. 30, 2001) (affirming conviction for murder during robbery and death sentence).

591. *Hodges*, 2001 WL 306937, at \*7.

592. *Id.*

593. *Id.* at \*8.

594. *See, e.g.,* Centobie v. State, No. CR-98-2056, 2001 WL 996129 (Ala. Crim. App. Aug. 31, 2001) (affirming capital murder conviction; victim's wife and official law enforcement representative; no objection at trial; no plain error); Wilson v. State, 777 So. 2d 856, 930 (Ala. Crim. App. 1999) (affirming capital murder conviction where trial court allowed one victim to remain in courtroom throughout trial and to testify as last witness for the State because this was not plain error, citing Rule 9.3(a), Alabama Rules of Criminal Procedure, and Rule 615); Anderson v. State, 542 So. 2d 292, 304-05 (Ala. Crim. App. 1987), *cert. denied*, 542 So. 2d 307 (Ala. 1989).

595. ALA. CODE § 15-14-55 (1995).

the exclusion or removal of the defendant.”<sup>596</sup> Alabama Code section 15-14-56(a) applies the exemption for a victim of crime to an appointed representative of a victim “[w]henver a victim is unable to attend such trial or hearing or any portion thereof by reason of death; disability; hardship; incapacity; physical, mental, or emotional condition; age; or other inability . . . .”<sup>597</sup>

The exclusion of other witnesses, although rarely refused upon request, is entirely a matter of discretion and not a matter of right. Thus, a trial court may choose to exclude some witnesses and not others from the operation of the Rule, and if it does so, its decision will not be reversed on appeal absent a gross abuse of discretion.<sup>598</sup>

Trial courts can exclude law enforcement personnel on the terms examined in the previous paragraph, but one must search far and wide to find cases in which a trial court has done so. Indeed, Alabama’s appellate courts seem inordinately fond of intoning, “Alabama appellate courts have time and again refused to hold it an abuse of discretion on the part of the trial court to allow a sheriff, police chief or similarly situated person who will later testify to remain in the courtroom during trial.”<sup>599</sup> The Alabama Court of Criminal Appeals has added several recent decisions to its “time and again” refusals to reconsider the especially permissive judicial attitude towards the exemption of law enforcement personnel from the Rule.<sup>600</sup> Yet, as Illinois’ baleful recent experiences with convicting the innocent would suggest, the testimony of law enforcement personnel seems no more immune to the possibly corrupting or educating influences exerted by other participants in a trial, most particularly perhaps by colleagues, than does the testimony of unofficial witnesses.<sup>601</sup>

Several post-Rules decisions have confirmed the proposition that “[w]hether a witness who has violated a sequestration order may thereafter testify likewise rests in the sound discretion of the trial judge . . . .”<sup>602</sup>

596. *Id.* § 15-14-54.

597. *Id.* § 15-14-56(a).

598. SCHROEDER & HOFFMAN, *supra* note 53, at 356.

599. *See, e.g.*, Stallworth v. State, No. CR-98-0366, 2001 WL 1149071, at \*11 (Ala. Crim. App. Sept. 28, 2001) (citations and internal quotation marks omitted).

600. *See Stallworth*, 2001 WL 1149071, at \*10 (affirming capital murder conviction and stating, “[T]he trial court . . . allow[ed] two police officers, . . . who investigated each case and who would be called as witnesses to remain in the courtroom during the testimony of other witnesses”); Hodges v. State, No. CR-98-1988, 2001 WL 306937, at \*7 (Ala. Crim. App. Mar. 30, 2001) (affirming conviction for murder during robbery and death sentence where trial court permitted detective to “sit[] here [at prosecutor’s table] and find[] exhibits for me as we go” without objection by defense because this was not plain error); Taylor v. State, 808 So. 2d 1148, 1194-96 (affirming capital murder conviction where jail warden was in the courtroom for security purposes and was a rebuttal witness because this was not an abuse of the trial court’s discretion, citing Rule 615 and Alabama Rule of Criminal Procedure 9.3(a)).

601. *See, e.g.*, WELLBORN, *supra* note 547, at 369-71 (reprinting the Biblical parable of Susanna and the Elders).

602. SCHROEDER & HOFFMAN, *supra* note 53, at 356. *See Hodges*, 2001 WL 306937, at \*8 (affirming conviction for murder during robbery and death sentence and stating “The trial court properly exercised its discretion in excluding Detective Ronald Robertson from ‘the Rule’”); *Taylor*, 808 So. 2d at 1195 (affirming capital murder conviction and stating, “Because Gaston was in the courtroom for security purposes and was a rebuttal witness, Taylor has failed to show that Gaston was even subject to the court’s sequestration order or that he purposely disobeyed the court’s order”).

Alabama Rule 616 (impeachment by evidence of bias, prejudice, or interest) has no federal counterpart. It provides:

A party may attack the credibility of a witness by presenting evidence that the witness has a bias or prejudice for or against a party to the case or that the witness has an interest in the case.<sup>603</sup>

Two of the three post-Rules opinions citing Rule 616 by number do so only incidentally.<sup>604</sup> In the third, *Reeves v. State*,<sup>605</sup> the Alabama Court of Criminal Appeals put limits to the textbook proposition that "it is ordinarily permissible to inquire into any charges" of a crime "that would reasonably give rise to an inference that a witness is biased."<sup>606</sup>

#### THE SEVEN HUNDREDS (OPINIONS AND EXPERT TESTIMONY)

Rule 701, read with Rule 602,<sup>607</sup> addresses the admissibility of lay witness "opinion."<sup>608</sup> In sum, lay witnesses will sometimes be allowed to testify in a way that includes the expression of inferences from their relevant perceptions, but only to facilitate their reporting of their relevant perceptions. Rule 701 reads:

If the witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.<sup>609</sup>

As many veteran students of the law of evidence might agree, only the fuzziest line, if any, marks the boundary between admissible lay inferences from observed phenomena under Rule 701 and admissible expert inferences from observed phenomena under Rule 702.<sup>610</sup>

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603. ALA. R. EVID. 616.

604. *Wynn v. State*, 804 So. 2d 1122 (Ala. Crim. App. 2000) (affirming capital murder conviction where Rule 616 was invoked once by defense counsel in a long colloquy at sidebar because nothing turned on it); *Smith v. State*, 745 So. 2d 922, 934 (Ala. Crim. App. 1999) (affirming capital murder conviction where counsel cited Rule 616 on appeal because, as the court correctly noted, "Rule 616 . . . is inapplicable here.").

605. 807 So. 2d 18 (Ala. Crim. App. 2000) (affirming capital murder conviction and holding that it was not error to deny appellant cross-examination regarding unrelated pending charges filed against prosecution's witness some time after he gave police a statement consistent with his trial testimony).

606. SCHROEDER & HOFFMAN, *supra* note 53, at 359.

607. *See, e.g., Allen v. Hill*, 758 So. 2d 574, 576 (Ala. Civ. App. 1999) ("Bass's . . . testimony that Hill was going 50-60 miles per hour as he entered the intersection" was admissible even though "other testimony by Bass indicated that he saw Hill's automobile only after it had entered the intersection.").

608. *See* ALA. R. EVID. 701.

609. *Id.*

610. Rule 702 provides: "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowl-

Consider, for example, the textbook proposition that “[b]efore a witness, lay or expert, can give an opinion, he must have sufficient knowledge and experience to draw inferences from the matters observed.”<sup>611</sup> With that, consider also the decision of the Alabama Court of Criminal Appeals in *Acklin v. State*,<sup>612</sup> in which the court affirmed a conviction for capital murder. The trial court had overruled the defense’s objection to this question: “[H]ave you ever, in your 10 years you worked in [emergency medical service], ever smelled such a concentration, the smell or concentration of gunpowder?” to which the answer was “No.”<sup>613</sup> According to the court, the witness “had 10 years’ experience as an emergency medical technician, and . . . had responded to hundreds of crime scenes involving serious injury,” and, therefore, the court held the evidence properly admitted under Rule 701, not Rule 702.<sup>614</sup> The court might, very arguably, have deemed this foundation sufficient to qualify this witness “as an expert by . . . experience [and] training.”

The reader will find Rule 702 (testimony by experts) set out at note 610, above. Research has revealed eighteen post-Rules opinions citing Rule 702 by number. Two opinions cited Rule 702 only incidentally.<sup>615</sup> The others contribute something new or confirmatory about the inquiries pursued in the following paragraphs.<sup>616</sup>

In determining admissibility *vel non* under Rule 702, a trial court must answer three questions: (1) Does the proffered information amount to “scientific, technical, or other specialized knowledge”? (2) Does the proffered witness qualify “as an expert by knowledge, skill, experience, training, or education”? (3) Will the information conveyed by this witness “assist the trier of fact to understand the evidence or to determine a fact in issue”?<sup>617</sup> Thinking carefully, the first two of these subsidiary determinations look like determinations of fact, reversible only if clearly erroneous. The third looks like the kind of prediction that ought to be reviewed only for abuse of discretion. Nevertheless, both pre-Rules and post-Rules, courts have too often

edge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.” ALA. R. EVID. 702.

611. SCHROEDER & HOFFMAN, *supra* note 53, at 374.

612. 790 So. 2d 975 (Ala. Crim. App. 2000).

613. *Id.* at 1003.

614. *Id.*

615. *Am. Color Graphics, Inc. v. Foster*, No. 2000044, 2001 WL 1143289, at \*7 (Ala. Civ. App. Sept. 28, 2001) (“We need not discuss whether he was properly qualified as an expert under Rule 702 . . .”), *rev’d sub nom. Ex parte Am. Color Graphics, Inc.*, No. 1010180, 2002 WL 1042347 (Ala. 2002); *Henderson v. State*, 715 So. 2d 863 (Ala. Crim. App. 1997).

616. Two of those merit no more than a footnote: *Eubanks v. Hale*, 752 So. 2d 1113, 1145 (Ala. 1999) (stating that an expert may testify to his conclusion that particular handwriting is that of a particular person.); *Taylor v. State*, 808 So. 2d 1148, 1162 (Ala. Crim. App. 2000) (noting that ordinarily neither a lay witness nor an expert may testify about inferences to be drawn from the appearance of wounds, e.g., entry and exit wounds). Both of these cases offer merely post-Rules expressions of well-established pre-Rules propositions.

617. See ALA. R. EVID. 702.

lumped the three together and reviewed the composite determination of admissibility *vel non* for abuse of discretion.<sup>618</sup>

Courts and commentators have, for a long time, treated "scientific" knowledge, with its leading-edge concerns about "novel" scientific evidence, as a distinct and most problematic subset of expertise. In *Kumho Tire Co. v. Carmichael*,<sup>619</sup> it seems the United States Supreme Court acknowledged, and perceived that Rule 702 acknowledges, the fragility of the line thought to set the "scientific" subset apart from other fields of expertise.<sup>620</sup> By contrast, the Alabama Supreme Court and the Alabama Court of Criminal Appeals have so far, it seems, maintained the line, problematic as the clarity and precise co-ordinates of that line might be, between "scientific" knowledge and "technical[] or other specialized" knowledge. For the time being, it must suffice to assemble the still fragmentary evidence supporting this observation. In *Courtauld's Fibers, Inc. v. Long*,<sup>621</sup> the Alabama Supreme Court said, "[N]either the *Frye* test nor the *Daubert* standard applies to Dr. Oehme's testimony. Instead, this issue is controlled by Rule 702."<sup>622</sup> In *West v. State*,<sup>623</sup> the Alabama Court of Criminal Appeals said, "Drexler's testimony did not constitute novel scientific evidence and . . . therefore the *Frye* test did not govern its admissibility. . . . Drexler simply used lighting and magnification or chemicals to aid in seeing writing that was already on the letters."<sup>624</sup>

In *Simmons v. State*,<sup>625</sup> the court said, "Crime-scene analysis and victimology do not rest on scientific principles like those contemplated in *Frye*; these fields constitute specialized knowledge. . . . [B]ecause crime-scene analysis is not scientific evidence . . . we are not bound by the test enunciated in *Frye*."<sup>626</sup> To distinguish "specialized knowledge" from science, the court said, "Specialized knowledge offers subjective observations and comparisons based on the expert's training, skill, or experience . . . ."<sup>627</sup> Time will tell whether these apparent judicial glimpses of an underlying order will mature into workable doctrine. Ultimately, nothing may turn upon the distinction between "scientific" knowledge on the one hand and "technical[] or

618. See, e.g., *Eubanks*, 752 So. 2d at 1146; *Broadnax v. State*, No. CR-97-0113, 2000 WL 869510, at \*30 (Ala. Crim. App. June 30, 2000); *Simmons v. State*, 797 So. 2d 1134 (Ala. Crim. App. 2000). Except, of course, in capital cases wherein the defense asserted no objection in the trial court. In such cases, as reviewing courts repeatedly say, the reviewing court reviews only for "plain error." See especially *Broadnax*, 2000 WL 869510, at \*30 (reviewing trial court decision to admit testimony of two experts for abuse of discretion and trial court's ruling regarding defense's failure to object to one expert for plain error); see also, *Greenhill v. State*, 746 So. 2d 1064, 1068 (Ala. Crim. App. 1999).

619. 526 U.S. 137 (1999).

620. "There is no clear line that divides the one ["scientific" knowledge] from the others ["technical" or "other specialized" knowledge]. *Kumho Tire Co.*, 526 U.S. at 148.

621. 779 So. 2d 198 (Ala. 2000).

622. *Courtauld's Fibers*, 779 So. 2d at 202.

623. 793 So. 2d 870 (Ala. Crim. App. 2000).

624. *West*, 793 So. 2d at 880.

625. 797 So. 2d 1134 (Ala. Crim. App. 1999).

626. *Simmons*, 797 So. 2d at 1151.

627. *Id.*

other specialized" knowledge, since the latter two categories satisfy Rule 702, as well.<sup>628</sup>

The venerable "*Frye* test" and the upstart "*Daubert* standard," which has displaced *Frye* in the federal courts, figured large in the post-Rules decisions introduced in the previous paragraph. DNA evidence aside, the Alabama Supreme Court "has not abandoned the 'general acceptance' test stated in *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923), and it has not adopted the *Daubert* standard in civil cases."<sup>629</sup>

Four post-Rules decisions citing Rule 702 by number have dealt with DNA testing.<sup>630</sup> With regard to DNA evidence, the *Frye* test has been superseded by Alabama Code section 36-18-30, which provides:

Expert testimony or evidence relating to the use of genetic markers contained in or derived from DNA for identification purposes shall be admissible and accepted as evidence in all cases arising in all courts of this state, provided, however, the trial court shall be satisfied that the expert testimony or evidence meets the criteria for admissibility as set forth by the United States Supreme Court in *Daubert, et ux., et al., v. Merrell Dow Pharmaceuticals, Inc.*, decided on June 28, 1993.<sup>631</sup>

In *Turner v. State*,<sup>632</sup> the Alabama Supreme Court invoked this code section, holding that by explicitly adopting the *Daubert* standard for DNA evidence, the legislature had overruled the "*Frye-plus*" standard only recently established for DNA evidence by the court's decision in *Ex parte Perry*.<sup>633</sup> "Unlike *Perry*," the court said, "*Daubert* does not require the accuracy of the testing in the particular case to be assessed at the admissibility stage."<sup>634</sup> The court sent these directions to the trial courts:

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628. For post-Rules decisions confirming this proposition, see *Knapp v. Wilkins*, 786 So. 2d 457, 458 (Ala. 2000) (treating chiropractor); *Courtaulds Fibers*, 779 So. 2d at 202 (veterinary toxicologist); *S. Energy Homes, Inc. v. Washington*, 774 So. 2d 505, 516-17 (Ala. 2000) ("The methodology used . . . was acquired through on-the-job training. It involves no scientific expertise, but merely a simple mathematic formula. . . . [He] obtained knowledge of the mathematic formula through on-the-job training in the mobile-home business, including inspection and appraisal work for the Veterans Administration and [HUD]."); *Eubanks v. Hale*, 752 So. 2d 1113, 1146-47 (Ala. 1999) (identification of handwriting); *West v. State*, 793 So. 2d 870, 881 (Ala. Crim. App. 2000) (experience in recovering obliterated handwriting); *Broadnax v. State*, No. CR-97-0113, 2000 WL 869510, at \*30 (Ala. Crim. App. June 30, 2000) (qualification to interpret blood spatters found at murder scene).

629. *Courtaulds Fibers*, 779 So. 2d at 202.

630. *Turner v. State*, 746 So. 2d 355 (Ala. 1998) (reversing the Court of Criminal Appeals' reversal of capital murder conviction); *Thomas v. State*, No. CR-96-0876, 1999 WL 1267801, at \*44 (Ala. Crim. App. Dec. 30, 1999) (affirming capital murder conviction); *Simmons*, 797 So. 2d at 1134 (affirming capital murder conviction); *Hammonds v. State*, 777 So. 2d 750 (Ala. Crim. App. 1999) (affirming capital murder conviction).

631. ALA. CODE § 36-18-30 (2001).

632. 746 So. 2d 355 (Ala. 1998).

633. 586 So. 2d 242 (Ala. 1991).

634. *Turner*, 746 So. 2d at 360.

[I]f the admissibility of DNA evidence is contested, the trial court must hold a hearing, outside the presence of the jury, and, pursuant to section 36-18-30, determine whether the proponent of the evidence sufficiently establishes affirmative answers to these two questions:

I. Are the theory and the technique (i.e., the principle and the methodology) on which the proffered DNA forensic evidence is based "reliable"?

II. Are the theory and the technique (i.e., the principle and the methodology) on which the proffered DNA evidence is based "relevant" to understanding the evidence or to determining a fact in issue?<sup>635</sup>

The court also took "judicial notice that the DNA matching evidence was reliable."<sup>636</sup> Taking its cue from the supreme court's decision in *Turner*, the Alabama Court of Criminal Appeals has subsequently said, "[A]s the Alabama Supreme Court took judicial notice of the reliability of the theory and techniques used in RFLP DNA matching testing in *Turner*, we take judicial notice of the reliability of the theory and techniques used in the PCR [polymerase chain reaction] method of DNA analysis."<sup>637</sup> Standard searches have so far revealed no decision holding that courts can take judicial notice of the reliability of "DNA population frequency statistical analysis evidence."<sup>638</sup>

Concerning the implications of Rule 702's "assist the trier of fact" formula, consider this passage from Justice Johnstone's concurrence in *Ex parte Wilson*:

[T]he opinion [of the Alabama Court of Criminal Appeals] . . . appears to hold that, when . . . a capital murder was especially heinous, atrocious, or cruel, an experienced police officer who has investigated many capital crimes may testify to his opinion that the alleged murder at issue was especially heinous, atrocious, or cruel. Such opinion testimony is not proper under our rules of evidence.<sup>639</sup>

He explained that, by adopting Alabama Code section 13A-5-49(8), "the Legislature implicitly found that *every* person is so charged with knowledge of this standard that his or her violating it is punishable by death."<sup>640</sup> The courts, he concluded, "cannot, consistently with this implicit finding, hold that jurors need expert assistance to apply this standard."<sup>641</sup>

635. *Id.* at 361.

636. *Id.* at 362.

637. *Simmons v. State*, 797 So. 2d 1134, 1146 (Ala. Crim. App. 1999) (affirming capital murder conviction).

638. *See Simmons*, 797 So. 2d at 1164.

639. 777 So. 2d 935, 936 (Ala. 2000).

640. *Wilson*, 777 So. 2d at 936.

641. *Id.*

In one post-Rules decision, the Alabama Court of Criminal Appeals asserted a proposition about Rule 702's words "a witness qualified as an expert . . . may testify" that may have seemed harmless enough, indeed instrumental, in the context of the case before it, but that may prove troublesome in other contexts. A witness said that court, need not necessarily have been "formally tendered" as an expert, so long as evidence in the record supports a finding that he is, in fact, an expert in the subject matter of his testimony.<sup>642</sup> The language waiving formal tender seems facially inconsistent with certain perhaps makeweight language in an opinion by the Alabama Court of Civil Appeals,<sup>643</sup> but the two decisions can, arguably, stand together.<sup>644</sup>

Rule 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing.<sup>645</sup>

*Hagood v. State*,<sup>646</sup> the one post-Rules opinion citing Rule 703 by number, appears to confirm the pre-Rules proposition that the facts or data on which the expert bases his opinion must already be in evidence or, at least, must be subject to the proponent's promise that they will be put in evidence before the proponent rests. Rule 703 does not stand for that proposition, however, and Rule 705 contradicts that proposition rather flatly.<sup>647</sup> Fortunately, *Hagood* need only be read as implying that Rule 705 need not even be invoked, because "all of the facts in the hypothetical were already in evidence."<sup>648</sup>

Rule 704 provides:

Testimony in the form of an opinion or inference otherwise admissible is to be excluded if it embraces an ultimate issue to be decided by the trier of fact.<sup>649</sup>

In *Fitch v. State*,<sup>650</sup> the Alabama Court of Criminal Appeals suggested that certain challenged testimony "did not constitute reversible error under Rule 704 . . . because Rule 702 . . . provides an exception for its admission," and

642. *Hodges v. State*, No. CR-98-1988, 2001 WL 306937, at \*25 (Ala. Crim. App. Mar. 30, 2001).

643. *Pileri Indus., Inc. v. Consol. Indust., Inc.*, 740 So. 2d 1108, 1111 (Ala. Civ. App. 1999) ("Mr. Pileri was not proffered as an expert in Government contracts.").

644. *Id.* ("Also, there was no testimony as to Mr. Pileri's qualifications as an expert, as required under Rule 702.").

645. ALA. R. EVID. 703.

646. 777 So. 2d 162, 188 (Ala. Crim. App. 1998) (affirming capital murder conviction and holding that "Because all of the facts in the hypothetical were already in evidence, the trial court did not err in overruling the appellant's objection.").

647. See *infra* text and accompanying notes 656-66.

648. *Hagood*, 777 So. 2d at 188.

649. ALA. R. EVID. 704.

650. No. CR-97-2284, 2001 WL 996293 (Ala. Crim. App. Aug. 31, 2001).

further stated that “expert testimony as to the ultimate issue should be allowed when it would aid or assist the trier of fact.”<sup>651</sup> In *Wilkerson v. State*,<sup>652</sup> however, that court had perhaps defined the outer limit of permissible encroachment upon Rule 704’s proscription. The trial court had not allowed the defendant “to question his expert witness, Dr. Alan Blotcky, a clinical psychologist who performed a court-ordered evaluation of the appellant, as to whether the appellant had the ability to form the requisite intent to commit murder.”<sup>653</sup> The Alabama Court of Criminal Appeals affirmed, stating:

[E]ven the more permissive federal rule does not allow an expert witness to state an opinion as to the ultimate issue of whether a defendant had the requisite mental state to commit murder. . . . [T]he appellant sought only to elicit Dr. Blotcky’s opinion of the issue of specific intent. Therefore, even under the modern trend, the appellant’s argument that Dr. Blotcky should have been allowed to testify concerning the appellant’s intent fails.<sup>654</sup>

A court that did not wish to confront Rule 704 as squarely as the court in *Fitch v. State* might nonetheless circumvent it by finding a particular opinion not, in fact, an opinion on the ultimate issue.<sup>655</sup>

Rule 705 provides:

The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.<sup>656</sup>

Pre-Rules, Alabama courts claimed to require that the facts underlying an expert’s opinion be disclosed to the factfinder before an expert witness could express that opinion.<sup>657</sup> Thus, if the underlying facts were known personally to the expert, he first had to disclose those upon which he based his opinion to the court and jury.<sup>658</sup>

Rule 705 has changed that, shifting the burden of best advocacy from the expert opinion’s proponent on direct examination to its opponent on

651. *Fitch*, 2001 WL 996293, at \*7; see also *Henderson v. State*, 715 So. 2d 863, 865 (Ala. Crim. App. 1997) (affirming conviction for second-degree arson and stating, “[E]xperts in arson cases should be allowed to give opinion testimony as to whether a fire was intentionally set if that testimony will aid or assist the jury”).

652. 686 So. 2d 1266 (Ala. Crim. App. 1996) (affirming capital murder conviction).

653. *Wilkerson*, 686 So. 2d at 1278.

654. *Id.* at 1279.

655. *Clayton ex rel Clayton v. Fargason*, 730 So. 2d 160, 164 (Ala. 1999).

656. ALA. R. EVID. 705.

657. *Schroeder & Hoffman*, *supra* note 53, at 413.

658. *Id.*

cross-examination.<sup>659</sup> The added responsibility, however, has not taken anything away from the cross-examiner's pre-Rules opportunity to impeach the expert's testimony.

Research has revealed one appellate decision invoking Rule 705 by number. In *Grayson v. State*,<sup>660</sup> the Alabama Court of Criminal Appeals affirmed Grayson's conviction for capital murder under count one of the indictment against him. During the sentencing phase, the trial court allowed "the prosecutor to repeatedly [cross-examine Dr. Goff, the defense's expert] witness concerning statements made by the appellant's codefendants. . . . [According to the defense,] the prosecutor's questions, referring to statements made by the codefendants, called for improper hearsay . . . ."<sup>661</sup>

In ruling these questions and answers not improperly admitted, the court of criminal appeals said, "[T]he State's purpose in referring to the codefendants' statements was to reveal the narrow scope of investigation and examination conducted by the expert prior [to] arriving at a diagnosis [of Grayson]."<sup>662</sup> Drawing upon the codefendants' statements about the crime, the prosecutor had asked Dr. Goff "whether he had considered certain specifics and details of the offense concerning the appellant's participation and conduct during the offense."<sup>663</sup> This tactic elicited from Dr. Goff the concession "that he had based his diagnosis on information obtained from the appellant's statements and that he had not considered the codefendant's statements [in] arriving at a diagnosis [of Grayson]."<sup>664</sup> The court concluded, "[T]he State was using the factual information from the accomplices' statements in order to challenge the expert witness's basis for his diagnosis, rather than to prove the truth of the matter asserted."<sup>665</sup> Under Rule 705, as under pre-Rules precedents, the State "could properly test the credibility of the expert's diagnosis by questioning him concerning the information upon which he based his diagnosis."<sup>666</sup>

Rule 706 makes provision for court-appointed experts.<sup>667</sup> One post-Rules decision, *Union Fidelity Life Ins. Co. v. McCurdy*,<sup>668</sup> has cited Rule 706 by number, although arguably mistakenly. In recommending a court appointee to assist the court in determining an appropriate attorney fee in a questionable case, the Alabama Supreme Court cited Rule 706.<sup>669</sup> Rule 53 of the Alabama Rules of Civil Procedure would have seemed more closely on point.

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659. See ALA. R. EVID. 705.

660. No. CR-95-1511, 1999 WL 1046427 (Ala. Crim. App. Nov. 19, 1999).

661. *Grayson*, 1999 WL 1046427, at \*31.

662. *Id.*

663. *Id.*

664. *Id.*

665. *Id.* at \*33.

666. *Grayson*, 1999 WL 1046427, at \*33.

667. See ALA. R. EVID. 706.

668. 781 So. 2d 186, 195 (Ala. 2000).

669. *McCurdy*, 781 So. 2d at 195.

THE EIGHT HUNDREDS  
(HEARSAY)

Under the Rules as under the law before them, “[h]earsay is not admissible.”<sup>670</sup> Rule 801 establishes the modern definition of hearsay which that proscription applies.

Rule 801(a)-(c) reads as follows:

The following definitions apply under this article:

(a) *Statement*. A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

(b) *Declarant*. A “declarant” is a person who makes a statement.

(c) *Hearsay*. “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.<sup>671</sup>

One or more of these sections, mostly section (c), has been implicated by number in some seventeen post-Rules decisions.

Rule 801 presents its definition of hearsay in four parts. First, it defines the building-block term of art “statement” as “(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.”<sup>672</sup> Second, it defines the building-block term of art “declarant” as “a person who makes a statement.”<sup>673</sup> Third, it defines “hearsay” generally as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”<sup>674</sup> Fourth, it *exempts* two traditional categories of hearsay, i.e., prior statements by witnesses and admissions by parties opponent, when offered to prove the truth of the matter asserted, from its definition of hearsay.<sup>675</sup>

The Rule’s failure to define another of its building-block terms of art, that is, “assertion,” has generated some interpretational confusion.<sup>676</sup> Defining a “statement” as an “assertion,” as the Rule does, implies either (1) solely that the two terms are equivalents, a futile and artless attempt at definition, or (2) additionally that “statements”/“assertions” constitute one subcategory of a superordinated category of utterances.<sup>677</sup> What, then, are the

670. ALA. R. EVID. 802.

671. ALA. R. EVID. 801.

672. ALA. R. EVID. 801(a).

673. ALA. R. EVID. 801(b).

674. ALA. R. EVID. 801(c).

675. ALA. R. EVID. 801(d).

676. See, e.g., *Ex parte Hunt*, 744 So. 2d 851, 856 (Ala. 1999) (“[T]here exists a split of authority as to whether a question can be within the term ‘statement’ as defined by Rule 801(a)(1).”). The opinion goes on to examine the split briefly.

677. As a legal term of art, “utterances” certainly encompass all human vocalizations, not only verbalizations. Considering whether and how much wider the term reaches must await another occasion.

other subcategories? Questions; words of promise; orders, requests, and proposals; and exclamations and expletives suggest themselves.

In a casebook-worthy post-Rules decision and opinion, the Alabama Supreme Court has addressed the questions whether and when a question falls within the definition of "assertion." The case is *Ex parte Hunt*,<sup>678</sup> a prosecution for forgery in which the court reversed Hunt's conviction on another ground and rendered a judgment of acquittal for want of sufficient evidence.<sup>679</sup> On the hearsay point, however, the court sided with the trial court, which had allowed an employee of the victim to give testimony reporting the following telephone conversation: "She asked who signed the payroll checks, who made the payroll checks out and I told her Mr. Sak. And she said what was his first name and I said 'Jim Sak.' And at that point she just hung up."<sup>680</sup> Acknowledging precedent *contra* in other jurisdictions,<sup>681</sup> the court said: "[W]hether a question is a 'statement' for purposes of Rule 801(a) . . . depends upon the nature of the question, the circumstances surrounding the question, and the fact sought to be proved by offering the question."<sup>682</sup> In support of this interpretation of "statement," the court first observed that, under Rule 801(a)(2), a person's nonverbal conduct falls within the meaning of "statement" only "if it is intended by the person as an assertion."<sup>683</sup> The court then proceeded: "[B]y not including a similar limitation requiring that an utterance must also have been 'intended by the person as an assertion,' the Committee meant to embrace implied as well as express assertions within the Rule 801(a)(1) definition of a 'statement' . . . ."<sup>684</sup> Applying this understanding to the case before it, the court concluded: "[T]he questions asked by the caller made no assertion, either expressly or implicitly. They did not state or imply the existence of any facts whatever. Thus the questions were not hearsay."<sup>685</sup>

Even more recently, in *Aldridge v. DaimlerChrysler Corp.*,<sup>686</sup> the high court has addressed the nonassertive subcategory of utterances for words of promise. Perceptive decisions like *Hunt* and *Aldridge* may eventually lead to a formal amendment of Rule 801(a)(2), perhaps along the following lines: "(2) *an utterance other than an assertion or nonverbal conduct of a person, if either is intended by the person as an assertion.*"

Some several years before *Aldridge* and *Hunt*, the Alabama Court of Criminal Appeals missed its own opportunity to publish casebook-worthy thinking about subcategories of utterances other than assertions. *Nettles v.*

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678. 744 So. 2d 851 (Ala. 1999).

679. *Hunt*, 744 So. 2d at 852.

680. *Id.* at 852-53.

681. *Id.* at 856-57.

682. *Id.* at 857.

683. *Id.*

684. *Hunt*, 744 So. 2d at 857.

685. *Id.*

686. 809 So. 2d 785, 797-98 (Ala. 2001) (holding testimony that Chrysler representatives had said employees signing VTEP would have preferential rehire rights was admissible as nonhearsay).

*State*,<sup>687</sup> was the case in which that court reaffirmed its own dubious conclusion that testimony offered under Rule 801(d)(2)(E) (vicarious admissions by co-conspirators) was admissible not only against a criminal defendant, but against the State.<sup>688</sup> Although the court's reasoning in *Nettles* was dubious at best, its decision was right on the mark.

In *Nettles*, the Alabama Court of Criminal Appeals reversed *Nettles*'s conviction for kidnapping and burglary and remanded the cause for a new trial.<sup>689</sup> At trial, *Nettles* had defended by testifying to a conspiracy to steal the cash receipts from the McDonald's which the victim, one Phillips, managed.<sup>690</sup> Besides himself, so *Nettles* testified, Phillips (the State's victim!), Leticia Dennis (another employee of McDonald's), and Russell Sargent (Dennis's boyfriend) were co-conspirators.<sup>691</sup> The trial court had prevented a defense witness from reporting a conversation among *Nettles*, Dennis, and Sargent during which, we are to suppose, they plotted or continued to plot their conspiracy.<sup>692</sup> It did so on the two-edged theory that examining counsel's leading questions sought to elicit inadmissible hearsay.<sup>693</sup> By the sounder view, however, much of this conversation among alleged co-conspirators was simply not hearsay under Rule 801(c)'s definition and, therefore, did not need the exemption provided by Rule 801(d)(2)(E) and misinvoked by the court of appeals. To the extent that the witness would not have reported conspirators' utterances asserting the existence of the conspiracy as a proposition of fact, but utterances that themselves constituted part of the conspiracy, the witness's testimony would simply not have reported *assertions*. No testimony reporting assertions equals no testimony reporting statements. No testimony reporting statements equals no testimony reporting hearsay.

Post-Rules cases afford some nice illustrations of Rule 801(c) at work.<sup>694</sup> In some of those cases, evidence deemed hearsay under Rule 801(c)'s definition was, nevertheless, admitted as nonhearsay under Rule 801(d), or as hearsay under an exception.

Because a statement offered as hearsay comes from a person not on the witness stand at the time he uttered the statement, the statement generally does not have the sanction of an oath, and the person who made it is usually neither available for cross-examination nor present in court where the trier

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687. 683 So. 2d 9 (Ala. Crim. App. 1996).

688. *Nettles*, 683 So. 2d at 13. For a discussion about why this conclusion is, at the most optimistic, dubious, see discussion *infra*.

689. *Id.* at 14.

690. *Id.* at 10.

691. *Id.*

692. *Id.* at 11.

693. *Nettles*, 683 So. 2d at 11.

694. See, e.g., *Johnson*, 823 So. 2d at 26-30 (affirming capital murder conviction where eavesdropper's notes about defendant's statements made in telephone conversations during calls placed from jail were admitted); *Adams v. State*, 794 So. 2d 450, 451 (Ala. Crim. App. 2001) (reversing conviction for second-degree theft where employee's report was offered to show value of stolen items and, thus, to prove the truth of the matter asserted).

of fact might evaluate his demeanor.<sup>695</sup> And even if the out-of-court declarant presently sits under oath in the witness chair, “[t]he definition of hearsay includes a statement made outside the trial by a declarant who takes the witness stand at trial to recount the previous statement.”<sup>696</sup> In this view, it is the lack of opportunity to cross-examine a declarant at the time of his out-of-court utterance, not at the time of his subsequent recounting, that lies at the heart of the hearsay problem.

If offered to prove the truth of the matter asserted, statements (as defined by Rule 801(a)) are hearsay, unless “made by the declarant while testifying at trial or hearing.”<sup>697</sup> If offered for a purpose other than proving the truth of the matter asserted, however, testimonial and documentary reports of statements not made while testifying at the present trial or hearing are not offered as hearsay.<sup>698</sup> Thus, a statement is not offered as hearsay when offered simply to show that it was made,<sup>699</sup> or to show that another person received notice of information communicated by the statement.<sup>700</sup> A statement is not offered as hearsay if offered to show the speaker’s or writer’s state of mind at the time of utterance.<sup>701</sup> Nor is a statement offered as hearsay when offered as a first step in showing its effect on a person who heard it when uttered.<sup>702</sup>

The purpose last noted does have a legitimate field of application, but prosecutors frequently invoke it with an unfortunately high success rate to funnel legally inconsequential but sometimes unduly prejudicial information into a jury’s collective mind. Feigning a purpose only to explain why some official or quasi-official nonparty behaved as he did (usually, but not always, a law enforcement agent now on the witness stand), prosecutors successfully introduce into evidence the testimonial reports of out-of-court statements made by informants and others, statements the only discernible material purpose of which is to prove this or that element of the prosecu-

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695. SCHROEDER & HOFFMAN, *supra* note 53, at 422.

696. Taylor v. State, 808 So. 2d 1148, 1193 (Ala. Crim. App. 2000).

697. See, e.g., Travis v. State, 776 So. 2d 819, 850 (Ala. Crim. App. 1997) (“Shad’s testimony did not involve information that was outside the scope of his own personal knowledge; it did not involve information that had been told to him by another person. Thus, he was testifying to events to which he was a party.”).

698. SCHROEDER & HOFFMAN, *supra* note 53, at 422.

699. *Id.*

700. *Id.*

701. Montgomery v. State, 781 So. 2d 1007, 1018-19 (Ala. Crim. App. 2000) (holding proposed testimony was not hearsay “because it [was] offered circumstantially to prove state of mind [i.e., circumstantial evidence of insanity] and not to prove the truth of the matter asserted” and, thus, distinguishing facts from application of Rule 803(3)).

702. Stallworth v. State, No. CR-98-0366, 2001 WL 1149071, at \*18 (Ala. Crim. App. Sept. 28, 2001) (affirming capital murder conviction where testimony consisted of cashier/witness reporting telephone conversation between declarant and someone on other end (talking about victim’s murder) and reporting defendant’s reaction to overhearing it); *Ex parte* Hunt, 744 So. 2d 851, 857 (Ala. 1999) (reversing conviction for forgery on another ground where witness/callee’s answers to caller’s questions were not offered to prove that Saks actually had authority to sign victim/company’s checks, but to prove that witness’s caller and the forger of Saks’s name were the same person).

tion's case, or worse, simply to paint the criminal defendant in a bad light.<sup>703</sup>

To its credit, the Alabama Supreme Court has, in two millenium year cases, cast doubt upon the legitimacy of this pretended purpose. Although, in *Ex parte Mason*,<sup>704</sup> it affirmed defendant's conviction for capital murder for want of plain error, the court said:

The informant's out-of-court declarations had been offered, without objection, for the *dubious purpose* of *showing why* the officer conducted his investigation and expressly not for the purpose of proving the truth of the matter stated. Likewise the trial court had admitted this testimony expressly subject to these limitations. The out-of-court declarations would have been inadmissible hearsay for the truth of the matter stated.<sup>705</sup>

In *Ex parte Melson*,<sup>706</sup> the court went further. Once again, the court affirmed a conviction for capital murder for lack of plain error.<sup>707</sup> Concerning the questionable "explain why" exception to the hearsay rule, however, the court said, "The State argues that the answer regarding Peraita's statement was elicited from Officer Ragan in order to *explain why* the police officer seized Melson's shoes, not to prove that Melson was wearing a particular pair of shoes. *We disagree with the State's argument.*"<sup>708</sup> Perhaps, with luck, these twin strokes by Alabama's highest court will toll the death knell for the "explain why" exception—at least in Alabama. If so, the legitimate part of what it let in to evidence will remain admissible under Rule 602.

Rule 801(d)(1) provides:

The following definitions apply under this article:

...

(d) *Statements that are not hearsay.* A statement is not hearsay if—

(1) **PRIOR STATEMENT BY WITNESS.** The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and is offered to rebut

703. See, e.g., *Ex parte Mason*, 768 So. 2d 1008, 1011 (Ala. 2000) ("for the dubious purpose of showing why the officer conducted his investigation"); *T.D.T. v. State*, 745 So. 2d 885, 894 (Ala. Crim. App. 1998) ("to show what instigated the investigation that resulted in the charges against T.D.T."); *Roper v. State*, 695 So. 2d 244, 246 (Ala. Crim. App. 1996) ("to explain the actions of the emergency room personnel"); *Miller v. State*, 687 So. 2d 1281, 1285 (Ala. Crim. App. 1996) ("to show the reasons for the officers' actions and how their investigation focused on a suspect").

704. *Mason*, 768 So. 2d at 1008.

705. *Id.* at 1011 (emphasis added).

706. 775 So. 2d 904 (Ala. 2000).

707. *Melson*, 775 So. 2d at 907-08.

708. *Id.* at 906-07 (emphasis added).

an express or implied charge against the declarant of recent fabrication or improper influence or motive.<sup>709</sup>

Post-Rules opinions have implicated Rule 801(d)(1) by number some seven times.

Ordinarily, a party cannot corroborate the testimony of his own witness by proving that he has previously made statements consistent with his current testimony, and when corroborating testimony is offered to prove the truth of the matters asserted, it is inadmissible hearsay.<sup>710</sup> Consider especially the post-Rules case, *Freeman v. State*,<sup>711</sup> wherein the Alabama Court of Criminal Appeals affirmed a conviction for robbery and attempted murder. The court declared itself to be:

[U]npersuaded by the appellant's argument that his own statement to police, in which he denied participating in the offense, had special exculpatory value and would have been admissible at trial, over a hearsay objection, as a prior consistent statement under Rule 801(d)(1)(B) . . . to rebut the inference, which the appellant says was created by the state during its cross-examination of the appellant, that the appellant had recently fabricated an alibi.<sup>712</sup>

To qualify for admission into evidence under Rule 801(d)(1)(B), said the court, "prior consistent statements must have been made before the witness . . . acquired a motive to fabricate."<sup>713</sup> The appellant, "who had been arrested as a suspect in robbery, clearly had a motive to fabricate at the time he made his statement to police."<sup>714</sup>

In several post-Rules cases, the Alabama Court of Criminal Appeals has called upon Rule 801(d)(1)(B) to fill a gap left by the omission from Alabama's Rule of a provision like that found in Federal Rule 801(d)(1)(C), which provides:

The following definitions apply under this article:

. . .

(d) *Statements which are not hearsay.* A statement is not hearsay if—

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the

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709. ALA. R. EVID. 801(d)(1).

710. SCHROEDER & HOFFMAN, *supra* note 53, at 427.

711. 722 So. 2d 806, 811-12 (Ala. Crim. App. 1998).

712. *Freeman*, 722 So. 2d at 811.

713. *Id.* at 812.

714. *Id.*

statement, and the statement is . . . (C) one of identification of a person made after perceiving the person . . . .<sup>715</sup>

In *Woods v. State*,<sup>716</sup> a prosecution for attempted murder, "the trial court . . . [had] allow[ed a detective] to testify that the victim, while hospitalized, gave a prior consistent statement concerning the identity of the person who had shot him."<sup>717</sup> In affirming Woods's conviction, the Alabama Court of Criminal Appeals acknowledged that "[u]nlike the Federal Rules of Evidence, the Alabama Rules of Evidence do not indicate that identity is a *per se* exception to the hearsay rule."<sup>718</sup> But the court went on:

This does not mean, however, that such a statement relating to identity is inadmissible *per se*. Alabama continues to recognize the rule that an identification statement may be admissible, but under another theory. For example, Alabama has long admitted identifications when offered to prove the act of identification, rather than the truth of the matter asserted.<sup>719</sup>

"Indeed," said the court:

[O]ne commentator, in addressing the admissibility of extrajudicial identifications, appears to have reconciled this line of prior substantive law [holding testimony reporting a declarant's out-of-court identification of a defendant admissible as nonhearsay if the declarant now testifies as an identification witness and can be cross-examined about the out-of-court identification] with Rule 801(d)(1) . . . in reaching a logical resolution to the problem of extrajudicial identifications."<sup>720</sup>

The commentator invoked, Professor Charles W. Gamble, has said, "[T]he Alabama Rules of Evidence now permit such consistent identifications, offered to rebut a charge of recent fabrication or improper influence or motive, as substantive evidence of the truth of the matter asserted."<sup>721</sup>

The Alabama Court of Criminal Appeals revisited this matter in *Chavers v. State*,<sup>722</sup> a prosecution for robbery, kidnapping, rape, and sodomy. The trial court had allowed a police officer to testify "that the victims had

715. FED. R. EVID. 801(d)(1)(C).

716. 709 So. 2d 1340 (Ala. Crim. App. 1997) (affirming attempted murder conviction).

717. *Woods*, 709 So. 2d at 1344.

718. *Id.*

719. *Id.* at 1345.

720. *Id.*

721. 2 CHARLES W. GAMBLE, MCELROY'S ALABAMA EVIDENCE § 273.01(2), at 1352 (5th ed. 1996).

722. 714 So. 2d 341 (Ala. Crim. App. 1997) (affirming conviction for robbery, kidnapping, rape, and sodomy).

made extrajudicial identifications of Chavers as one of their assailants from a photographic array.”<sup>723</sup> The court said:

The objected-to testimony was not inadmissible hearsay, because it was not offered to prove the truth of the matter asserted. Rather, the testimony was offered in response to Chavers’s challenge to the reliability of the victims’ identification, to show that the victims’ in-court identification was not fabricated, but was consistent with previous identifications.<sup>724</sup>

Having so said, the court affirmed Chavers’s conviction.<sup>725</sup>

Rule 801(d)(2) provides:

The following definitions apply under this article:

...

(d) *Statements that are not hearsay.* A statement is not hearsay if—

....

(2) **ADMISSIONS BY PARTY OPPONENT.** The statement is offered against a party and is (A) the party’s own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party’s agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.<sup>726</sup>

Some thirteen post-Rules opinions have implicated Rule 801(d)(2) by number.

Rule 801(d)(2)(A) has been implicated in some seven post-Rules decisions,<sup>727</sup> none of which require comment here. Research has revealed no post-Rules decision implicating Rule 801(d)(2)(B). Research has revealed one decision implicating Rule 801(d)(2)(C), wherein the Alabama Court of Civil Appeals affirmed, *sub silentio*, a trial court’s consideration on motion

723. *Chavers*, 714 So. 2d at 344.

724. *Id.* at 344-45.

725. *Id.* at 346.

726. ALA. R. EVID. 801(d)(2).

727. *Dorsey v. State*, No. CR-97-1522, 2001 WL 564212, at \*30 (Ala. Crim. App. May 25, 2001); *Johnson v. State*, 823 So. 2d 1, 28 (Ala. Crim. App. 2000) (affirming capital murder conviction where eavesdropper testified to defendant’s statements made in telephone conversations during calls placed from jail); *Griffin v. State* 790 So. 2d 267, 290 (Ala. Crim. App. 1999) (affirming capital murder and holding that “A plea of guilty by a defendant to a [different] felony and his allocution on that plea are admissions under Rule 801(d)(2)(A)”; *Durham v. State*, 730 So. 2d 235, 237 (Ala. Civ. App. 1999); *Hall v. Duster*, 727 So. 2d 834, 837 (Ala. Civ. App. 1999); *Hagood v. State*, 777 So. 2d 162, 208-10 (Ala. Crim. App. 1998); *Radford v. State*, 726 So. 2d 756, 759 (Ala. Crim. App. 1998).

for summary judgment of "a brief prepared on the owner's behalf in a prior action in which he was defendant in a slip-and-fall case occurring at the same building."<sup>728</sup>

Research has revealed only one case in which the Alabama Supreme Court has invoked Rule 801(d)(2)(D) by number, but that particularly instructive decision merits a closer than usual look for the insight it affords into the realities of foundational proof behind the "tests" and formulas of the law. In *New Plan Realty Trust v. Morgan*,<sup>729</sup> Kimberly Morgan sued her former apartment landlord, New Plan, for trespass and the conversion of personal property, including priceless heirlooms, during the term of her lease.<sup>730</sup> According to the court's recitations from the record, Morgan herself had already moved out because of personal problems with another tenant, a former boyfriend, but New Plan's complex manager, Marsha Babineaux, promised Morgan that New Plan would not disturb the things she had not yet been able to move out until the lease expired.<sup>731</sup> Babineaux went back on her promise, misappropriating or throwing out Ms. Morgan's things, perhaps on the very day she knew Ms. Morgan was coming for them.<sup>732</sup> Particularly pivotal and damaging at trial, according to the report, was the testimony of Joan Davis, Ms. Morgan's former neighbor at New Plan, reporting what New Plan's cleaning woman, Kathy, had told her about Babineaux's reprehensible behavior.<sup>733</sup> After trial, the circuit court rendered judgment for Morgan on a jury verdict for \$100,000 in compensatory damages and \$100,000 in punitive damages.<sup>734</sup> On appeal, New Plan asserted, *inter alia*, that Davis's testimony had reported inadmissible hearsay.<sup>735</sup> Here is Davis's testimony reporting what Kathy had told her:

They [Kathy and the custodian] said that Marsha [Babineaux] had sent them in to clean out the apartment and they were upset because they told Marsha that usually when somebody left that they didn't get all their things. They took them all over to the office for at least 90 days, you know, gave the person time to come get them. Marsha said she wasn't going to do that, said just dispose of them, to take

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728. *Cruze v. Davis*, 693 So. 2d 514, 515 (Ala. Civ. App. 1997) (affirming summary judgment for Davis, the owner of the premises and co-defendant, the lessee of the premises, in a slip-and-fall case). Upon motion for summary judgment, the circuit court had apparently considered as *Cruze's* evidentiary showing "a brief prepared on the owner's behalf in a prior action in which he was defendant in a slip-and-fall case occurring at the same building . . ." *Cruze*, 693 So. 2d 514 at 515. The Alabama Court of Civil Appeals rested its affirmance not on the ground that the writing was inadmissible, but that it was not sufficient to withstand a motion for summary judgment. *Id.* at 516.

729. 792 So. 2d 351 (Ala. 2000).

730. *Morgan*, 792 So. 2d at 354.

731. *Id.* at 355-56.

732. *Id.* at 356.

733. *Id.* at 357-58.

734. *Id.* at 354.

735. *Morgan*, 792 So. 2d at 360.

the clothes and give them to Goodwill and everything else throw in the dumpster.<sup>736</sup>

The court, however, held that Morgan's counsel had laid a sufficient foundation to admit this testimony under Rule 801(d)(2)(D).<sup>737</sup> Here is that foundation:

Q: Did you have an occasion—did you have a conversation or hear of a conversation with anyone from me [*sic*] who worked for the apartment complex, the maintenance man or Kathy, the cleaning woman?

A: Uh-huh.

Q: Regarding what happened to [Morgan's] property?

A: I did.<sup>738</sup>

Here is what the court said about that foundation:

This particular testimony was introduced without objection. It establishes that Kathy was the cleaning woman who worked for the apartment complex. . . . New Plan did not . . . challenge Kathy's status as its employee-housekeeper. . . . New Plan's . . . motion *in limine* itself characterized Kathy as New Plan's housekeeper. . . . Thus Kathy's out-of-court declaration, as recounted by the witness Joan Davis after the trial court overruled New Plan's objection, was admissible to prove both the fact of Kathy's agency and the scope of her authority *since Morgan had already established her status as New Plan's cleaning woman.*<sup>739</sup>

The court affirmed the circuit court's judgment in full.<sup>740</sup>

Research has revealed five post-Rules decisions implicating Rule 801(d)(2)(E). In *Nettles v. State*,<sup>741</sup> the Alabama Court of Criminal Appeals reaffirmed its own dubious conclusion that testimony offered under Rule 801(d)(2)(E) (vicarious admissions by co-conspirators) was admissible not only against criminal defendants when adverse to them, but against the State when adverse to it.<sup>742</sup> At trial, *Nettles* had defended against robbery and kidnapping charges by testifying to a conspiracy to steal the cash receipts from the McDonald's which the victim, one Phillips, managed.<sup>743</sup> Besides himself, according to *Nettles*, Phillips (the State's victim!), Leticia Dennis

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736. *Id.* at 361.

737. *Id.* at 361-62.

738. *Id.* at 360.

739. *Id.* at 360-61.

740. *Morgan*, 792 So. 2d at 366.

741. 683 So. 2d 9 (Ala. Crim. App. 1996).

742. *Nettles*, 683 So. 2d at 13.

743. *Id.* at 10.

(another employee of McDonald's), and Russell Sargent (Dennis's boyfriend) were co-conspirators.<sup>744</sup> The trial court had prevented a defense witness from reporting a conversation among Nettles, Dennis, and Sargent during which, we are to suppose, they plotted, or continued to plot, their conspiracy.<sup>745</sup> It did so on the theory that examining counsel's leading question sought to elicit inadmissible hearsay.<sup>746</sup>

The Alabama Court of Criminal Appeals reversed Nettles's conviction and remanded the cause for a new trial.<sup>747</sup> As explained *supra*, this disposition was supportable, but not by the rationale propounded by the court. To remain true to the theory under which Rule 801(d)(2)(E) proceeds, the out-of-court statements of co-conspirators can be admitted only against a co-conspirator. Therefore, to hold the conversation among Nettles, Dennis, and Sargent admissible against the State under Rule 801(d)(2)(E), the court would of necessity have had to deem them co-conspirators with the State. This conclusion would have been nonsense. The court has, it must be said, more recently recited the proper formula,<sup>748</sup> with no apparent awareness, however, that *Nettles* still lies planted like a jurisprudential landmine in the court's garden of citable propositions and quotable quotes.<sup>749</sup>

The remaining three post-Rules decisions bring to mind Rule 801(d)(2)(E)'s requirements that a proponent produce sufficient foundational evidence to support findings (1) that there was, in fact, a conspiracy, (2) that the declarant was, in fact, a co-conspirator, and (3) that the declarant made the proffered statement "during the course and in furtherance of the conspiracy."<sup>750</sup>

In *Acklin v. State*,<sup>751</sup> the Alabama Court of Criminal Appeals affirmed Acklin's conviction for capital murder. Responding to Acklin's argument "that the trial court erred in admitting into evidence statements and threats Joey Wilson and Corey Johnson made to the people in the apartment the night of the murders,"<sup>752</sup> the court said:

The quantum o[f] proof required to demonstrate the existence of a conspiracy in order to permit the admission of the statements of the coconspirators is that the proof must establish a prima facie case of conspiracy. . . . Acklin does not dispute the existence of the con-

744. *Id.*

745. *Id.* at 10-11.

746. *Id.* at 11.

747. *Nettles*, 683 So. 2d at 14.

748. *Johnson v. State*, 820 So. 2d 842 (Ala. Crim. App. 2000) (affirming capital murder conviction and stating, "To meet this requirement [of Rule 801(d)(2)(E)] the statement must be offered against a party. The statement here was not offered against a party but was offered in Johnson's defense.").

749. See *Hoffman*, *supra* note 89, at 950-52 nn.241-50.

750. See ALA. R. EVID. 801(d)(2)(E).

751. 790 So. 2d 975 (Ala. Crim. App. 2000) (statements and threats made to victims by co-conspirators at scene before murders).

752. *Acklin*, 790 So. 2d at 998.

spiracy, and the evidence presented tended to establish proof of the conspiracy.<sup>753</sup>

Responding to Acklin's follow-up argument "that some of the statements of Joey Wilson and Corey Johnson elicited through the testimony of Michelle Hayden were not made 'in furtherance of the conspiracy,'" <sup>754</sup> the court concluded *ipse dixit* that all of the statements elicited via Hayden were made in furtherance of the conspiracy.<sup>755</sup>

In *Radford v. State*,<sup>756</sup> the Alabama Court of Criminal Appeals affirmed Radford's conviction for murder, concluding that, because the State did adduce evidence of a conspiracy to cover up Radford's role in the murder independent of the co-conspirators' statements, the statements were properly admitted under Rule 801(d)(2)(E).<sup>757</sup> Testimony relating "the appellant's own statements," said the court:

[A]dmitted into evidence . . . as admissions . . . constituted evidence independent of the appellant's coconspirators' statements that a conspiracy existed, thereby forming the basis for the admission of the coconspirators' statements under Rule 801(d)(2)(E) . . . . The appellant himself told Eaton that he was worried that he would "snitch" and he told Siler not to "run his mouth." . . . [H]e told Spigner that he would kill her because she knew too much.<sup>758</sup>

Notice that the conspiracy offered as foundation for the admission into evidence of co-conspirators' out-of-court statements was not to murder the victim, but to cover up Radford's role in the murder.<sup>759</sup> This implies the interesting proposition that the conspiracy offered as foundation need not be to commit the crime under prosecution, so long as it was to commit some crime.

Here, with leave, let us consider a post-Rules opinion that did not cite Rule 801(d)(2)(E) by number, but which nevertheless brings it to mind. In *Durham v. State*,<sup>760</sup> the State of Alabama prosecuted a forfeiture action against a father and son. At stake was the father's pickup truck, which the son had, allegedly, used in the marijuana trade.<sup>761</sup> The Alabama Court of Civil Appeals affirmed the circuit court's judgment of forfeiture, holding that it had not erred in admitting, over a hearsay objection, evidence of certain out-of-court statements by the son.<sup>762</sup> "The son's statements were not

753. *Id.* at 999.

754. *Id.* at 1000.

755. *Id.*

756. 726 So. 2d 756 (Ala. Crim. App. 1998) (affirming murder conviction).

757. *Radford*, 726 So. 2d at 759-60.

758. *Id.* at 759.

759. *Id.*

760. 730 So. 2d 235 (Ala. Civ. App. 1999) (affirming judgment forfeiting vehicle).

761. *Durham*, 730 So. 2d at 236.

762. *Id.* at 237.

hearsay," said the court, "by virtue of their exclusion under Rule 801(d)(2)(A) . . . ."<sup>763</sup> Under what theory, however, were the son's incriminating statements admissible against the father? The opinion did not suggest complicity, much less conspiracy, which, of course, would have brought Rule 801(d)(2)(E) to mind.

Rule 802 says succinctly, "Hearsay is not admissible except as provided by these rules, or by other rules adopted by the Supreme Court of Alabama or by statute."<sup>764</sup> Although Rule 802 does not say so on its face, it must necessarily also accommodate constitutional exceptions in addition to the statutory exceptions it expressly accommodates. The Alabama Supreme Court has recognized this necessity in *Ex parte Griffin*,<sup>765</sup> wherein it said: "Rather than violate Griffin's right to due process, we follow the United States Supreme Court's holding in *Chambers v. Mississippi*, 410 U.S. 1920 (1967)] and hold that Griffin's constitutional rights supersede the hearsay rule in the Alabama Rules of Evidence."<sup>766</sup>

Two other post-Rules opinions remind us of incidentally interesting, though not closely related, propositions. Hearsay evidence is admissible by statute in waiver-of-parental-consent proceedings.<sup>767</sup> Rule 802's proscription of hearsay applies not only at trial, but at other proceedings, where appropriate, as well.<sup>768</sup>

Of Rule 803's twenty-three exceptions, only the first, the third through the sixth, and the eighth have, apparently, received explicit post-Rules appellate judicial attention. The following paragraphs address those six exceptions.

Rule 803(1) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) PRESENT SENSE IMPRESSION. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.<sup>769</sup>

Research has revealed two post-Rules decisions implicating Rule 803(1), neither of which sets an example worth perpetuating.<sup>770</sup>

Rule 803(3) provides:

763. *Id.*

764. ALA. R. EVID. 802.

765. 790 So. 2d 351 (Ala. 2000).

766. *Griffin*, 790 So. 2d at 355 (reversing capital murder conviction).

767. ALA. CODE § 26-21-4(b) (1992). See *Ex parte Anonymous*, 808 So. 2d 1030, 1041 (Ala. 2001) (Woodall, J., dissenting); *Ex parte Anonymous*, 806 So. 2d 1269, 1276-77 (Ala. 2001).

768. *Sharrief v. Gerlach*, 798 So. 2d 646, 651 (Ala. 2001) ("Hearsay evidence is not admissible in support of a motion for a new trial, and a new trial will not be granted on the basis of such evidence.").

769. ALA. R. EVID. 803(1).

770. *Johnson v. State*, 823 So. 2d 1 (Ala. Crim. App. 2001) (affirming capital murder conviction); *Taylor v. State*, 808 So. 2d 1148 (Ala. Crim. App. 2000) (affirming capital murder conviction).

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....

(3) THEN EXISTING MENTAL, EMOTIONAL, OR PHYSICAL CONDITION. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.<sup>771</sup>

The admission of statements relating to pain or other physical sensations reflects a policy of admitting statements which, because they are more or less spontaneous, are deemed sufficiently reliable to warrant exception from the hearsay rule. Consider this post-Rules example. In *J.L. v. L.M.*,<sup>772</sup> according to the Alabama Court of Civil Appeals, the juvenile court did not err in admitting a witness's testimony that J.L.'s children would say, "[C]an I have something to eat?"<sup>773</sup>

In *Fomby v. Popwell*,<sup>774</sup> an action by a boat passenger, Sabrina Fomby, against the boat operator, James Popwell, to recover damages for injuries, chiefly a broken back, allegedly caused by negligent operation of the boat, the Alabama Court of Civil Appeals identified a limit to the admissibility of hearsay under Rule 803(3). At trial, the circuit court had, upon Popwell's objection, excluded the following: "Q. Now has Sabrina expressed to you during—From the time that she got hurt up until now, has she ever expressed to you any specific concerns that she has? A. She is worried about—"<sup>775</sup> In affirming the circuit court's judgment on a jury verdict for Popwell, the Alabama Court of Civil Appeals said: "[W]hile this rule [Rule 803(3)] permits [a witness] to testify that Fomby said she was worried, it does not permit her to testify as to the causes of her worry."<sup>776</sup> Arguably, this conclusion squares well with Rule 803(3)'s proviso, "but not including a statement of memory or belief to prove the fact remembered or believed."<sup>777</sup>

Rule 803(4) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

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771. ALA. R. EVID. 803(3).

772. 805 So. 2d 729 (Ala. Civ. App. 2001).

773. *J.L.*, 805 So. 2d at 731.

774. 695 So. 2d 628 (Ala. Civ. App. 1996).

775. *Fomby*, 695 So. 2d at 632.

776. *Id.*

777. See ALA. R. EVID. 803(3).

(4) STATEMENTS FOR PURPOSES OF MEDICAL DIAGNOSIS OR TREATMENT. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.<sup>778</sup>

Several post-Rules decisions have invoked Rule 803(4).<sup>779</sup> Of these, *Biles v. State* seems particularly noteworthy and, perhaps, novel.<sup>780</sup> In defending against prosecution for child abuse and reckless manslaughter of his girlfriend's infant daughter, Hannah, Biles tried to explain some of the baby's injuries by testimony that she tended to bleed and bruise easily.<sup>781</sup> To counter this contention, an emergency room physician, Dr. Smith, testified that Hannah's regular doctor, Dr. Turner, told him by telephone that Hannah did not bleed and bruise easily.<sup>782</sup> In approving the trial court's admission of Dr. Smith's testimony, the Alabama Court of Criminal Appeals said:

In the instant case, Dr. Smith called Hannah's primary care physician in order to gather information that would assist him in treating and diagnosing her. Information concerning Hannah's medical history, including her alleged tendency to bleed or bruise easily, was pertinent to determining the cause of her grave condition and the prescribed course of treatment. . . . Further, Turner's statements were intended to assist Dr. Smith in his effort.<sup>783</sup>

In the mine run of cases, one expects proponents to invoke Rule 803(6) when offering testimonial reports of hearsay statements by a physician other than the diagnosing or treating physician, rather than Rule 803(4), as here. Nevertheless, Rule 803(4)'s encompassing formulation, "[s]tatements made for purposes of medical diagnosis or treatment," seems broad enough to support its invocation in *Biles*.<sup>784</sup>

Rule 803(5) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

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778. ALA. R. EVID. 803(4).

779. *Am. Color Graphics v. Foster*, No. 2000044, 2001 WL 1143289 (Ala. Civ. App. Sept. 28, 2001), *rev'd sub nom. Ex parte Am. Color Graphics, Inc.*, No. 1010180, 2002 WL 1042347 (Ala. May 24, 2002); *Biles v. State*, 715 So. 2d 878 (Ala. Crim. App. 1997); *Roper v. State*, 695 So. 2d 244, 245-46 (Ala. Crim. App. 1996).

780. See *Biles*, 715 So. 2d at 878 (affirming conviction for child abuse and reckless manslaughter).

781. *Id.* at 886.

782. *Id.* at 886-87.

783. *Id.* at 887.

784. See ALA. R. EVID. 803(4).

(5) **RECORDED RECOLLECTION.** A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.<sup>785</sup>

Under post-Rules practice, as the Alabama Court of Criminal Appeals has confirmed in *Johnson v. State*,<sup>786</sup> the proponent of recorded recollection need not show that the sponsoring witness has no present recollection whatever, but only that the witness "now has insufficient recollection to enable the witness to testify fully and accurately."<sup>787</sup> In that case, the witness "never testified, because she was never asked, whether she had an independent recollection . . . or whether she could testify fully and accurately . . . without the assistance of her notes."<sup>788</sup> The moral for all future proponents of recorded recollection seems clear enough.

Rule 803(6) provides:

The following [is] . . . not excluded by the hearsay rule, even though the declarant is available as a witness:

....

(6) **RECORDS OF REGULARLY CONDUCTED ACTIVITY.** A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.<sup>789</sup>

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785. ALA. R. EVID. 803(5).

786. 823 So. 2d 1 (Ala. Crim. App. 2001).

787. *Johnson*, 823 So. 2d at 37 (affirming conviction for capital murder and stating, "Ellison never testified, because she was never asked, whether she had an independent recollection of the telephone conversations or whether she could testify fully and accurately about the telephone conversations without the assistance of her notes").

788. *Id.* at 37-38.

789. ALA. R. EVID. 803(6).

Research has discovered six post-Rules opinions citing by number or implicating Rule 803(6). Two of these afford instructive, if not path-breaking, examples of the judicial application of one or another piece of the Rule's language.<sup>790</sup> One addresses the problem of double hearsay within records otherwise admissible under Rule 803(6).<sup>791</sup> One gives pause concerning the proper standard for judicial review of trial court decisions under Rule 803(6).<sup>792</sup> One reminds the readership that a proffered piece of hearsay evidence must not only satisfy a Rule's requirements, but must pass constitutional muster as well.<sup>793</sup> The sixth cautions humility, demonstrating again that none of us can always get it exactly right.<sup>794</sup>

One of Rule 803(6)'s key elements requires that a record must have been "kept in the course of a regularly conducted business activity."<sup>795</sup> In *Featherston v. State*, a prosecution for criminal possession of a forged instrument, the trial court had admitted "the forgery affidavits executed by Mr. Campbell [whose signature was forged and who was, at the time of trial, deceased] . . . under the business records exception."<sup>796</sup> The Alabama Court of Criminal Appeals reversed Featherston's conviction, holding deceased's forgery affidavits not admissible under Rule 803(6) because they were not memoranda kept in the course of the deceased's regularly conducted business activity.<sup>797</sup>

Rule 803(6) requires that the foundational requirement held missing in *Featherston*, as well as its other foundational requirements, be "shown by the testimony of the custodian [of the proffered document] or other qualified witness."<sup>798</sup> In *Dowdell v. State*,<sup>799</sup> the Alabama Court of Criminal Appeals afforded useful examples of the meaning of "other qualified witness" and the foundational evidence required to show an alternate witness's qualifications, as well as an additional example of a showing that a proffered record was "kept in the course of a regularly conducted business activity."<sup>800</sup> In *Dowdell*, the court affirmed a conviction for fraudulent use of a credit card over the defendant's objection that "the trial court . . . [had] admitt[ed] into

790. *Featherston v. State*, No. CR-98-0687, 2001 WL 1149094 (Ala. Crim. App. Sept. 28, 2001) (reversing conviction for criminal possession of forged instrument), *rev'd*, No. 1010502, 2002 WL 960047 (Ala. May 10, 2002); *Dowdell v. State*, 790 So. 2d 359 (Ala. Crim. App. 2000) (affirming conviction for fraudulent use of a credit card).

791. *James v. State*, 723 So. 2d 776 (Ala. Crim. App. 1998) (reversing capital murder conviction).

792. *Am. Color Graphics v. Foster*, No. 2000044, 2001 WL 1143289 (Ala. Civ. App. Sept. 28, 2001) (affirming judgment for permanent total disability benefits), *rev'd sub nom. Ex parte Am. Color Graphics, Inc.*, No. 1010180, 2002 WL 1042347 (Ala. May 24, 2002).

793. *McNabb v. State*, No. CR-98-0967, 2001 WL 1299193 (Ala. Crim. App. Oct. 26, 2001) (affirming capital murder conviction).

794. *Minor v. State*, 780 So. 2d 707 (Ala. Crim. App. 1999) (affirming capital murder conviction), *rev'd*, 780 So. 2d 796 (Ala. 2000).

795. ALA. R. EVID. 803(6).

796. No. CR-98-0687, 2001 WL 1149094, at \*3 (Ala. Crim. App. Sept. 28, 2001), *rev'd*, No. 1010502, 2002 WL 960047 (Ala. May 10, 2002).

797. *Featherston*, 2001 WL 1149094, at \*7-8.

798. See ALA. R. EVID. 803(6).

799. 790 So. 2d 359 (Ala. Crim. App. 2000).

800. See ALA. R. EVID. 803(6).

evidence a bank record [and] the supervisor who printed the computer-generated record did not testify.”<sup>801</sup> “In this case,” said the court, “Leslie King, an electronic services assistant at Auburn Bank, [gave testimony laying a sufficient foundation].”<sup>802</sup> The opinion recited at length the substance of the “electronic services assistant[’s]” testimony<sup>803</sup> and concluded: “[T]he record of Farrow’s [the victim/cardholder’s] transaction history was properly admitted at trial.”<sup>804</sup>

The Alabama Court of Criminal Appeals has reminded us that getting a record admitted under Rule 803(6) does not necessarily get every unit of information contained in the record admitted into evidence. In *James v. State*,<sup>805</sup> the trial court . . . [had] admitted into evidence four police reports [documenting complaints of harassment and burglary against James by the eventual murder victim and her grandmother].<sup>806</sup> The Alabama Court of Criminal Appeals held the police reports themselves properly admitted under Rule 803(6), but the statements therein by the victim and her grandmother, offered for the truth of the matters asserted, improperly admitted, because they were second-level hearsay for which the state had shown no recognized exception to the hearsay rule.<sup>807</sup>

The opinion in *American Color Graphics v. Foster*<sup>808</sup> raised questions about the proper scope of review of trial court decisions under Rule 803(6). In that case, the Alabama Court of Civil Appeals affirmed a judgment for permanent total disability benefits. In holding erroneous the circuit court’s decision that certain information in a medical report was admissible hearsay under Rule 803(6), the court said, “[W]e cannot conclusively say that plaintiff’s exhibit 2(A) was not prepared in anticipation and preparation for the lawsuit Foster filed against ACG. Thus, we conclude that [exhibit 2(A)] constitutes inadmissible hearsay.”<sup>809</sup> The “cannot-conclusively-say” standard for reversal seems to be a creature of the court’s own invention. Courts most usually, if indeed not universally, apply the “clearly erroneous” standard to their review of a trial judge’s determinations of fact. A “cannot-conclusively-say” standard would seem significantly less deferential to a trial court’s determinations of fact than the conventional “clearly erroneous” standard.

A proffered piece of hearsay evidence must not only satisfy a specific Rule’s requirements, but it must pass constitutional muster, as well. In criminal prosecutions, as the Alabama Court of Criminal Appeals reminded

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801. *Dowdell*, 790 So. 2d at 360.

802. *Id.* at 361.

803. *Id.* at 361-62.

804. *Id.* at 362.

805. 723 So. 2d 776 (Ala. Crim. App. 1998).

806. *James*, 723 So. 2d at 778 (reversing capital murder conviction).

807. *Id.* at 781.

808. No. 2000044, 2001 WL 1143289 (Ala. Civ. App. Sept. 28, 2001), *rev’d sub nom. Ex parte Am. Color Graphics, Inc.*, No. 1010180, 2002 WL 1042347 (Ala. May 24, 2002).

809. *Foster*, 2001 WL 1143289, at \*6 (but harmless error).

us in *McNabb v. State*,<sup>810</sup> the proponent of hearsay admissible under Rule 803(6) must still surmount a Sixth Amendment challenge to its admissibility under the Confrontation Clause.<sup>811</sup> To do so, the proponent must show (1) the present unavailability of the out-of-court declarant and (2) the reliability of the out-of-court statement.<sup>812</sup> When the matter asserted in the hearsay statement addresses “peripheral matters” neither “crucial” to the prosecution’s case nor “devastating” to the defense, the proponent need not show unavailability.<sup>813</sup> When the matter asserted in the hearsay statement can come in under a “firmly rooted” hearsay exception, the proponent need ordinarily make no further showing of reliability.<sup>814</sup> Rule 803(6) embodies such a “firmly rooted” exception.<sup>815</sup>

No one gets it right all the time. The opinion in *Minor v. State*,<sup>816</sup> a prosecution for capital murder, implied the non-contentious proposition that hospital records may be admitted under Rule 803(6). Unfortunately, however, it never got beyond raising the implication. According to the prosecution, Minor had killed his infant son by severely shaking and beating him.<sup>817</sup> At trial, the prosecution called the infant’s pediatrician to testify that, based upon her own physical examinations of the infant, “he was a normal, healthy term baby.”<sup>818</sup> Without objection by Minor’s counsel, she testified further that, on the day after the infant’s birth, “she witnessed a medical student evaluate [the infant]’s health. She explained that although she did not perform the examination herself, she observed it and signed the medical student’s report indicating that [the infant] was normal.”<sup>819</sup>

On appeal from his conviction, Minor contended that the circuit court had erred in admitting the pediatrician’s testimony about the record of the medical student’s physical evaluation of the infant.<sup>820</sup> Nothing in the opinion suggests that the record itself was admitted or offered in evidence. In groping for the theory appropriate for a response to Minor’s objection, the court cited Rule 803(4), but relied on reasoning appropriate not to Rule 803(4), but to Rule 803(6).<sup>821</sup> On reflection, it would seem that Minor’s attorney had the best of the argument: Testimony by another about what the medical student had said, either orally or in the report, was hearsay admissible under neither Rule 803(4) nor Rule 803(6). The court of appeals apparently suspected so, too, concluding: “This error, however, if any, is harm-

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810. No. CR-98-0967, 2001 WL 1299193 (Ala. Crim. App. Oct. 26, 2001) (affirming capital murder conviction).

811. See *McNabb*, 2001 WL 1299193, at \*30.

812. *Id.*

813. *Id.* at \*31.

814. See *id.* at \*33.

815. See *id.* at \*32-\*33.

816. 780 So. 2d 707 (Ala. Crim. App. 1999) (affirming capital murder conviction).

817. *Minor*, 780 So. 2d at 709.

818. *Id.* at 766 (internal quotation marks omitted).

819. *Id.*

820. *Id.*

821. “Additionally, [the infant’s pediatrician] established that the medical record in question was made in the course of normal hospital procedures . . . .” *Id.*

less.”<sup>822</sup> At least arguably, it missed an opportunity to exercise its teaching function, showing element by element how the proffered testimony failed to pass muster, first under Rule 803(4) and then under Rule 803(6).

Rule 803(8) provides:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

....

(8) PUBLIC RECORDS AND REPORTS. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (A) the activities of the office or agency, or (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, when offered against the defendant in criminal cases, matters observed by police officers and other law enforcement personnel, or (C) in civil actions and proceedings and against the state or governmental authority in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.<sup>823</sup>

Research has revealed six post-Rules decisions implicating Rule 803(8) by number: *Mainor v. Hayneville Telephone Co.*,<sup>824</sup> *Snavely v. City of Huntsville*,<sup>825</sup> *Farmer v. Town of Daphne*,<sup>826</sup> *Steiner v. State*,<sup>827</sup> *Gwarjanski v. State*,<sup>828</sup> and *McNabb v. State*.<sup>829</sup>

Applying Rule 803(8), the Alabama Court of Criminal Appeals has held a properly certified computer printout of a defendant's driving history admissible as proof of matters asserted therein.<sup>830</sup> As an example of how to lay a sufficient foundation, that court has said:

In this case, the official custodian of records for the Alabama Department of Public Safety [ADPS], Perry B. Hardy, signed the copy of Snavely's driving history stating that the computer printout was a true and correct copy. Additionally, a notary public certified that

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822. *Minor*, 780 So. 2d at 766.

823. ALA. R. EVID. 803(8).

824. 715 So. 2d 800, 802 (Ala. Civ. App. 1997). In dissent, Judge Crawley concluded "that the trial court properly admitted the accident reports" under Rule 803(8). *Mainor*, 715 So. 2d at 802-04 (Crawley, J., dissenting).

825. 785 So. 2d 1162 (Ala. Crim. App. 2000) (affirming, in part, conviction for driving without a license plate).

826. 782 So. 2d 808 (Ala. Crim. App. 2000) (affirming conviction for speeding).

827. 706 So. 2d 1308 (Ala. Crim. App. 1997) (affirming DUI conviction).

828. 700 So. 2d 357 (Ala. Crim. App. 1996) (affirming DUI conviction).

829. No. CR-98-0967, 2001 WL 1299193 (Ala. Crim. App. Oct. 26, 2001) (affirming capital murder conviction).

830. *Snavely*, 785 So. 2d at 1162; *Farmer*, 782 So. 2d at 809 ("even if the evidence was inadmissible under the business exception to the hearsay rule, the document was properly admitted under . . . Rule 803(8)").

Perry B. Hardy was the official custodian of records for the Alabama Department of Public Safety.<sup>831</sup>

That court has also held properly certified copies of entries in the ADPS I-5000 logbook admissible under Rule 803(8).<sup>832</sup> That logbook shows the dates on which an authorized technician of the ADPS has tested and certified accurate the "Intoxilyzer" used to measure the blood alcohol level of the instant defendant.<sup>833</sup> In response to a defendant/appellant's argument that entries from the logbook were inadmissible under "the law enforcement exception" included in Rule 803(8)(B), the Alabama Court of Criminal Appeals began, "Other jurisdictions have applied the law enforcement exception 'only to matters observed or investigated by police in adversarial, investigative circumstances where those involved may well have a motivation to misrepresent in order to secure a conviction.'"<sup>834</sup> It continued: "The inspection of the calibration of the I-5000 is an administrative function that is not performed pursuant to the investigation of any particular person."<sup>835</sup> In saying this, it reaffirmed its pre-Rules holding that the provisions of Rule 803(8)(B) barring matters observed by law enforcement officers do not apply to records of routine, nonadversarial matters. It concluded: "[A] certified copy of the logbook relating to the I-5000 is admissible . . . when offered to show that the device was inspected to insure that the device had been properly calibrated."<sup>836</sup>

In *Mainor v. Hayneville Telephone Co.*,<sup>837</sup> the Alabama Court of Civil Appeals held that Rule 803(8) does not supersede the prohibition set down by Alabama Code section 32-10-11. In dissent, however, Judge Crawley concluded "that the trial court properly admitted the [accident] reports into evidence pursuant to Rule 803(8)."<sup>838</sup>

Unlike the text of Rule 803(8)(B),<sup>839</sup> the text of Rule 803(8)(A) does not contain explicit Confrontation Clause protection. Nevertheless, the Alabama Court of Criminal Appeals probably had it right when it supposed, in *McNabb v. State*,<sup>840</sup> that, in criminal prosecutions, the proponent of hearsay admissible under Rule 803(8)(A) must still surmount a Sixth Amendment

831. *Snavelly*, 785 So. 2d at 1168.

832. *Steiner*, 706 So. 2d at 1308; *Gwarjanski*, 700 So. 2d at 357.

833. *Steiner*, 706 So. 2d at 1309-10.

834. *Id.* at 1312.

835. *Id.*

836. *Id.*

837. 715 So. 2d 800, 802 (Ala. Civ. App. 1997) (cited as authoritative by the Alabama Supreme Court in *Ex parte Burch*, 730 So. 2d 143, 149 (Ala. 1999)).

838. *Mainor*, 715 So. 2d at 804 (Crawley, J., dissenting).

839. Rule 803(8)(B) authorizes admission into evidence of qualifying public records and reports "setting forth . . . (B) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, *excluding, however, when offered against the defendant in criminal cases, matters observed by police officers and other law enforcement personnel . . .*" ALA. R. EVID. 803(8)(B) (emphasis added).

840. No. CR-98-0967, 2001 WL 1299193 (Ala. Crim. App. Oct. 26, 2001).

challenge to its admissibility under the Confrontation Clause.<sup>841</sup> To do so, the proponent must show (1) the present unavailability of the out-of-court declarant and (2) the reliability of the out-of-court statement.<sup>842</sup> When the matter asserted in the hearsay statement addresses “peripheral matters” neither “crucial” to the prosecution’s case nor “devastating” to the defense, the proponent need not show unavailability.<sup>843</sup> When the matter asserted in the hearsay statement can come in under a “firmly rooted” hearsay exception, the proponent need ordinarily make no further showing of reliability.<sup>844</sup> Rule 803(8)(A) embodies such a “firmly rooted” exception.<sup>845</sup>

Rule 804 contains those exceptions to the hearsay rule invocable only upon a showing of the declarant’s present unavailability to testify.<sup>846</sup> The Alabama Court of Criminal Appeals invoked this requirement in *Johnson v. State*.<sup>847</sup> On appeal, Johnson complained that the trial court excluded the testimony of Chris Parham, who drove the get away car, “that Madison told him that Morris killed the clerk.”<sup>848</sup> Affirming Johnson’s conviction for capital murder and citing Rule 804(b)(3), the court said, “Absolutely nothing in the record supports the [conclusion] that Madison was unavailable to testify. In fact, defense counsel himself . . . ‘supposed’ that he could put Madison on the stand.”<sup>849</sup>

*Johnson* is the only discovered post-Rules decision to cite Rule 804(b)(3)<sup>850</sup> by number. Only two other post-Rules opinions have cited Rule 804(b) by number, both of which addressed Rule 804(b)(1).

841. *McNabb*, 2001 WL 1299193, at \*30 (affirming capital murder conviction).

842. *Id.*

843. *Id.* at \*31.

844. *See id.* at \*33.

845. *See id.* at \*32-\*33.

846. Rule 804(a) provides:

(a) *Grounds of unavailability*. “Unavailability as a witness” includes situations in which the declarant--

(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant’s statement; or

(2) persists in refusing to testify concerning the subject matter of the declarant’s statement despite an order of the court to do so; or

(3) now possesses a lack of memory of the subject matter of the declarant’s statement;

or

(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant’s attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant’s attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if exemption, refusal, lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

ALA. R. EVID. 804(a).

847. 820 So. 2d 842 (Ala. Crim. App. 2000) (affirming capital murder conviction).

848. *Johnson*, 820 So. 2d at 866.

849. *Id.* at 866-67.

850. Rule 804(b)(3) provides:

(b) *Hearsay exceptions*. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

In *Barnes v. Norfolk Southern Railroad*,<sup>851</sup> the Alabama Supreme Court reminded its readership that Alabama Rule 804(b)(1)<sup>852</sup> excludes more former testimony from its scope than does its federal counterpart.<sup>853</sup> Affirming a judgment on a jury verdict for the defendant, the court found no error in excluding certain former testimony offered by Barnes, because Barnes was not a party to the Tennessee actions in which the declarant gave the testimony.<sup>854</sup>

In criminal prosecutions, the proponent of hearsay admissible under Rule 804(b)(1) must still surmount a Sixth Amendment challenge to its admissibility under the Confrontation Clause. To do so, the proponent must also show the present unavailability of the out-of-court declarant. Will the showing already made to satisfy Rule 804(a)(5) always satisfy the constitutional requirement as well? Recent words by the Alabama Supreme Court suggest the answer may be no. In *Ex parte Scroggins*,<sup>855</sup> the trial court "allowed the State to offer the testimony an eyewitness . . . had given at the preliminary hearing," finding the witness unavailable, because "unless this witness wanted to be found, locating him would have been virtually impossible."<sup>856</sup> For this ruling, the Alabama Supreme Court reversed Scroggins's conviction for capital murder and remanded the cause for a new trial. "When," said the court, "the prosecution seeks to introduce, against a criminal defendant, the former testimony of a now unavailable witness, its burden in seeking the witness's presence is enhanced by the defendant's Sixth Amendment right to confront witnesses."<sup>857</sup> "Here," the court continued,

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...  
 (3) STATEMENT AGAINST INTEREST. A statement which was at the time of its making so contrary to the declarant's pecuniary or proprietary interest that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

ALA. R. EVID. 804(b)(3).

851. 816 So. 2d 27 (Ala. 2001) (affirming judgment on verdict for railroad in FELA action).

852. Rule 804(b)(1) provides:

(b) *Hearsay exceptions*. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) FORMER TESTIMONY. Testimony of a witness, in a former trial or action, given (A) under oath, (B) before a tribunal or officer having by law the authority to take testimony and legally requiring an opportunity for cross-examination, (C) under circumstances affording the party against whom the witness was offered an opportunity to test his or her credibility by cross-examination, and (D) *in litigation in which the issues and parties were substantially the same as in the present cause*.

ALA. R. EVID. 804(b)(1) (emphasis added).

853. Federal Rule 804(b)(1) provides:

(b) *Hearsay exceptions*. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) FORMER TESTIMONY. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, *or, in a civil action or proceeding, a predecessor in interest*, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

FED. R. EVID. 804(b)(1) (emphasis added).

854. *Barnes*, 816 So. 2d at 29-30.

855. 727 So. 2d 131 (Ala. 1998).

856. *Scroggins*, 727 So. 2d at 132.

857. *Id.* at 133.

“the State failed to show that it used due diligence and made a good faith effort in trying to locate the witness whose testimony it sought to introduce at trial.”<sup>858</sup> Here is the court’s recounting of the showing it deemed insufficient:

Morgan Knight, an investigator with the Jefferson County district attorney’s office, was the only witness to testify as to Williams’s unavailability. Knight’s testimony reflects that he conducted his search for Williams primarily by telephone. He did not know whether Williams had been served with a subpoena by the Jefferson County sheriff’s office. He stated that he put a “hold” on Williams, but that although the juvenile authorities arrested him and placed him in the juvenile facility, he was released before Scroggins’s trial. No writ of attachment was ever issued for Williams.<sup>859</sup>

Whether an enhanced pre-trial “burden in seeking the witness’s presence” also implies an enhanced at-trial burden to show unavailability remains to be seen. Also remaining to be seen, is whether the effort shown in *Scroggins* will pass muster under Rule 804(b)(1) in a case not complicated by the Sixth Amendment’s requirement.

Rule 805 provides:

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.<sup>860</sup>

The opinion in *James v. State*<sup>861</sup> did not cite Rule 805 by number, but it implicated it of a certainty. In that case, “the trial court . . . [had] admitted into evidence four police reports [documenting complaints of harassment and burglary against James by the eventual murder victim and her grandmother].”<sup>862</sup> The Alabama Court of Criminal Appeals held the police reports themselves properly admitted under Rule 803(6), but the statements therein by the victim and her grandmother, offered for the truth of the matters asserted, improperly admitted, because they were second-level hearsay for which the state had shown no recognized exception to the hearsay rule.<sup>863</sup>

Rule 807 of the Federal Rules of Evidence provides for “residual” or growing-point exceptions as follows:

A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not ex-

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858. *Id.* at 134.

859. *Id.*

860. ALA. R. EVID. 805.

861. 723 So. 2d 776 (Ala. Crim. App. 1998) (reversing capital murder conviction).

862. *James*, 723 So. 2d at 778.

863. *Id.* at 781.

cluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.<sup>864</sup>

The Alabama Rules of Evidence do not include a Rule 807, but the Alabama Court of Criminal Appeals has suggested that the Alabama Supreme Court has authority to recognize growing-point exceptions. In *Featherston v. State*,<sup>865</sup> that court reversed Featherston's conviction for criminal possession of a forged instrument, holding deceased's forgery affidavits not admissible under Rule 803(6) because they were not memoranda kept in the course of deceased's regularly conducted business activity. The court seemed to regret that the Alabama Rules of Evidence contained no residual hearsay exception under which it could hold the forgery affidavits admissible. Acknowledging that the advisory committee's notes expressed "no position as to whether the Alabama Supreme Court may expand the number of hearsay exceptions by decision," the court asserted that "the Supreme Court may, nevertheless, elect to adopt a residual exception to Rule 803 . . . on a case-by-case basis," but concluded, "[T]his Court [of Criminal Appeals] lacks the rulemaking authority of the Supreme Court."<sup>866</sup>

#### THE NINE HUNDREDS (AUTHENTICATION AND IDENTIFICATION)

Rule 901(a) provides:

(a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.<sup>867</sup>

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864. FED. R. EVID. 807.

865. No. CR-98-0687, 2001 WL 1149094 (Ala. Crim. App. Sept. 28, 2001) (reversing conviction for criminal possession of forged instrument), *rev'd*, No. 1010502, 2002 WL 960047 (Ala. May 10, 2002).

866. *Featherston*, 2001 WL 1149094, at \*7.

867. ALA. R. EVID. 901(a).

Rule 901(b) then goes on to set out a nonexclusive list of ten ways in which a proponent can satisfy Rule 901(a)'s "sufficient to support a finding" requirement.<sup>868</sup> Rule 901 shares this requirement with Rule 602, and in so doing reveals an important functional relationship between the two Rules. That is, Rule 901 requires for all non-testimonial carriers of information the same foundational showing required for testimonial information by Rule 602.<sup>869</sup> This "sufficient to support a finding" standard perpetuates Alabama's pre-Rules standard.<sup>870</sup>

Research has revealed nine post-Rules opinions citing Rule 901 by number.

Many of these, some only indirectly, touch upon the application of Rule 901(b)(1), which provides:

(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) TESTIMONY OF WITNESS WITH KNOWLEDGE. Testimony that a matter is what it is claimed to be.<sup>871</sup>

This simple and most direct means sometimes gets lost in the clutter of supposedly complicated facts and more challenging circumstantial alternatives. Consider the examples in the following paragraphs.

In *Kennedy v. State*,<sup>872</sup> the Alabama Supreme Court reiterated Rule 901's simple lesson, saying: "The legal question always presented in this kind of case is whether the evidence is what it is represented to be."<sup>873</sup> Both before and after stating that lesson, however, the court spilled much more ink over a weak link in the chain of the State's custody over the damning cocaine than it did over the information that Kennedy had sold the substance to the testifying undercover agent as cocaine.<sup>874</sup>

In *Ingram v. State*,<sup>875</sup> Ingram contended, *inter alia*, on appeal from his conviction for capital murder, "that the state failed to prove the proper chain of custody of . . . a charred board [to which Ingram had allegedly taped the victim] so as to allow either [its] admission . . . as evidence or testimony pertaining to [it]."<sup>876</sup> In a column-and-a-half, the Alabama Court of Criminal

868. ALA. R. EVID. 901(b).

869. See ALA. R. EVID. 602, 901.

870. "Under traditional Alabama law the evidence presented on the foundational requirement does not have to be conclusive or overwhelming; rather, it must be strong enough for the question to go to the jury." *Ingram v. State*, 779 So. 2d 1225, 1254 (Ala. Crim. App. 1999) (citations omitted); see also *Lee v. State*, 748 So. 2d 904, 911 (Ala. Crim. App. 1999).

871. ALA. R. EVID. 901(b)(1).

872. 690 So. 2d 1222 (Ala. 1996) (reversing Court of Criminal Appeals' reversal of conviction for illegal distribution of cocaine).

873. *Kennedy*, 690 So. 2d at 1224.

874. *Id.* at 1223-24.

875. 779 So. 2d 1225 (Ala. Crim. App. 1999) (affirming capital murder conviction).

876. *Ingram*, 779 So. 2d at 1253.

Appeals recited the trial testimony establishing each link in the chain of custody of the charred board to which the victim had been taped, conceding the weakness of one link because of the unavailability of one intermediate custodian, but reminding that this weakness went to weight, not admissibility.<sup>877</sup> The court made little or nothing of a more obvious and more direct source of identification: The witness who collected the board at the scene testified at trial that it was the same board.<sup>878</sup>

In *Driskell v. Pope*,<sup>879</sup> an action by a tenant against a landlord to recover for damage to personal property, the Alabama Court of Civil Appeals affirmed the exclusion of an engineering report that might have saved the tenant from defeat by summary judgment, because “the report was not ‘properly authenticated’ and was, ‘thus, inadmissible hearsay that cannot be relied on to defeat a motion for [a] summary judgment.’ . . . [T]his engineering report was not admissible because it was not a sworn or certified copy [but a faxed copy] of the report.”<sup>880</sup> In dissent, Judge Crawley quoted from the record:

Q. Let me ask you a couple of questions just to make sure that I’m clear about some things. This engineering report, did you ever see that it was actually done? A. Did I see that it was done? Q. That is, did you see anything that looked like a copy of a report, did you ever read anything? A. Yes, yes, twenty-five pages. Q. Was it from the company called Carr and Associates Engineering? A. That’s correct. Q. From Pelham, Alabama? A. Correct. Q. If I—I’m going to mark—this is a faxed copy. A. That’s— Q. Do you recognize it? A. Yes, I do. Q. Is that the same one that you— A. That’s it.<sup>881</sup>

He contended that this colloquy provided sufficient authentication under Rule 901(a).

With the three foregoing cases, compare *Johnson v. State*.<sup>882</sup> On appeal from his conviction for capital murder:

Johnson contend[ed] that the trial court erred in admitting into evidence a tape recording of the two emergency 911 calls placed by Barry Rushakoff, the night manager of the hotel, on the night of the murder. . . . [T]he tape was not properly authenticated because, he

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877. *Id.* at 1255-56.

878. *Id.*

879. 707 So. 2d 264 (Ala. Civ. App. 1997).

880. *Driskell*, 707 So. 2d at 265 (citation omitted).

881. *Id.* at 266 (Crawley, J., dissenting).

882. 823 So. 2d 1 (Ala. Crim. App. 2001) (reviewing for plain error and affirming capital murder conviction).

sa[id], it contained several voices in the background that were never identified.<sup>883</sup>

The Alabama Court of Criminal Appeals said, “Under the “pictorial communication” theory, Rushakoff’s testimony was sufficient to authenticate the tape recording of the 911 calls [he himself had placed]. Any unidentified sounds or voices on the tape recording affected the weight and credibility of the tape, not its admissibility. [N]o error, plain or otherwise . . . .”<sup>884</sup> Having thus spoken, the court affirmed Johnson’s conviction.<sup>885</sup>

A favorite, indeed over-celebrated, method for proving the identity and untampered condition<sup>886</sup> of relevant tangibles, for example, murder weapons and confiscated drugs, has been and continues to be proof of an unbroken “chain of custody.” In Alabama, any discussion of authentication by showing an unbroken “chain of custody” ought to begin with Alabama Code section 12-21-13, which reads as follows:

Physical evidence connected with or collected in the investigation of a crime shall not be excluded from consideration by a jury or court due to a failure to prove the chain of custody of the evidence. Whenever a witness in a criminal trial identifies a physical piece of evidence connected with or collected in the investigation of a crime, the evidence shall be submitted to the jury or court for whatever weight the jury or court may deem proper. The trial court in its charge to the jury shall explain any break in the chain of custody concerning the physical evidence.<sup>887</sup>

Of the six post-Rules cases citing Rule 901 and invoking chain-of-custody language, three do not cite section 12-21-13 at all,<sup>888</sup> one invokes it as a makeweight,<sup>889</sup> one distinguishes it as inapplicable on the record before the court,<sup>890</sup> and one casts doubt on its constitutionality.<sup>891</sup> Several of the cases deserve closer study.

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883. *Johnson*, 823 So. 2d at 23.

884. *Id.* at 25.

885. *Id.* at 57.

886. “The purpose for requiring that the chain of custody be shown is to establish to a reasonable probability that there has been no tampering with the evidence.” *Heard v. State*, 632 So. 2d 1009, 1011 (Ala. Crim. App. 1993) (citations omitted).

887. ALA. CODE § 12-21-13 (1995).

888. *Kennedy v. State*, 690 So. 2d 1222 (Ala. 1996); *Harris v. State*, No. CR-99-0496, 2001 WL 1149188 (Ala. Crim. App. Sept. 28, 2001); *Ingram v. State*, 779 So. 2d 1225 (Ala. Crim. App. 1999).

889. *Powell III v. State*, 796 So. 2d 404, 422 (Ala. Crim. App. 1999) (“Moreover, the jacket was admissible under § 12-21-13.”).

890. *Lee v. State*, 748 So. 2d 904, 912 (Ala. Crim. App. 1999) (“Moreover, this is not a case where a witness specifically identified the evidence and where the condition of the evidence was not an issue in the case. Section 12-21-13.”).

891. *Thomas v. State*, No. CR-96-0876, 1999 WL 1267801, at \*54 (Ala. Crim. App. Dec. 30, 1999) (“[W]ithout deciding the constitutionality of applying § 12-21-13 in a case where the chain of custody is challenged in the trial court.”).

In *Ingram v. State*,<sup>892</sup> Ingram contended, *inter alia*, on appeal from his conviction for capital murder, “that the state failed to prove the proper chain of custody of the victim’s body, the victim’s hands, and a charred board so as to allow either the admission of the items as evidence or testimony pertaining to the items.”<sup>893</sup> In almost two full columns, the Alabama Court of Criminal Appeals recited the trial testimony establishing each link in the chain of custody of the victim’s body, conceding that “one link in the chain was weak because of the lack of direct testimony from the [Department of Forensic Sciences’] contract driver, [a soldier now stationed in Germany],” but reminding that this weakness went to weight, not admissibility.<sup>894</sup> In another full column, the court recited the trial testimony establishing each link in the chain of custody of the victim’s hands, conceding again the weakness of one link because of the unavailability of the contract driver, but reminding again that this weakness went to weight, not admissibility.<sup>895</sup> In another column-and-a-half, the court recited the trial testimony establishing each link in the chain of custody of the charred board to which the victim had been taped, conceding yet again the weakness of one link because of the unavailability of the contract driver, but reminding yet again that this weakness went to weight, not admissibility.<sup>896</sup> Saying it found no plain error, the court affirmed Ingram’s conviction.<sup>897</sup>

In *Kennedy v. State*,<sup>898</sup> a prosecution for illegal distribution of cocaine, Kennedy challenged the sufficiency of the prosecution’s chain of custody over the damning cocaine. The Alabama Court of Criminal Appeals reversed Kennedy’s conviction. On ultimate review, the Alabama Supreme Court recited the chain of custody and acknowledged a weak link: the lab worker described as “Mike” did not testify at trial.<sup>899</sup> The court concluded, “[T]he State presented by both direct and circumstantial evidence that the substance the officer bought from the defendant was the same substance examined by the forensic examiner . . . .”<sup>900</sup> Having so concluded, the court reversed the decision of the Alabama Court of Criminal Appeals and reinstated Kennedy’s conviction.<sup>901</sup>

In *Harris v. State*,<sup>902</sup> Harris appealed his conviction for unlawful distribution and possession of a controlled substance to the Alabama Court of Criminal Appeals. The court said:

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892. 779 So. 2d 1225 (Ala. Crim. App. 1999).

893. *Ingram*, 779 So. 2d at 1253.

894. *Id.* at 1254-55.

895. *Id.* at 1255.

896. *Id.* at 1255-56.

897. *Id.* at 1281-83.

898. 690 So. 2d 1222 (Ala. 1996) (reversing Court of Criminal Appeal’s reversal of conviction for illegal distribution of cocaine).

899. *Kennedy*, 690 So. 2d at 1223.

900. *Id.* at 1225.

901. *Id.*

902. No. CR-99-0496, 2001 WL 1149188 (Ala. Crim. App. Sept. 28, 2001).

Harris argues that the State failed to account for the cocaine's whereabouts for the five-day period between the receipt of the crack cocaine by the commander of the drug task force for the City of Brewton and the time the commander turned it over to the laboratory. However, the commander testified that he tested the crack as soon as he received it, using a Nacro Pouch field kit. He then stated that he submitted the crack to the laboratory in Mobile five days later, which time period, he testified, was not unusual. He further stated that the crack was still in rock form when submitted, and was in a bag and "Randolph Harris' name, State of Alabama" and the case numbers were on the bag. He stated that he handed the evidence over to Kelly Cannon, one of the lab technicians.<sup>903</sup>

The court affirmed Harris's conviction, saying: "Any objection by Harris on this ground addresses a weak link and thus goes to the weight of the evidence."<sup>904</sup>

As another post-Rules decision demonstrates, courts can accept circumstantial proof other than the kinds of circumstantial proof exemplified in Rule 901(b). In *Thomas v. State*,<sup>905</sup> Thomas contended on appeal from his conviction for capital murder that "the prosecution failed to establish a chain of custody for the pieces of windowpane glass from the victim's kitchen window . . . . Six latent fingerprints lifted from these pieces of glass matched Thomas's known prints."<sup>906</sup> The Alabama Court of Criminal Appeals rejected this contention, saying:

[W]e find that Mancini [a forensic scientist with the Alabama Department of Forensic Sciences] seized the glass [at the scene] . . . and transported it to the lab . . . . While Mancini did not specifically testify as to the handling and safeguarding of the glass, *by the very nature of latent fingerprints, any tampering or mishandling of the glass would have destroyed any identifying usefulness.*<sup>907</sup>

That is, in the court's view, evidence that someone had successfully lifted discernible fingerprints from the shards of glass supported an inference of the absence of tampering. This view left out of mind the admittedly remote possibility that some unidentified malefactor in the chain of custody had copied fingerprints from another source onto the shards of glass. The court, however, found support for its inference in another inference. It said:

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903. *Harris*, 2001 WL 1149188 at \*3.

904. *Id.*

905. No. CR-96-0876, 1999 WL 1267801 (Ala. Crim. App. Dec. 30, 1999) (reviewing for plain error only and affirming conviction for capital murder during rape and burglary).

906. *Thomas*, 1999 WL 1267801, at \*51 (citation omitted).

907. *Id.* at 52-53 (emphasis added).

Moreover, the record neither offered nor has Thomas alleged any ill will, bad faith, evil motive, or evidence of tampering with the glass and the latent fingerprints by Mancini. . . . [W]ithout a showing of any of these, we will presume, *particularly under plain-error review*, that the integrity of evidence routinely handled by governmental officials was suitably preserved.<sup>908</sup>

That is, the absence of evidence or suggestion of tampering suggested an inference that there had been none.

Rule 902 specifies kinds of writings that require no extrinsic proof of authenticity, that is, so-called self-authenticating documents.<sup>909</sup> Alabama's appellate courts have as yet only lightly cited Rule 902. Indeed, the discovered post-Rules cases citing Rule 902 have all addressed the proper application of Rule 902(4) (certified copies of public records). Thus, Alabama practitioners and students must rely, in the interim, largely upon the text of the Rule itself, such persuasive precedent as afforded by published judicial applications of Federal Rule 902 and substantially similar state law rules, and the quite helpful advisory committee's notes to Alabama Rule 902.<sup>910</sup>

The concluding paragraph of Rule 902, that is, Rule 902(10), portends the principal theme running through the Notes themselves:

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to . . . [a]ny signature, document, or other matter declared by any statute, state or federal, or any rule promulgated by the Alabama Supreme Court to be presumptively or prima facie genuine or authentic.<sup>911</sup>

Nowhere do the Notes suggest that Rule 902 supersedes any pre-Rules statute or rule bearing upon the procedures for and/or the effects of self-authentication.<sup>912</sup>

According to the Notes, "[t]he certificate [specified by Rule 902(4)] must comply with Rule 902(1), (2) or (3) or with any statute or other rule of court[, including Rule 44(e)]."<sup>913</sup> Among the statutes incorporated by implicit reference is Alabama Code section 13A-5-10.1(a), which provides that "[c]ertified copies of case action summary sheets, docket sheets or other records of the court are admissible for the purpose of proving prior convictions of a crime, if the prior conviction is otherwise admissible under the laws of this state."<sup>914</sup> Alabama's post-Rules appellate decisions citing Rule 902 have all addressed the proper application of Rule 902(4).

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908. *Id.* at 54 (emphasis added).

909. ALA. R. EVID. 902.

910. *See id.* and advisory committee's note.

911. ALA. R. EVID. 902(10).

912. *See* ALA. R. EVID. 902 advisory committee's note.

913. *Id.*

914. ALA. CODE § 13A-5-10.1(a) (1994).

In *Ex parte Hagood*,<sup>915</sup> the Alabama Supreme Court held properly admitted under Rule 902(4) “a facsimile copy of a certified record showing two prior felony convictions in Indiana.”<sup>916</sup> The court said:

Records showing prior convictions are properly admitted if they are certified by the clerk or deputy clerk of the court in which those convictions were obtained. . . . This method of authentication has been recognized as a proper method for proving a prior conviction to establish the existence of an aggravating circumstance in a capital case. The use of this method is supported by Rule 44(a)(1) . . . which, when amended in 1995, superseded section 12-21-70. . . . Rule 44(a)(1) . . . prescribes the means used for proving out-of-state convictions when the official records . . . are kept outside the state.<sup>917</sup>

Rule 44(a)(1) provides:

An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within a territory subject to the administrative or judicial jurisdiction of the United States or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by a person purporting to be the officer having the legal custody of the record, or by the officer’s deputy. If the official record is kept without the state, the copy shall be accompanied by a certificate under oath of such person that such person is the legal custodian of such record and that the laws of the state require the record to be kept.<sup>918</sup>

The court finessed the prickly Rule 902(4) problem raised by admitting the faxed copy by recharacterizing it as a Rule 1001(3) definitional problem and a Rule 1003 problem in the admissibility of duplicates.<sup>919</sup> The following section (Contents of Writings) addresses *Hagood*’s significance on those grounds.

In three opinions, the Alabama Court of Criminal Appeals has given valuable instruction on the requirements of Rule 902(4) certification. First, in *Mester v. State*,<sup>920</sup> the court showed the bar how not to do it. Affirming Mester’s conviction for DUI for lack of a demonstration of harm in the error, nevertheless the court said, “Absent proper certification, the logsheets were not admissible as self-authenticating documents. Thus, the State failed

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915. 777 So. 2d 214 (Ala. 1999).

916. *Hagood*, 777 So. 2d at 216.

917. *Id.* (citations omitted).

918. ALA. R. CIV. P. 44(a)(1).

919. See *Hagood*, 777 So. 2d at 216-17.

920. 755 So. 2d 66 (Ala. Crim. App. 1999).

to establish the necessary predicate to admit the I-5000 test results.”<sup>921</sup> Because of its instructional value, the court’s reasoning bears repeating at some length:

Dunston properly administered the I-5000 test. However, Dunston had no personal knowledge concerning the proper calibration of the machine, other than the information contained on the logsheet itself. [T]he person who inspected the I-5000 machine did not testify. . . . The State attempted to establish that the I-5000 machine was in proper working order by offering “certified” copies of relevant pages from the logbook.<sup>922</sup>

Acknowledging Rule 902(4), the court said, “A certified document is self-authenticated,”<sup>923</sup> but continued:

However, the purported certificate contained on the pages from the logbook admitted into evidence is signed by the “Corrections Lieutenant” at the Blount County Sheriff’s Department. There was no evidence presented to identify, nor did the certification itself identify, the “corrections lieutenant” as the person who is the custodian of the records for the Blount County Sheriff’s Department. Moreover, there was no indication that the corrections lieutenant was the person who had inspected the I-5000 machine.<sup>924</sup>

Then, in the other two opinions, the court showed how to do it right. In *Crews v. State*,<sup>925</sup> the court held that a circuit clerk’s certification of records of prior felony convictions need not include an express recitation that “the circuit clerk who certified the records was the lawful custodian of the original documents . . . [because section 12-17-94(a)(3)] mandates that the circuit clerk be custodian of the records of the court.”<sup>926</sup> Then, in *McNabb v. State*,<sup>927</sup> the court held both the “log from the Montgomery Police Department” and the “booking report from the Montgomery County detention facility” properly certified by the respective custodians of records of those facilities.<sup>928</sup> As to the authentication of the booking report, the court provided this valuable detail:

[T]hat certification included a statement that the copy of the report introduced into evidence was a true and correct copy of the original

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921. *Mester*, 755 So. 2d at 72-73.

922. *Id.* at 72.

923. *Id.*

924. *Id.* at 73.

925. 797 So. 2d 1123 (Ala. Crim. App. 2000).

926. *Crews*, 797 So. 2d at 1125.

927. No. CR-98-0967, 2001 WL 1299193 (Ala. Crim. App. Feb. 1, 2002).

928. *McNabb*, 2001 WL 1299193, at \*33.

report kept at the facility; that the report was kept in the course of the facility's regular course of business; that the facility maintained reports for each inmate, including one for McNabb; that the report was created on or near the date indicated on the document; and that the information in the report was completed by a person with knowledge of the acts and events referred to in the report.<sup>929</sup>

Having thus spoken, the court affirmed McNabb's conviction for capital murder.<sup>930</sup>

THE TEN HUNDREDS  
(CONTENTS OF WRITINGS)

Rule 1001 provides definitions for the terms "writings," "original," and "duplicate," thereafter employed in subsequent Rules. As to writings, it says:

(1) WRITINGS. "Writings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, or other form of data compilation.<sup>931</sup>

According to the advisory committee's notes, adoption of this definition "is a rejection of the corresponding federal rule, which expands the best evidence principle to cover recordings and photographs."<sup>932</sup>

As to originals, Rule 1001 says:

(2) ORIGINAL. An "original" of a writing is the writing itself or any counterpart intended to have the same effect by a person executing or issuing it. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original."<sup>933</sup>

Research has revealed no post-Rules opinion citing Rule 1001(2) by number.

As to duplicates, Rule 1001 says:

(3) DUPLICATE. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by

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929. *Id.* at \*33.

930. *Id.* at \*51.

931. ALA. R. EVID. 1001(1).

932. ALA. R. EVID. 1001 advisory committee's note.

933. ALA. R. EVID. 1001(2).

means of photography, or by equivalent technique which accurately reproduces the original.<sup>934</sup>

As a technologically contemporary example, consider *Ex parte Hagood*,<sup>935</sup> wherein the Alabama Supreme Court held admissible as a duplicate the faxed copy of the original records of the defendant's prior convictions in another state.

Rule 1002 provides:

To prove the content of a writing, the original writing is required, except as otherwise provided by statute, these rules, or by other rules applicable in the courts of this state.<sup>936</sup>

In *Withee v. State*,<sup>937</sup> the Alabama Court of Criminal Appeals reasoned that Alabama Rule 1001 needs no definitions of "recordings" or "photographs" because Alabama Rule 1002, unlike Federal Rule 1002, does not apply to recordings and photographs.

Rule 1003 provides:

A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.<sup>938</sup>

Research has revealed one post-Rules opinion citing Rule 1003 by number.

In *Ex parte Hagood*,<sup>939</sup> the Alabama Supreme Court held admissible as a duplicate the faxed copy of the original records of the defendant's prior convictions in another state, saying, "The fax copy of the record detailing Hagood's prior convictions in Indiana falls within the Rule 1001(3) definition of 'duplicate.' The fax copy exactly replicated the certified record, and was intended to serve in lieu of the original, which was kept in Indiana."<sup>940</sup> Whether this issue must or can remain unlinked to the "unless" under Rule 1003 merits further study, but the court's definitional decision was arguably made easier by the circumstance that:

Hagood never raised "a genuine question . . . as to the authenticity of the original" document or certification showing his prior convictions. Rule 1003. Likewise, during the sentencing phase of his trial Hagood never disputed the validity of his prior convictions. He

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934. ALA. R. EVID. 1001(3).

935. 777 So. 2d 214, 217 (Ala. 1999).

936. ALA. R. EVID. 1002.

937. 728 So. 2d 684, 689 (Ala. Crim. App. 1998) (affirming manslaughter conviction).

938. ALA. R. EVID. 1003.

939. 777 So. 2d 214 (Ala. 1999).

940. *Hagood*, 777 So. 2d at 217.

merely argued that the fax copy of the record detailing his prior convictions was not in proper form.”<sup>941</sup>

To put it more starkly, “Right-headed rules of procedure will not permit an opponent who has no reason in good faith to doubt the authenticity of the original or the accuracy of the duplicate to inflict additional expense upon the proponent or the court.”<sup>942</sup>

Rule 1004 provides that “[t]he original is not required, and other evidence of the contents of a writing is admissible, should there be no duplicate readily available . . . if” the proponent establishes one of four specified conditions.<sup>943</sup> Research has revealed one post-Rules opinion citing Rule 1004 by number.

In *Ryan’s Family Steakhouses, Inc. v. Brooks-Shades*,<sup>944</sup> Ryan’s and their employee and co-defendant, Gonzales, moved to dismiss the action against them in deference to an alleged agreement to arbitrate differences such as this one. The Alabama Supreme Court affirmed the circuit court’s denial of the co-defendants’ motion, saying:

The most sympathetic interpretation of the argument made by Ryan’s and Gonzales would be that their evidence of habit, routine, or practice, offered pursuant to Rule 406, tended to prove the existence of an arbitration agreement and that their secondary evidence, offered pursuant to Rule 1004, tended to prove the contents of that arbitration agreement, which one is left to assume has somehow been lost.<sup>945</sup>

“The trial judge,” the court went on, “had the discretion to believe the more direct and countervailing evidence of the plaintiffs . . . that no arbitration agreement ever existed between them and Ryan’s.”<sup>946</sup>

#### THE ELEVEN HUNDREDS (MISCELLANEOUS RULES)

Rule 1101 specifies the proceedings to which the Alabama Rules of Evidence do and do not apply. Two discovered post-Rules decisions have cited Rule 1101(b)(3) by number, confirming that the Rules do not apply to sentencing proceedings.<sup>947</sup>

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941. *Id.*

942. SCHROEDER & HOFFMAN, *supra* note 53, at 561.

943. ALA. R. EVID. 1004.

944. 781 So. 2d 215, 219 (Ala. 2000) (affirming trial court’s order denying dismissal for arbitration).

945. *Ryan’s Family Steakhouses*, 781 So. 2d at 219.

946. *Id.*

947. *Ex parte Dunaway*, 746 So. 2d 1042 (Ala. 1999) (Court of Criminal Appeal’s affirmance of conviction for capital murder affirmed); *Wilson v. State*, 777 So. 2d 856 (Ala. Crim. App. 1999) (conviction for capital murder affirmed).

## REPRISE

Many of my old colleagues at the bench and bar, including a first generation of treasured former students, will recall the pride we felt in the mid-1970s, when our recently adopted Alabama Rules of Civil Procedure won national recognition as a forward-looking model. Now, many colleagues at the bench and bar, including two generations of treasured former students, may look with satisfaction on the Alabama Rules of Evidence. May each of us—judge, legislator, lawyer, student, or academic—bear his or her part of our collective custodial responsibility for promoting the “growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined.”<sup>948</sup>

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948. ALA. R. EVID. 102.