



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

The Busy Lawyer's Guide to Foundations and Authentication

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

A Defender's Guide to Federal Evidence

A Trial Practice Handbook for Criminal Defense Attorneys



Written by Rene L. Valladares

Federal Public Defender, District of Nevada,
Adjunct Professor, William S. Boyd School of Law
and UNLV Department of Criminal Justice

This Guide to Federal Evidence is the only federal evidence handbook written exclusively for criminal defense lawyers. The Guide analyzes each Federal Rule of Evidence and outlines the main evidentiary issues that confront criminal defense lawyers. It also summarizes countless defense favorable cases and provides tips on how to avoid common evidentiary pitfalls. The Guide contains multiple user-friendly flowcharts aimed at helping the criminal defense lawyer tackle evidence problems. A Defender's Guide to Federal Evidence is an indispensable tool in preparing a case for trial, and an invaluable resource during trial.

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— District of Nevada —



THE BOOK



of

ENGLISH
MAGIC

Philip Carr-Gomm & Richard Heygate



Sources

- Imwinkelried, E., Evidentiary Foundations
- Lubet, T., Modern Trial Advocacy
- Mauet, T., Fundamentals of Trial Techniques
- Mauet, T., Wolfson, W. Trial Evidence



We Can Do It!



J. M. Flax



POST FEB. 15 TO FEB. 28

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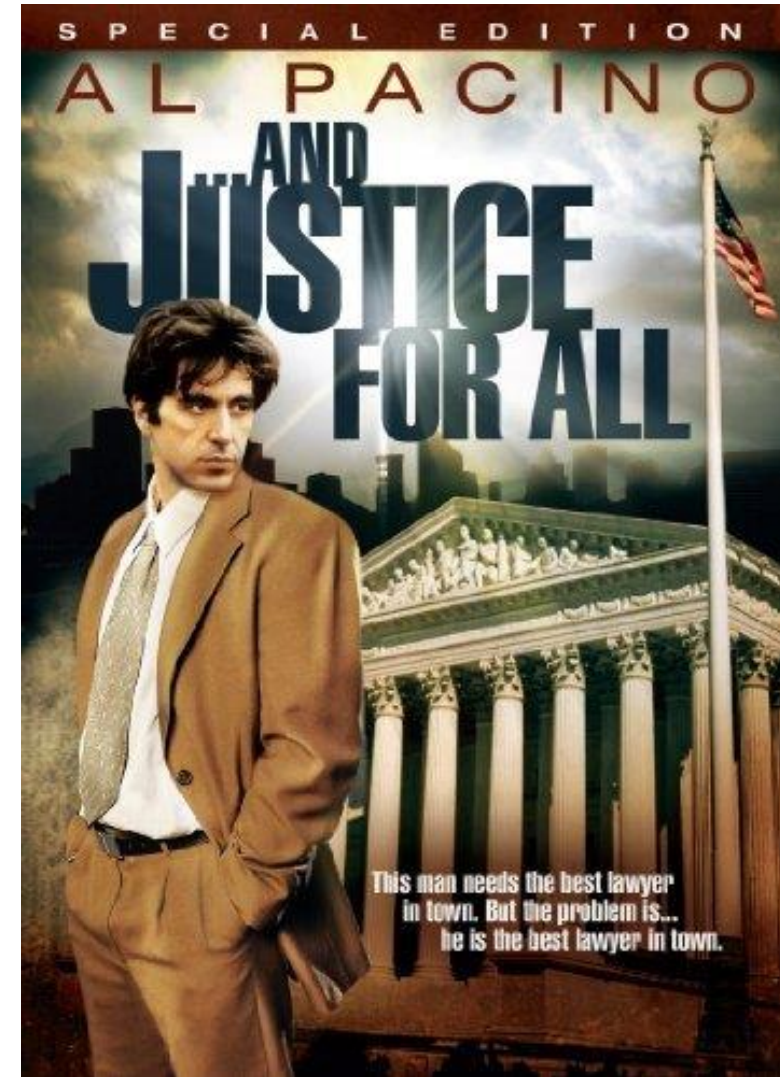
Roadmap

- **Basic foundational principles**
- Foundational requirements
- General matters
- **Top 12 Foundations**
- Testimony
- Exhibits



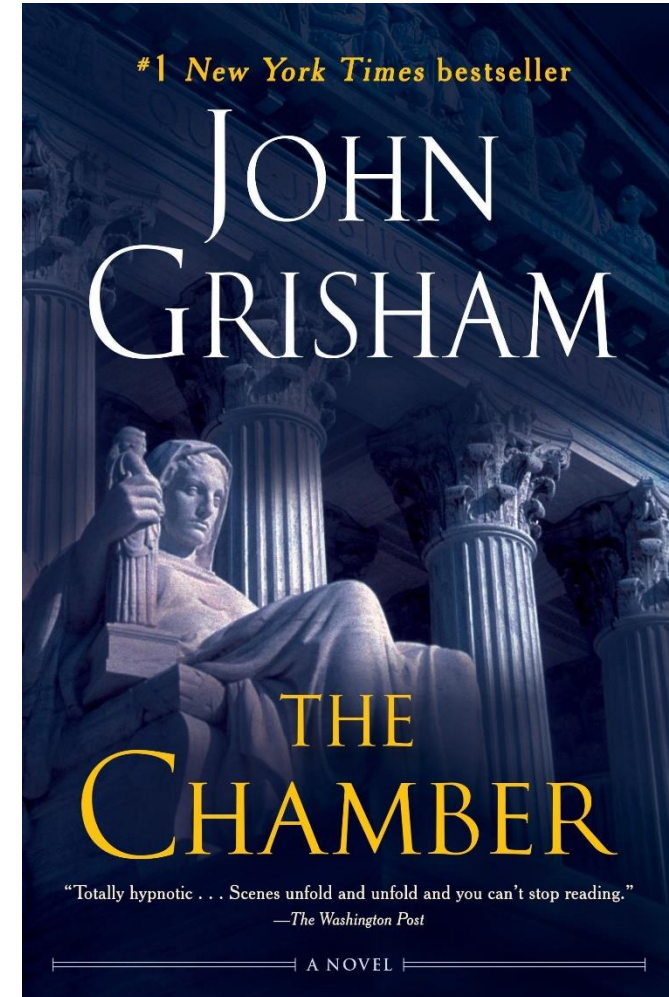
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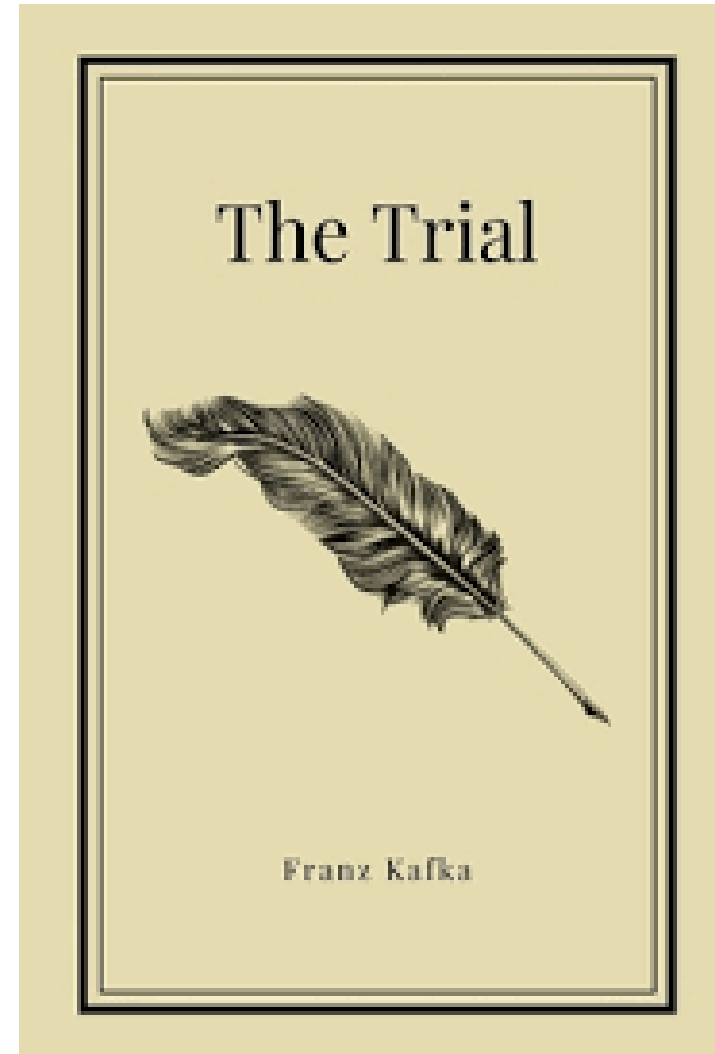
Foundational requirements

- RASP
- Relevance-FRE 401
- Authenticity-FRE 901, 902
- Specific Admissibility-e.g.:
FRE 803, 804
- Prejudice-FRE 403



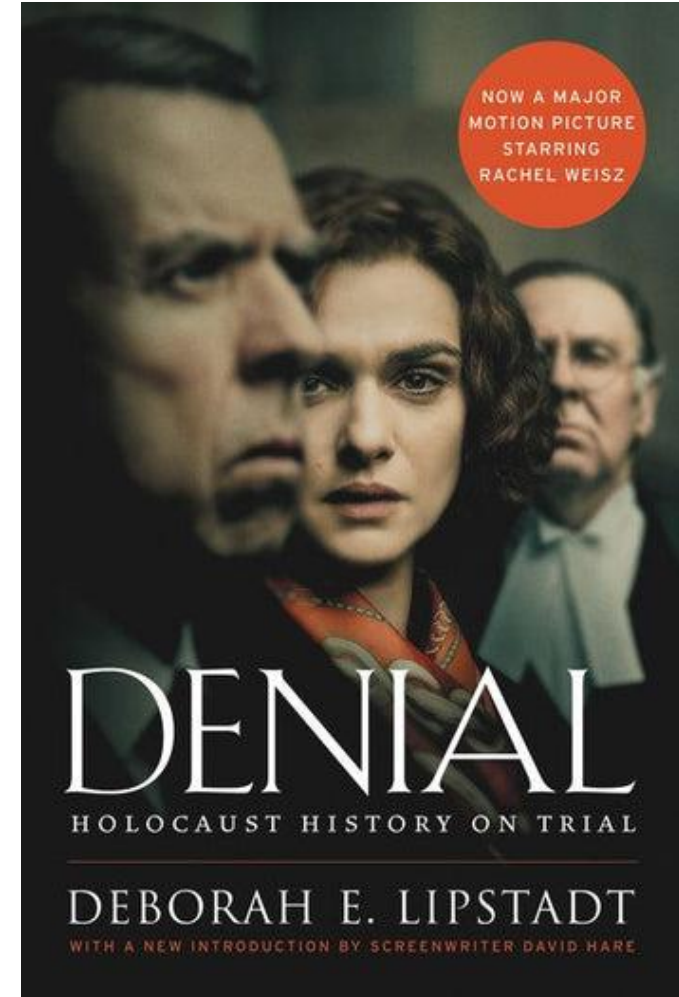
RASP-Relevance

- According to **FRE 401**, evidence is relevant if:
 - **a.** It has any tendency to make a fact **more or less probable** (**FRE401(a)**); and
 - **b.** The fact is of **consequence** in determining the action (**FRE 401(b)**)



Relevance standard is low

- The relevance standard under **FRE 401** is **low**
- This lax relevance standard is **frequently exploited** by prosecutors attempting to introduce evidence of dubious value



Bias and credibility always relevant

- United States v. Abel, 469 U.S. 45, 51 (1984)
- Holding that “[a] successful showing of bias on the part of a witness would have a tendency to make the facts to which he testified less probable in the eyes of the jury than it would be without such testimony.”



RASP-Authenticity

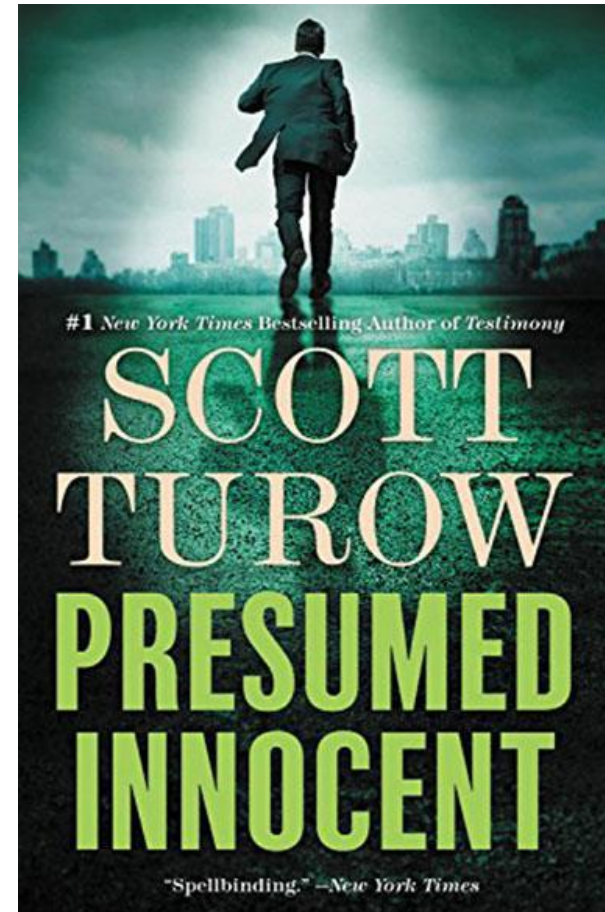
- **FRE 901(a)-
Authenticating or
Identifying Evidence**
- To satisfy requirement of authenticating or identifying an item of E,
- **proponent must produce E to support finding that the item is what the proponent claims it is**
- Applies to exhibits
- **Also applies** to certain testimonial E
- e.g.: testimony regarding phone conversation: recognition of person on other end of the line

- **FRE 901(b)-
Authenticating or
Identifying Evidence**
- Provides **10 examples**:
- Testimony by a W with knowledge
- Distinctive characteristics
- Opinion about a voice
- Evidence about telephone conversation

- **FRE 902(a)-Evidence that
is Self-Authenticating**
- **14 categories** of E that is self-authenticating:
- Foreign documents
- Certified copies of public records
- Certified domestic records of a regularly conducted activity

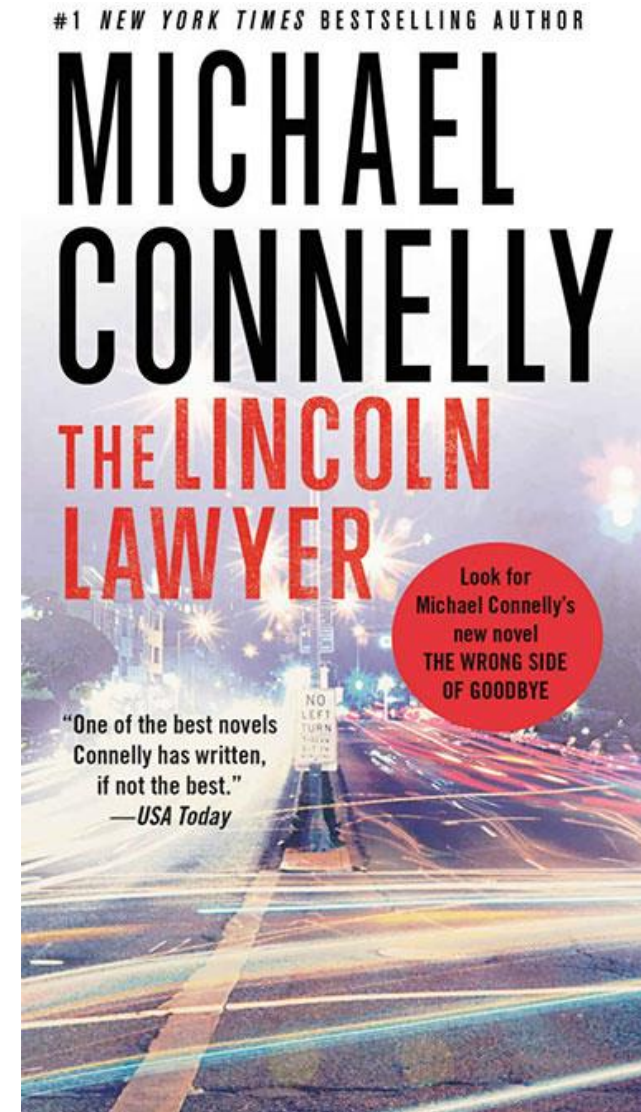
RASP-Specific admissibility

- FREs contain a host of specific provisions that govern admissibility of various forms of proof
- For instance, hearsay rules require preliminary showing prior to admissibility



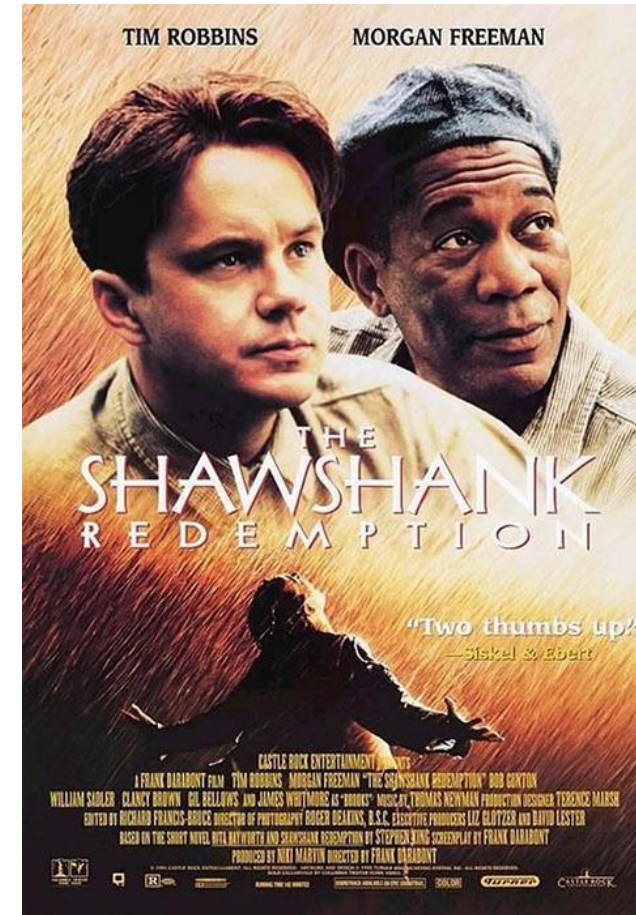
RASP-Prejudice

- **FRE 403** allows courts to exclude relevant evidence if its probative value is **substantially** outweighed by the danger of unfair **prejudice, confusion of the jury, or waste of time**



Prejudice

- Evidence is unfairly prejudicial under **FRE 403** if it tends to produce a jury decision based on an improper ground, typically an emotional one, unrelated to whether the defendant is guilty of the crime



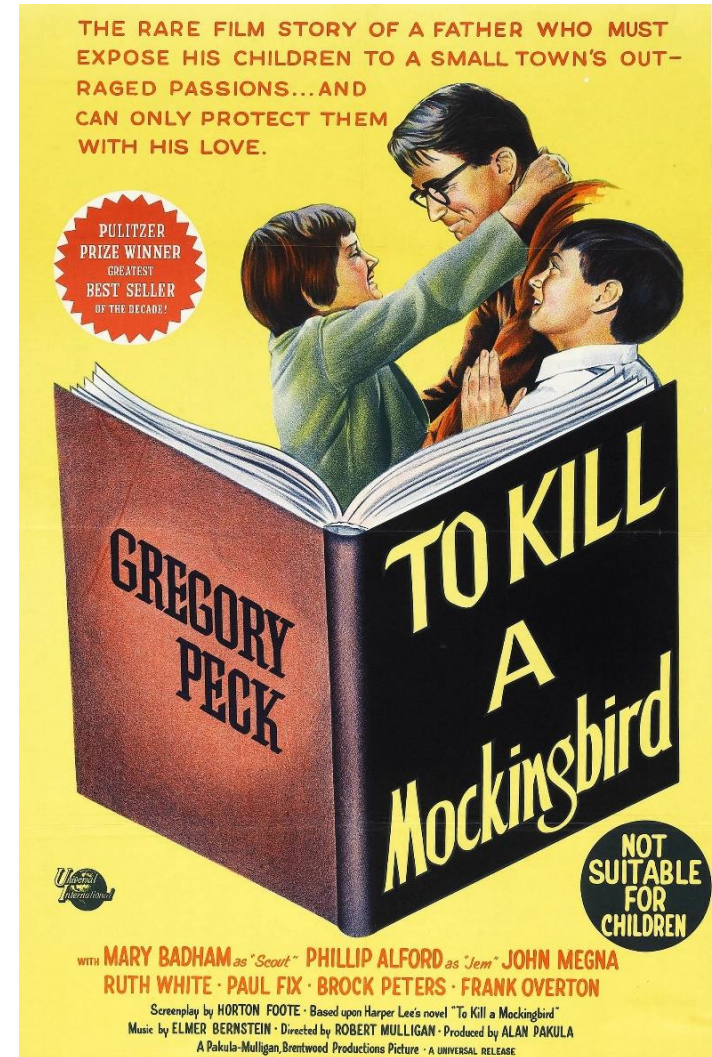
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General matters

- Admissibility determined by court-FRE 104(a)
- In determining admissibility, FREs do not apply (except for privileges)-FRE 104(a)
- Laying foundation on cross
- Admissibility vs. weight



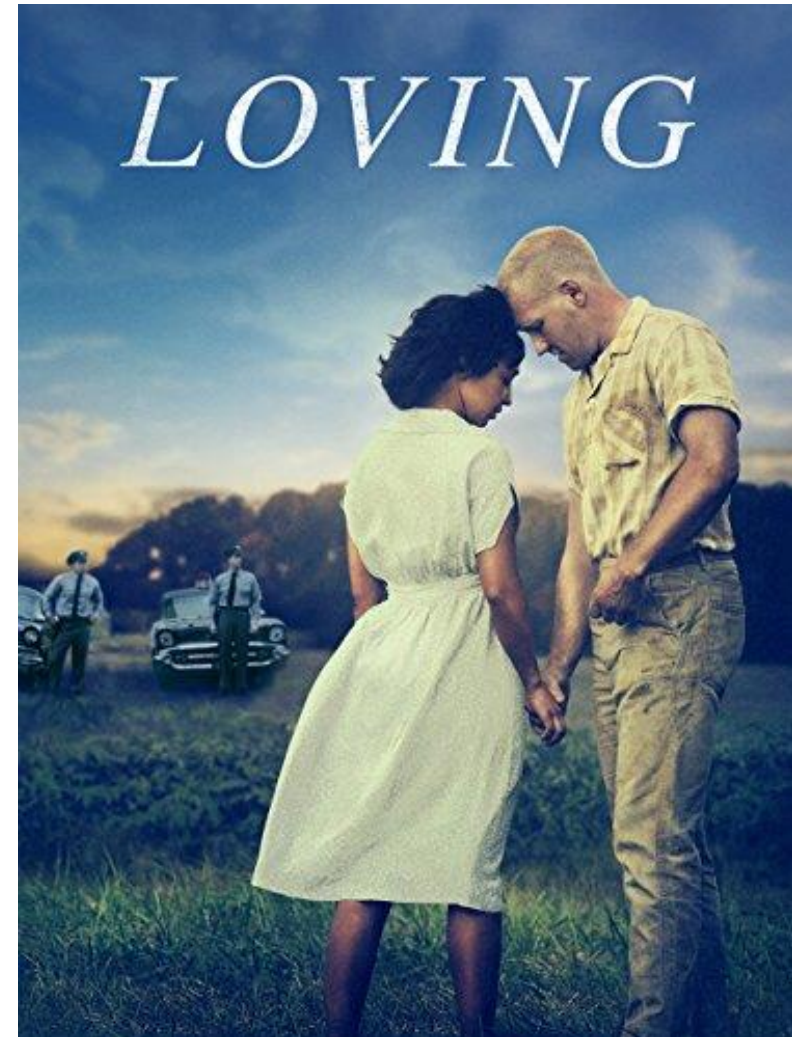
Objections

- G

- ❑ 1. Motion in limine
- ❑ 2. Object
- ❑ 3. Motion to strike
- ❑ 4. Motion for a mistrial
- ❑ 5. Request to take W on voir dire

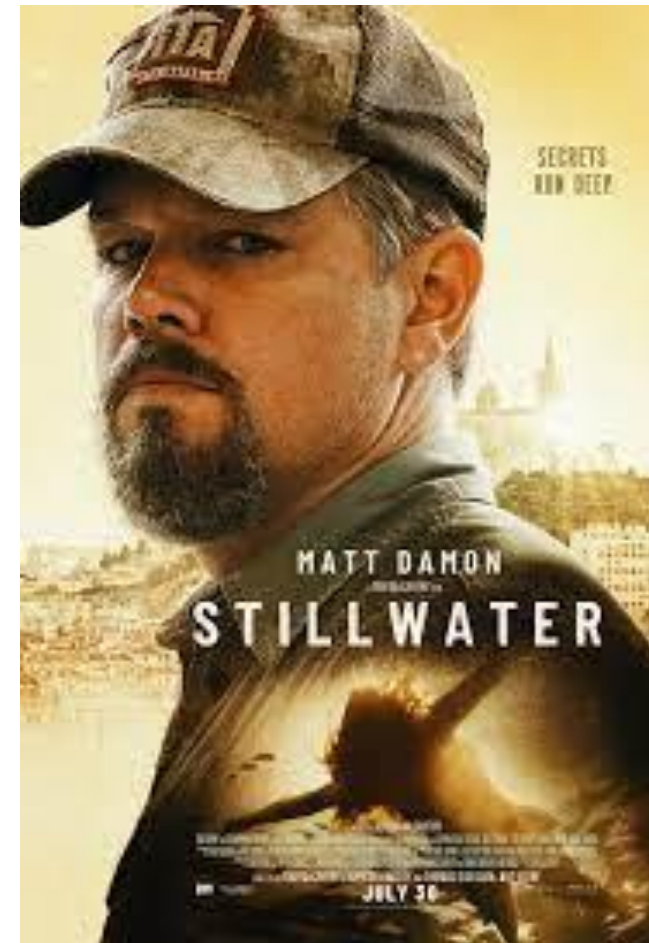
- D

- ❑ Offer of proof



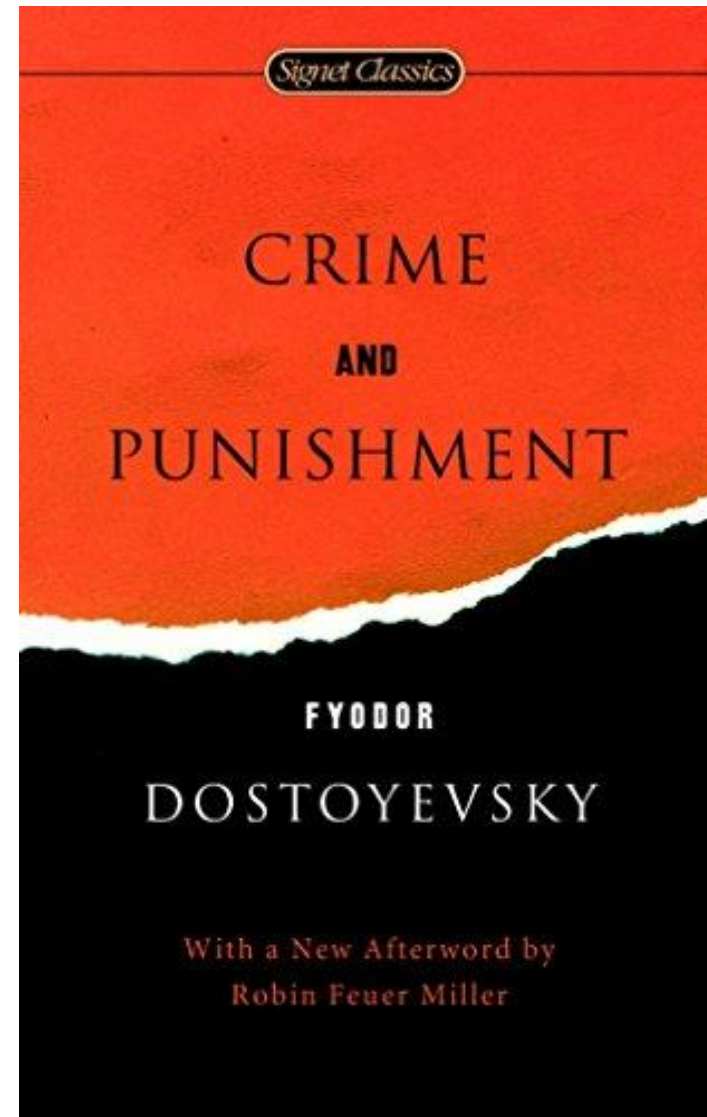
Conditional admissibility-Beware

- If court lets E in and G fails to present proof:
 - ❑ 1. Move to strike
 - ❑ 2. Move for curative instruction
 - ❑ 3. Move for a mistrial



Roadmap

- Basic foundational principles
- **Top 12 Foundations**
- Testimony
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Top 12 Foundations

Testimonial E

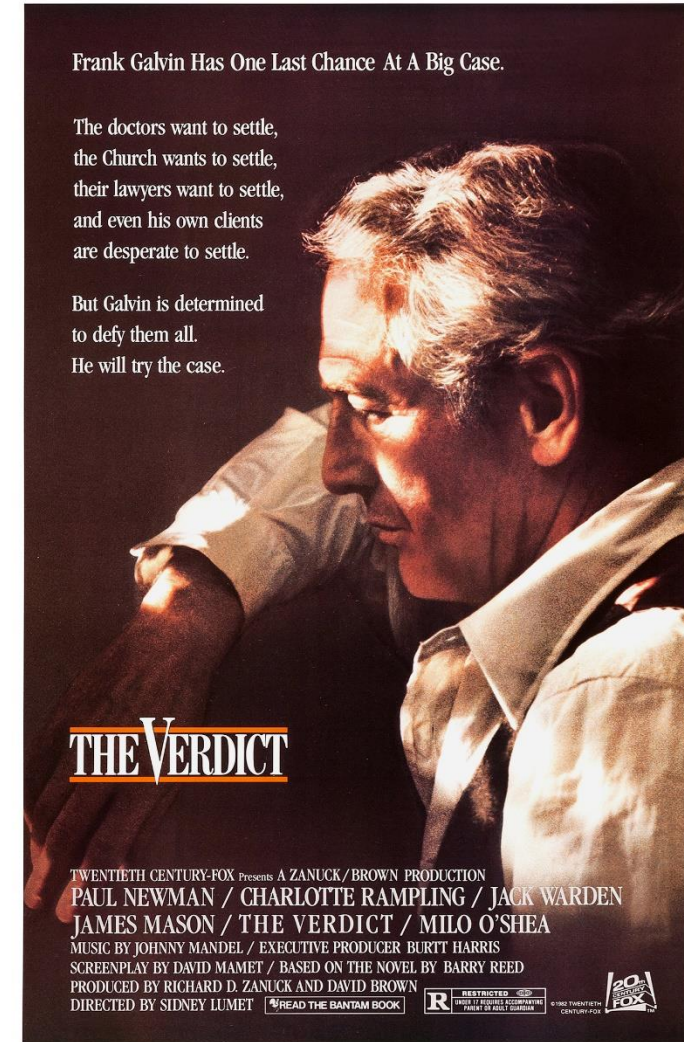
- ❑1. Conversations
- ❑2. Telephone conversations
- ❑3. Character E
- ❑4. Opinion E
- ❑5. Refreshing recollection

Exhibits

- ❑6. Real E
- ❑7. Photos/videos
- ❑8. Business records
- ❑9. Public records
- ❑10. E-mails
- ❑11. Recorded recollection
- ❑12. Summaries

Testimonial E

- RASP
- Relevance:
- Authentication
- Specific admissibility-
Hearsay
- Prejudice



Frank Galvin Has One Last Chance At A Big Case.

The doctors want to settle,
the Church wants to settle,
their lawyers want to settle,
and even his own clients
are desperate to settle.

But Galvin is determined
to defy them all.
He will try the case.

THE VERDICT

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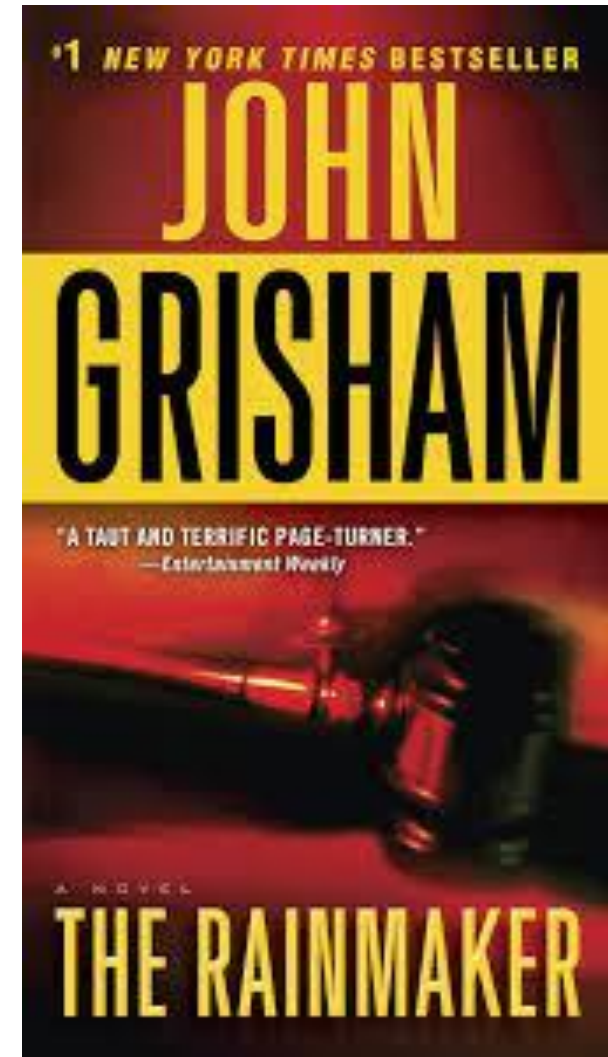
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Testimonial evidence

- ❑ 1. Competency-FRE 601
 - Judge's competency as W-FRE 605
 - Juror's competency as W-FRE 606
- ❑ 2. Personal knowledge-FRE 602 (except experts-FRE 703)
- ❑ 3. Oath or affirmation to testify truthfully-FRE 603



D. Favorable case-U.S. v. Lightly,
677 F.2d 1027 (4th Cir. 1982)



D. Favorable case-U.S. v. Lopez,
762 F.3d 852 (9th Cir. 2014)



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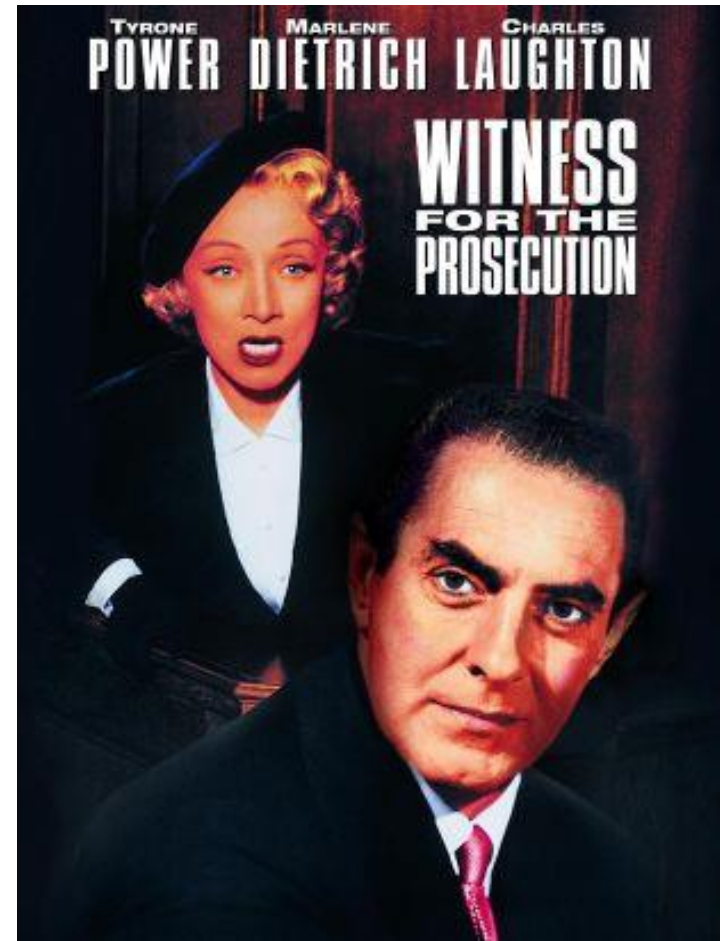
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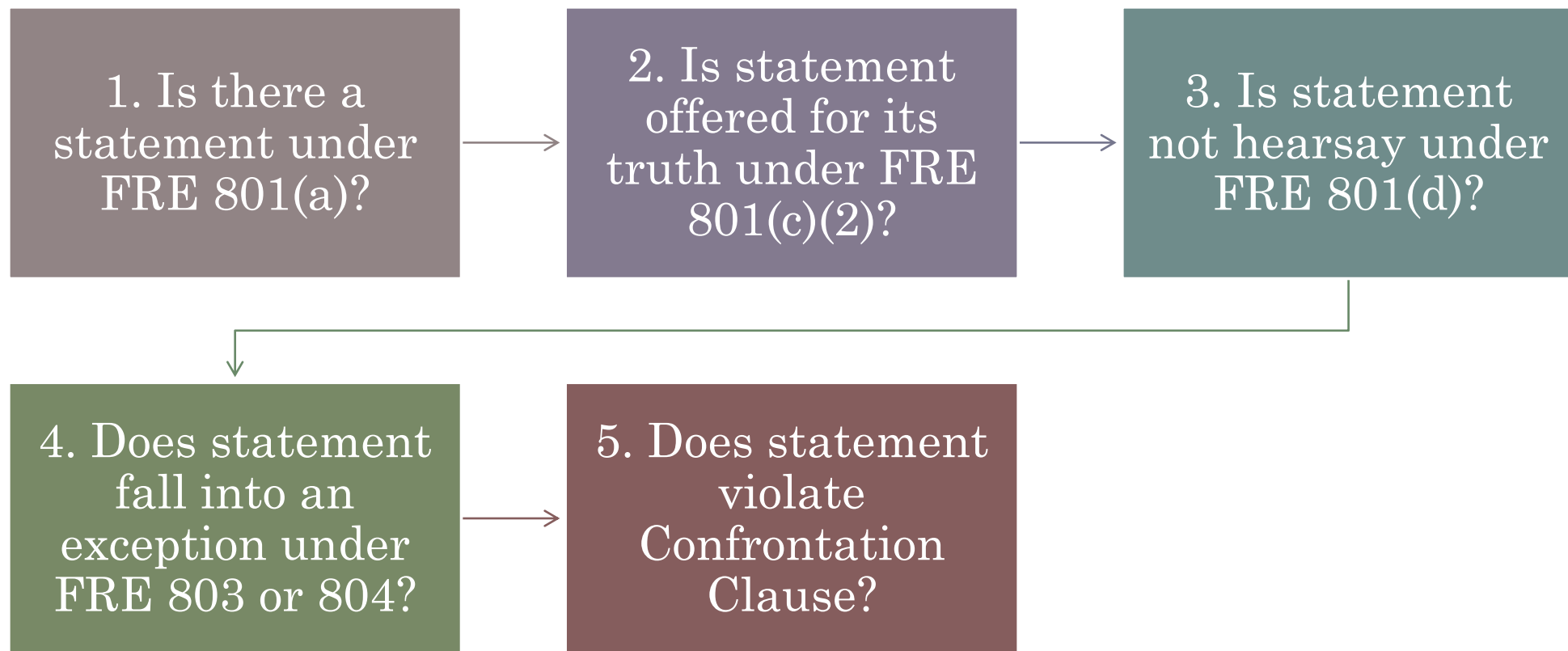
1. Conversation

Foundational elements of a conversation

- ❑ 1. When the conversation occurred
- ❑ 2. Where
- ❑ 3. Who was present
- ❑ 4. Who said what to whom



Conversation: Hearsay



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

❑ **FRE 801(d)(1):** Declarant W
prior statement

- Prior **inconsistent** statement given under oath
- Prior **consistent** statement offered to rebut claim of recent fabrication
- Statement of **identification**

❑ **FRE 801(d)(1)(2):**
Opposing party statement

- Individual
- Adoptive
- Authorized
- Agent
- **Coconspirator**

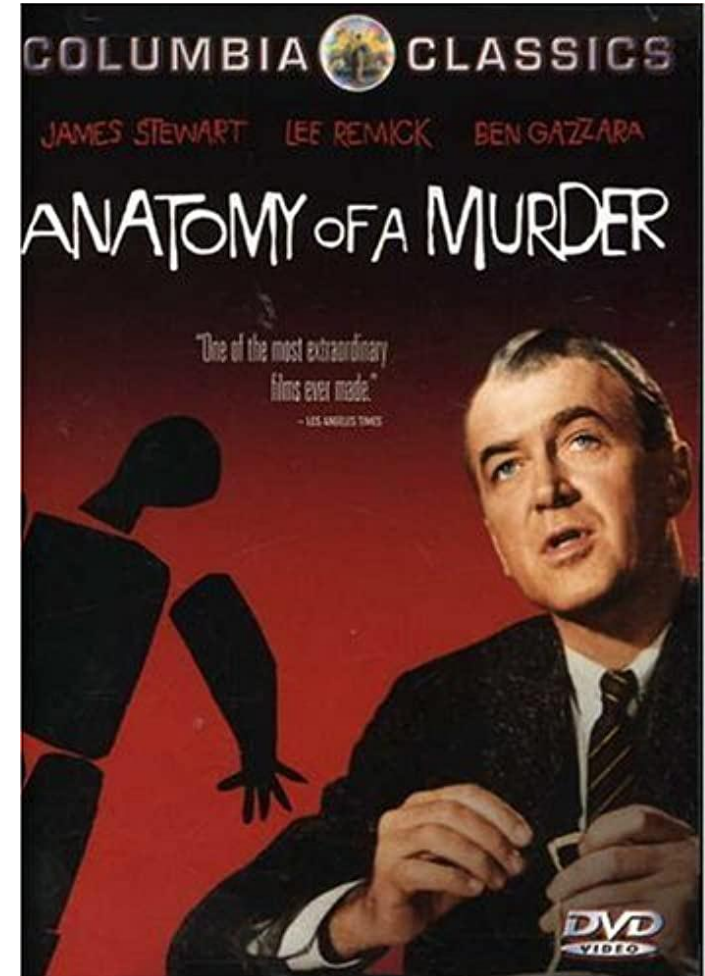
Hearsay Exceptions: FRE 803

Availability Immaterial

- ❑ FRE 803(1)-Present Sense Impression
- ❑ FRE 803(2)-Excited Utterance
- ❑ FRE 803(3)-State of Mind
- ❑ FRE 803(4)-Statements for Purposes of Medical Diagnosis
- ❑ FRE 803(5)-Recorded recollection
- ❑ FRE 803(6)-Business Records
- ❑ FRE 803(8)-Public Records
- ❑ FRE 803(7), (9)-Absence of Records
- ❑ FRE 803(22)-Judgment of Conviction

Hearsay Exceptions: FRE 804 Declarant Unavailable

- ❑ Dying Declaration-FRE
804(b)(2)
- ❑ Against Interest-FRE
804(b)(3)



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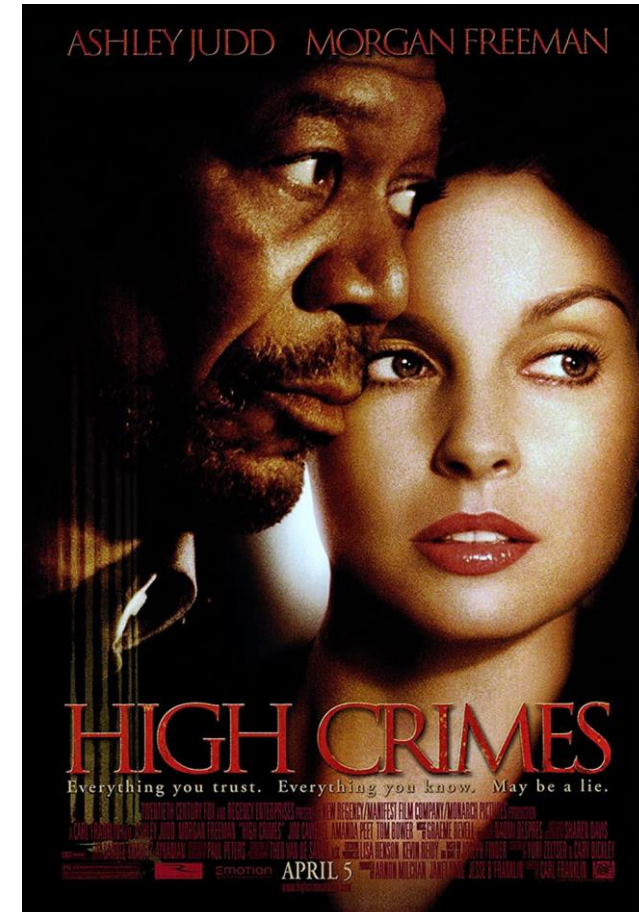
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2. Telephone conversations-W knows other person

Elements of telephone conversation

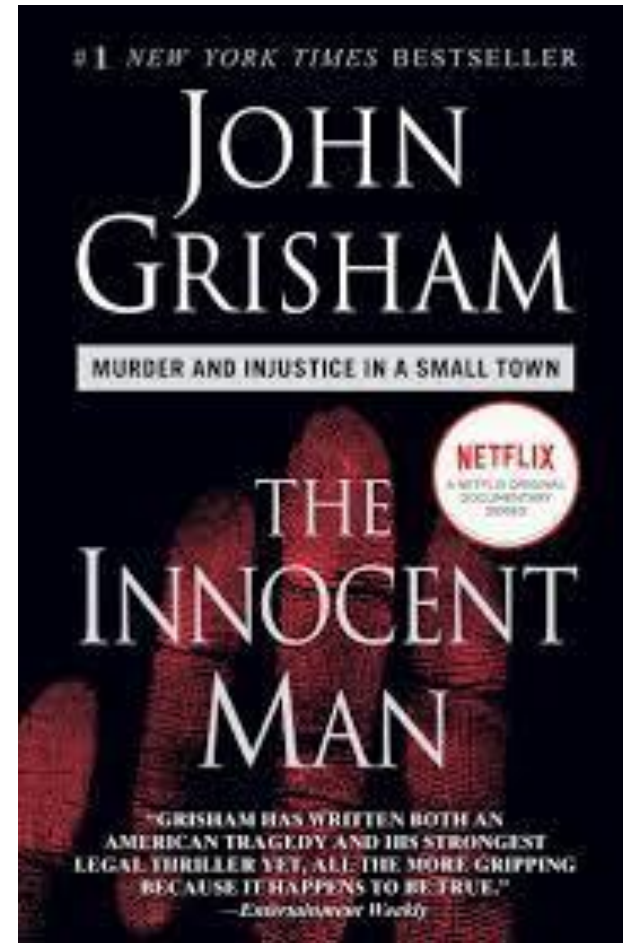
- ❑ 1. When (the conversation occurred)
- ❑ 2. Where
- ❑ 3. W knows other person
- ❑ 4. How W knows other person
- ❑ 5. Who else was present
- ❑ 6. Who said what to whom
- **FRE 901(b)(5)-Opinion about a voice**



Telephone conversations-W does not know other person

Individual

- ❑ 1. When (the conversation occurred)
- ❑ 2. Where
- ❑ 3. W obtained #
- ❑ 4. W dialed #
- ❑ 5. Voice at other end identified self
- ❑ 6. Who else participated
- ❑ 7. Who said what to whom
- **FRE 901(b)(6)(A)**



Telephone conversations-W does not know other person

Business

- ❑ 1. When (the conversation occurred)
- ❑ 2. Where
- ❑ 3. W obtained #
- ❑ 4. W dialed #
- ❑ 5. Voice at other end acknowledged business entity
- ❑ 6. Who else participated
- ❑ 7. Who said what to whom
- **FRE 901(b)(6)(B)**



Top 12 Foundations

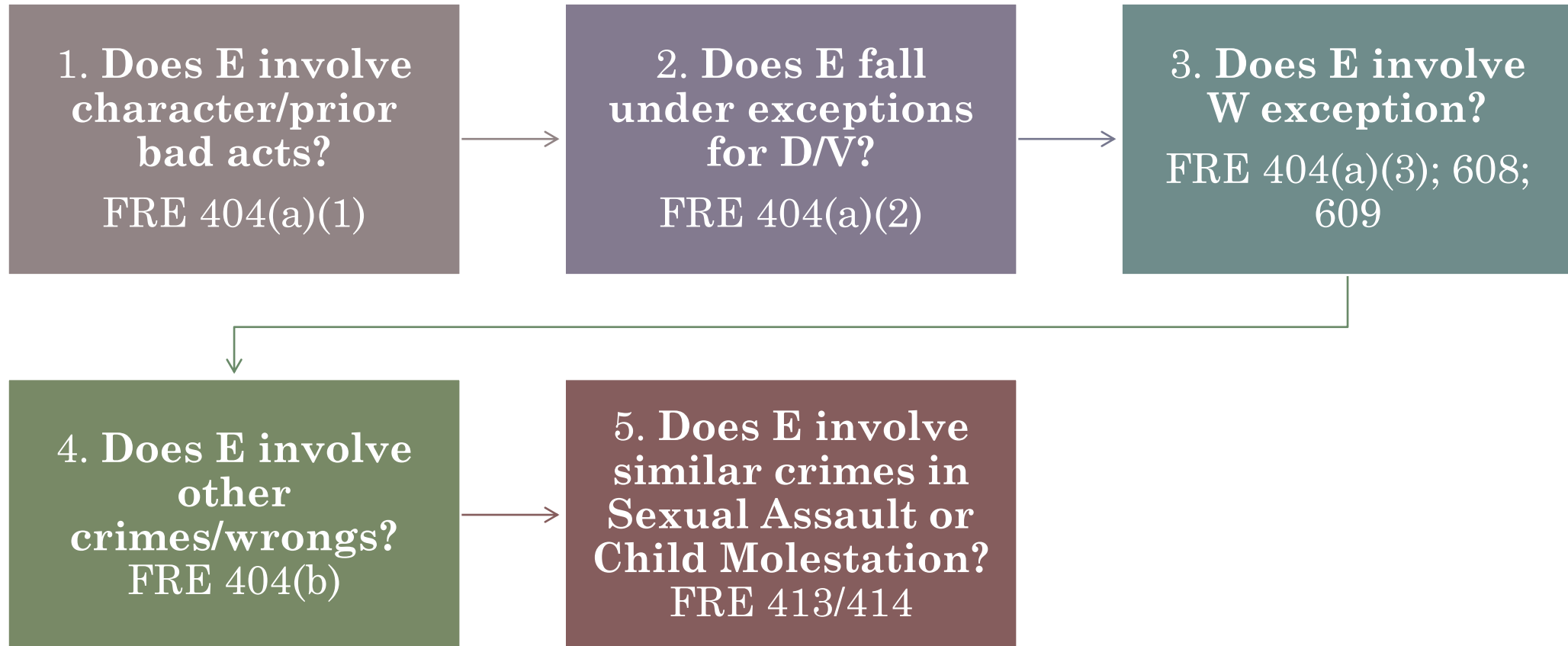
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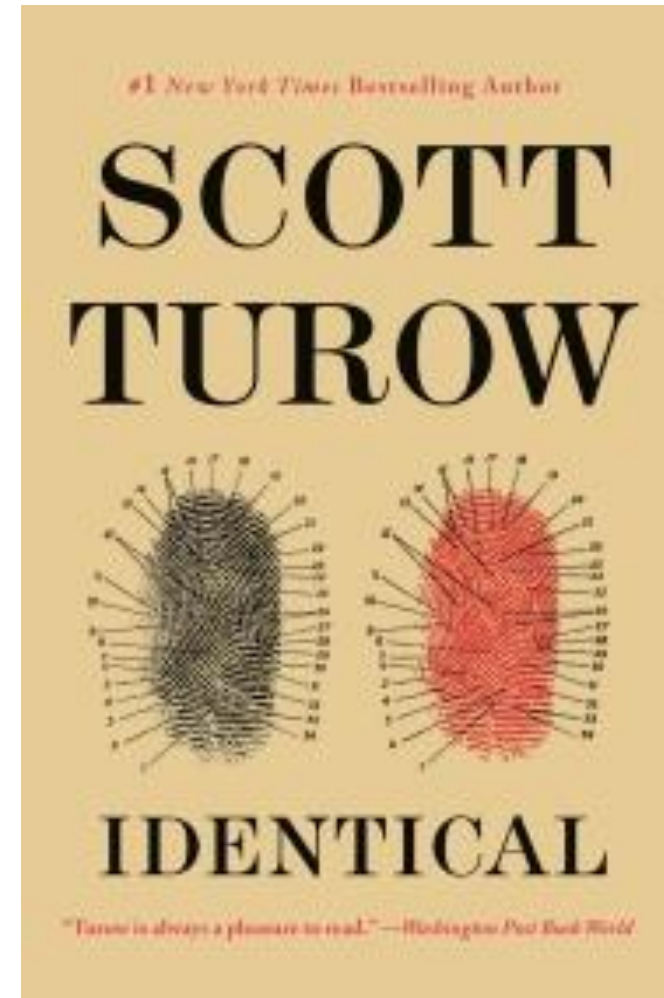
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3. Character and Prior Acts E-Approach



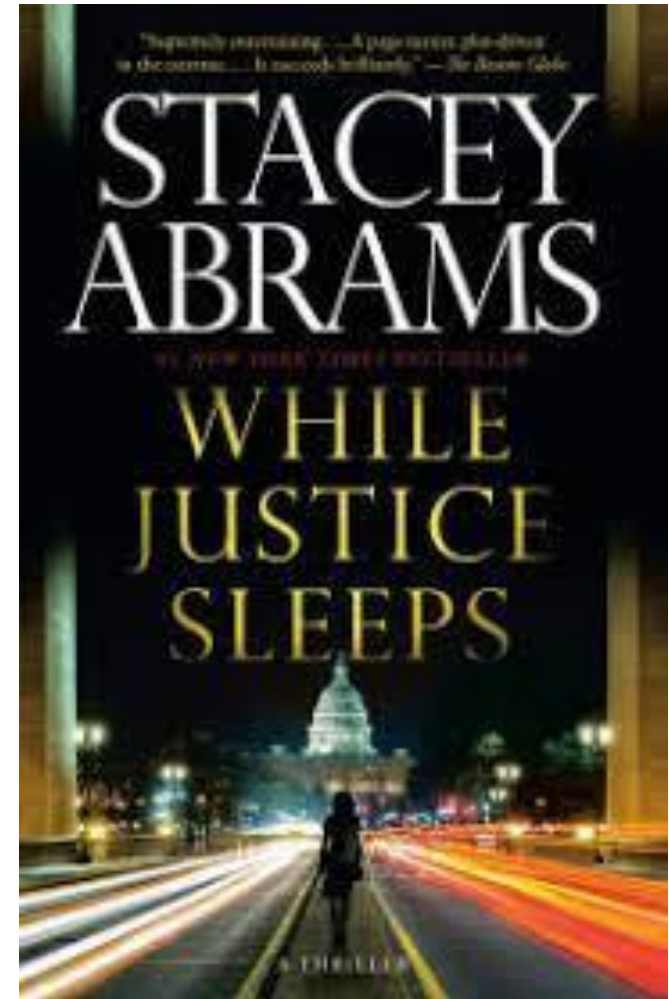
Propensity prohibition

- **FRE 404(a)**-
Character not admissible to prove action in conformity
- **FRE 404(b)(1)**-
propensity prohibition also applies to other crimes, wrongs, or acts



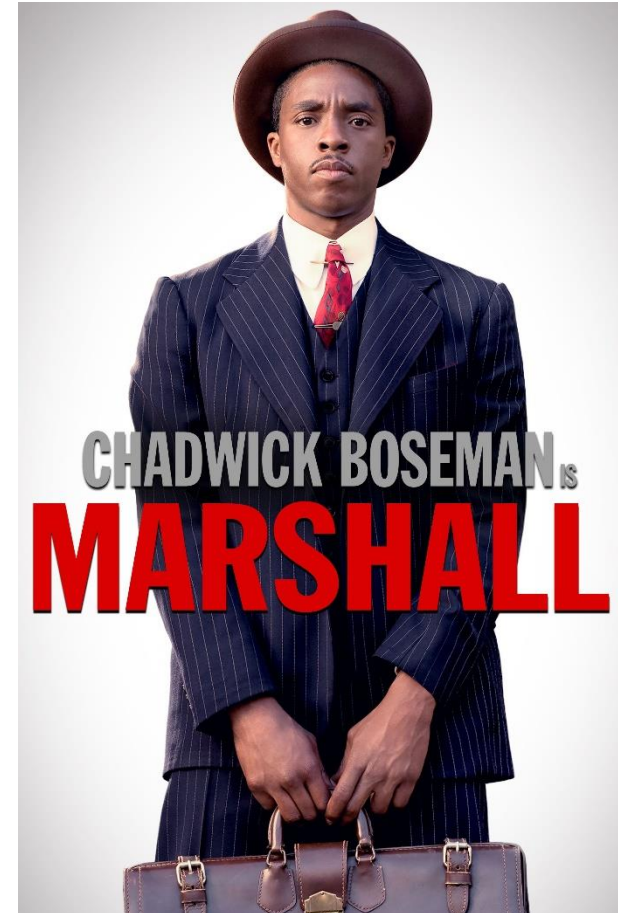
Character-Exceptions for a D or V in a Criminal Case-

- FRE 404(a)(2)
 - ❑ 1. Evidence of D's character
 - ❑ 2. Evidence of V's character
 - ❑ 3. Prohibited Use of V's sexual behavior or disposition



Character of W

- FRE 608(a)
- Only relevant character trait of a witness is **truthfulness or untruthfulness**
- E of truthful character of W only admissible **after character for truthfulness has been attacked**

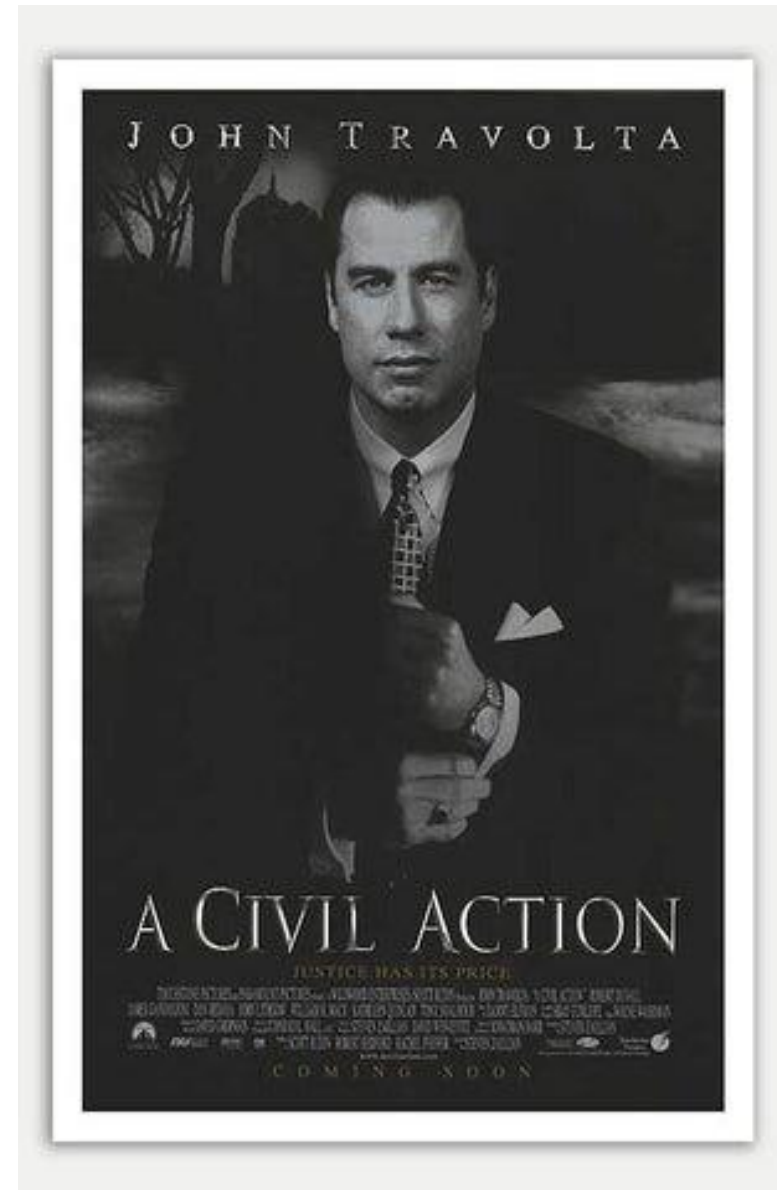


Methods of Proving Character

- **FRE 405(a) By Reputation or Opinion**
- When admissible, character may be proved by testimony about the person's **reputation** or by testimony in the form of an **opinion**
- On **cross-examination** of the character witness, the court may allow an inquiry into relevant **specific instances** of the person's conduct



- **FRE 405(b) By Specific Instances of Conduct**
- When a person's character or character trait **is an essential element of a charge, claim, or defense**, the character or trait may also be proved by relevant specific instances of the person's conduct



FRE 609-Impeachment by E of Criminal Conviction

- **FRE 609** allows a party to attack a W's credibility by E of prior conviction
- **Drivers:**
 - ❑ What type of case is it? (Is dishonesty involved)
 - ❑ Is the W the D?
 - ❑ How much time has passed since conviction/release?
 - ❑ Has the conviction been pardoned or annulled?
 - ❑ Was adjudication a juvenile one?

Top 12 Foundations

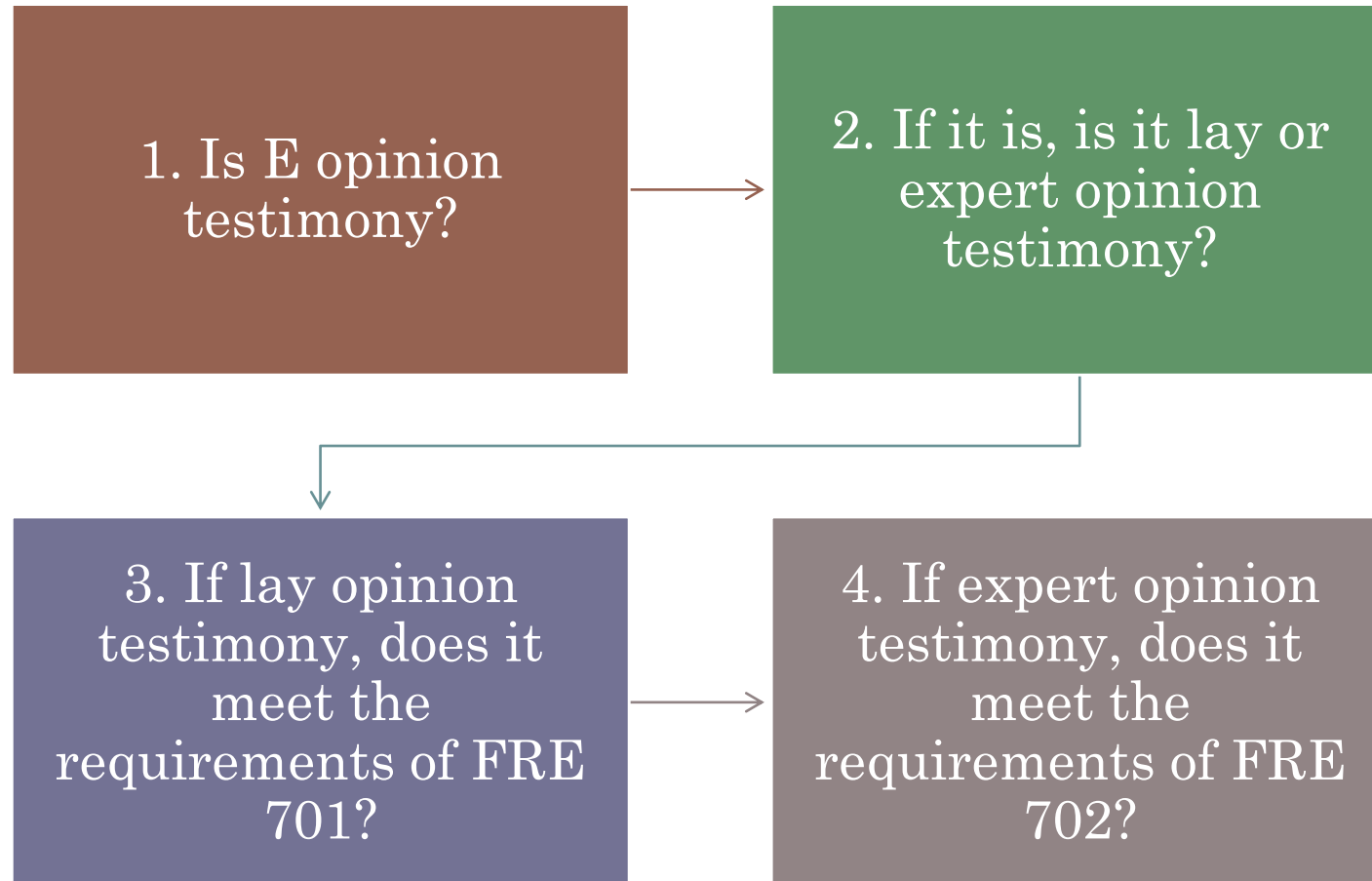
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4. Opinion and Expert Testimony-Approach



FRE 701-Lay opinion testimony

- An opinion presented by a lay witness:
 - ❑ 1. Must be “rationally based on the witness’s perception.” FRE 701(a),
 - ❑ 2. Must be “(h)elpful to clearly understanding the witness’s testimony or to determining a fact in issue.” FRE 701(b), and
 - ❑ 3. Cannot be “based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” FRE 701(c).



FRE 702-Expert witness testimony

- ❑1. The W must **qualify** as an expert
- ❑2. The expert knowledge must be **helpful**. FRE 702(a)
- ❑3. It must be based on “**sufficient facts or data**.” FRE 702(b)
- ❑4. It must be the product of “**reliable principles and methods**.” FRE 702(c)
- ❑5. The expert must have “**reliably applied the principles and methods to the facts**.” FRE(d)



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5. Refreshing recollection-FRE 612

- **FRE 612 –Refreshing recollection**

- 1. W forgets
- 2. Examiner uses something (typically a writing) to refresh W memory
- 3. W testifies from (refreshed) memory

- Writing used to refresh memory does not have to be admissible
- Writing not read to jury
- Writing not in evidence
- If the W cannot recall, recorded recollection might apply

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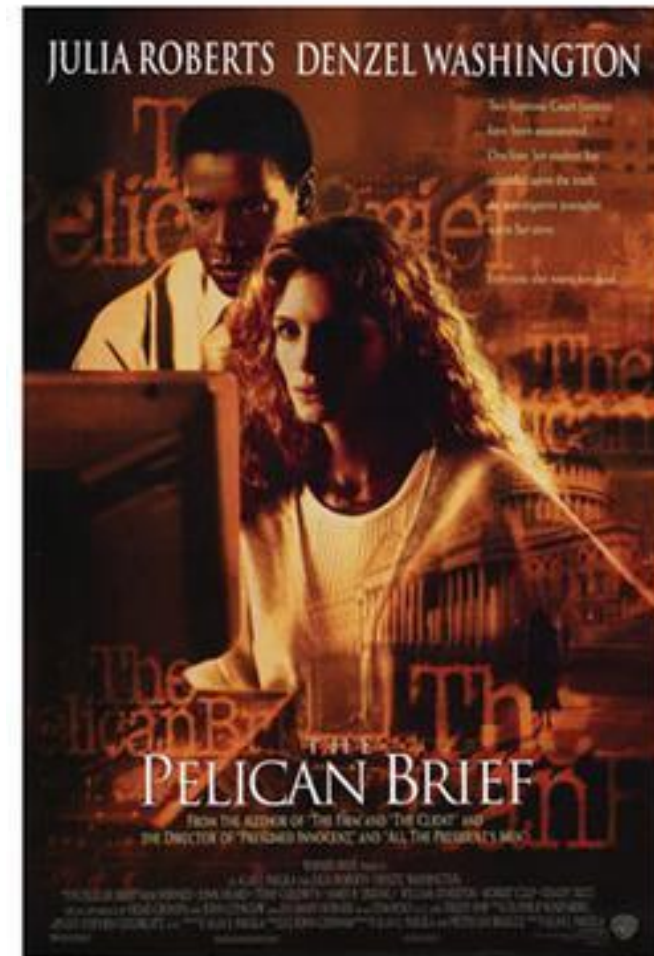
Foundational requirements

- RASP
- Relevance-FRE 401
- Authenticity-FRE 901
- Specific Admissibility-e.g.:
FRE 803, 804
- Prejudice-FRE 403



Admissible E v. Illustrative Aid

- Admissible E vs. illustrative aids
- **If exhibit sufficiently accurate:** it might be admitted into E
- Continuum based on accuracy: Is exhibit to scale? Is it rough drawing?
- **Illustrative aid used to help W explain testimony, but not E**



Offering exhibit into E

- ❑ 1. Mark exhibit
- ❑ 2. Show counsel
- ❑ 3. Show witness
- ❑ 4. W Identifies
- ❑ 6. Offer exhibit into e
- ❑ 7. Show jury



Top 12 Foundations

Testimonial E

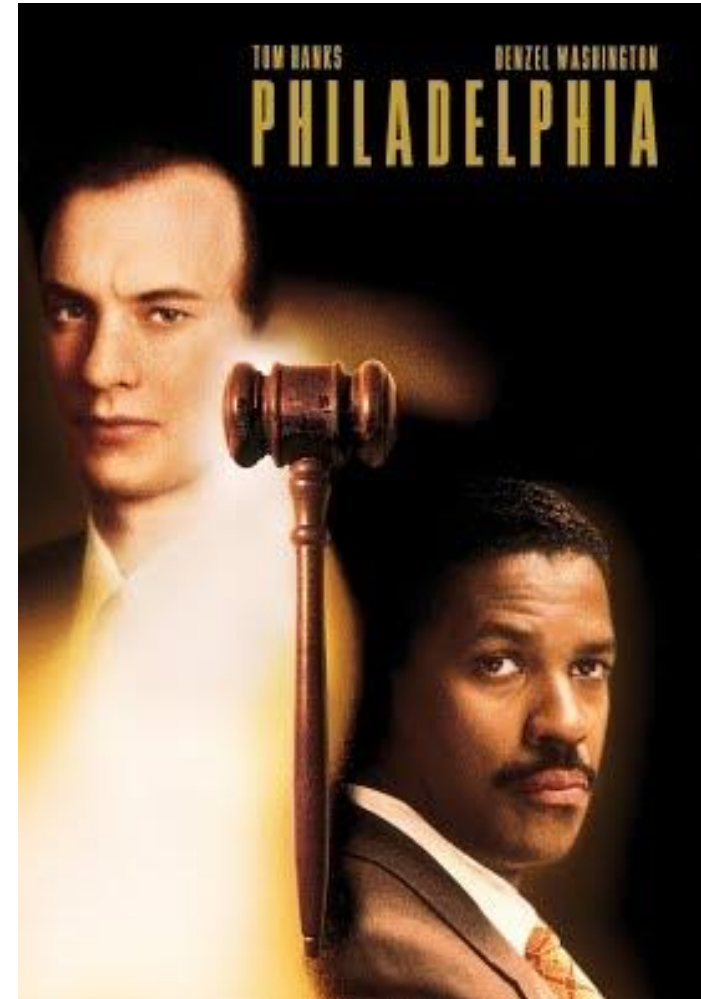
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6. Real E

- RASP-Authenticity
 - a. Recognition of exhibit
 - b. Chain of custody

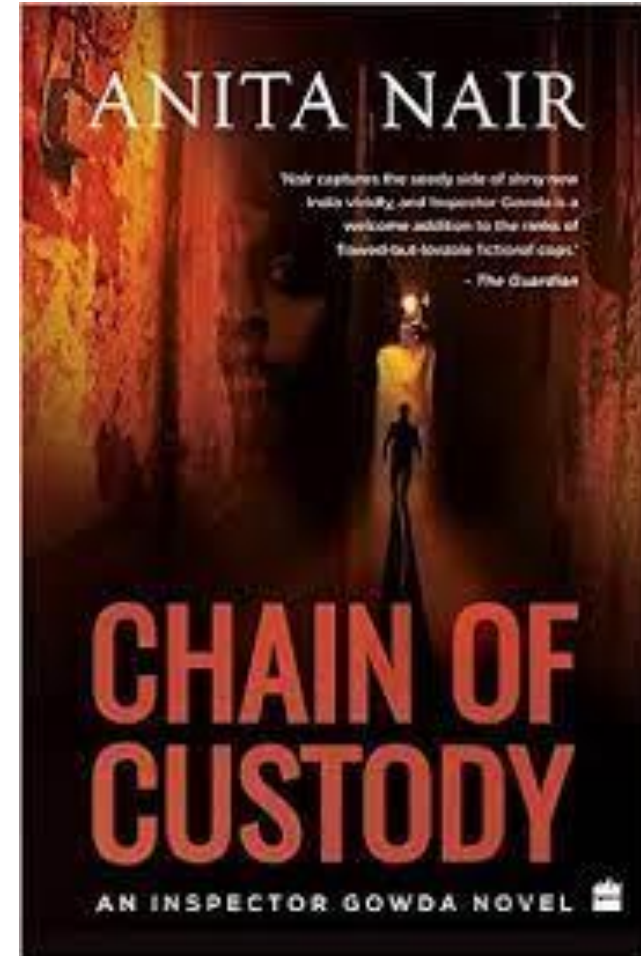


a. Recognition of exhibit

- ❑ 1. W recognizes exhibit
 - ❑ 2. W knows how exhibit looked on relevant date
 - ❑ 3. Exhibit in same or substantially same condition as on relevant date
- W recognizes object due to unique appearance/features
 - Object given recognizable markings (tagged, marked for identification, etc.)

b. Chain of custody

- E in continuous, secure control of person(s)
- Fungible objects-not readily identifiable
- Chain of custody circumstantially proves what the proponent claims it to be



Top 12 Foundations

Testimonial E

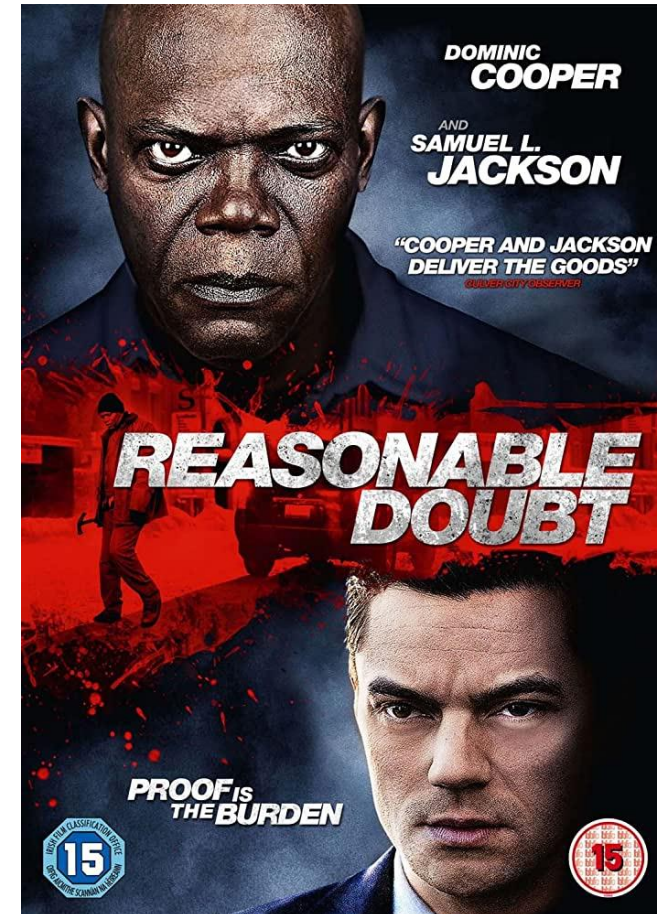
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7. Photos/videos

- RASP-Authenticity
 - ❑ 1. W recognizes scene depicted
 - ❑ 2. W knows how scene looked on relevant date
 - ❑ 3. Photo/video “fairly and accurately” depicts scene
- Typically not necessary to call photographer



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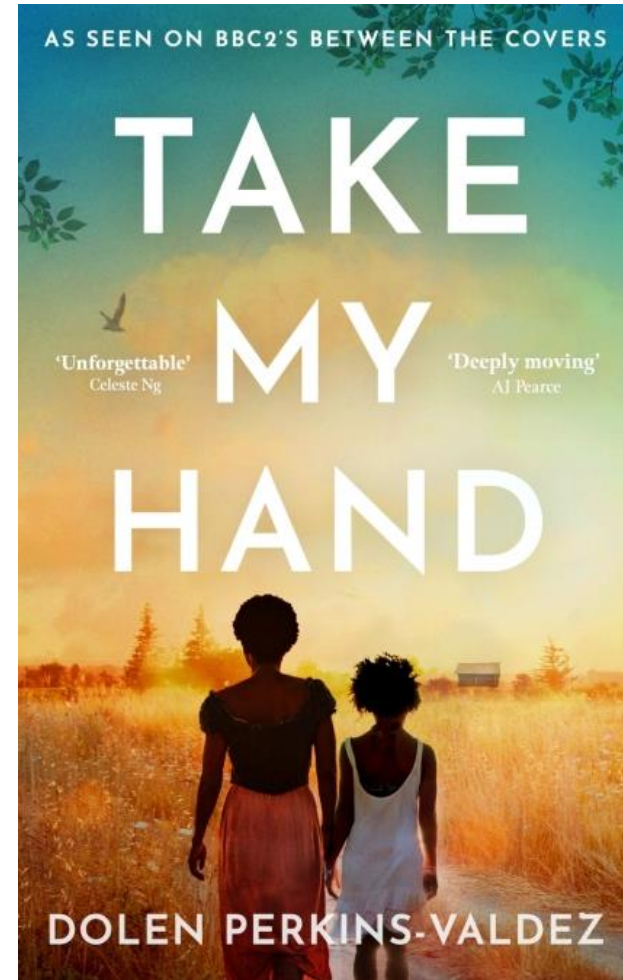
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8. Business Records-FRE 803(6)

- RASP- Hearsay
- Admissible if:
 - ❑ 1. Made at or near **time** of transaction or event
 - ❑ 2. Made by (or based on information transmitted from) **person with knowledge**
 - ❑ 3. **Kept in the course** of regularly conducted business activity
 - ❑ 4. Were made as a part of the **regular practice** of that business

Business records-KRAP

- RASP-Hearsay
- KRAP
 - ❑1. Kept
 - ❑2. Regular course of business
 - ❑3. At or near time of event
 - ❑4. Personal knowledge (made by or transmitted by)
- Professor John Barkai,
University of Hawaii

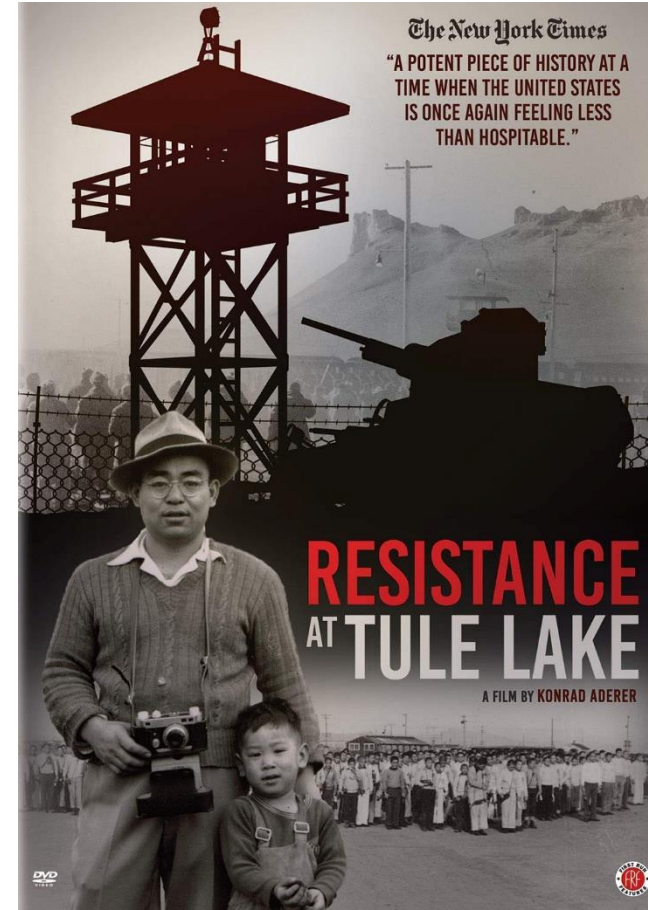


- RASP-Authenticity
 - ❑ 1. FRE 901(a)(1)-
Testimony of W with
knowledge (custodian)
 - ❑ 2. FRE 902(11) provides
that **certified domestic**
business records are self-
authenticating
- **Reasonable notice** and
opportunity to inspect
must be given



Note

- **Record does not come in if opponent shows that source of information or method of preparation lacks trustworthiness**
- **Cannot** be prepared in anticipation of litigation
- **Lookout** for hearsay within hearsay



D. Favorable case-U.S. v. Laster,
258 F. 3d 525 (6th Cir. 2001)



D. Favorable case-U.S. v. Williams, 661 F.2d 528 (5th Cir. 1981)



**D. Favorable case-U.S. v. Blecham,
657 F.3d 1052 (10th Cir. 2011)**



Top 12 Foundations

Testimonial E

- ❑1. Conversations
- ❑2. Telephone conversations
- ❑3. Characters E
- ❑4. Opinion E
- ❑5. Refreshing recollection

Exhibits

- ❑6. Real E
- ❑7. Photos/videos
- ❑8. Business records
- ❑9. Public records
- ❑10. E-mails
- ❑11. Recorded recollection
- ❑12. Summaries

9. Public Records- FRE 803(8)

- ❑ Records setting forth activities of a public office or agency, **or**
- ❑ Matters observed in the course of official duties
- May be admitted unless opponent shows lack of trustworthiness
- **Cannot** be prepared in anticipation of litigation
- **Lookout** for hearsay within hearsay
- **FRE 902** provides instances of public records that are self authenticating (e.g.: sealed, certified, official publications)

Public records-Law Enforcement Exclusion

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



Note

- **Record does not come in if opponent shows that source of information or method of preparation lacks trustworthiness**
- **Cannot** be prepared in anticipation of litigation
- **Lookout** for hearsay within hearsay



D. Favorable case-U.S. v. Orellana-Blanco, 294 F.3d 1143 (9th Cir. 2002)



D. Favorable case-U.S. v. Marguet-Pillado, 560 F.3d 1078 (9th Cir. 2009)



Top 12 Foundations

Testimonial E

- ❑1. Conversations
- ❑2. Telephone conversations
- ❑3. Characters E
- ❑4. Opinion E
- ❑5. Refreshing recollection

Exhibits

- ❑6. Real E
- ❑7. Photos/videos
- ❑8. Business records
- ❑9. Public records
- ❑10. E-mails
- ❑11. Recorded recollection
- ❑12. Summaries

10. E-mails

- **Authentication**
- Distinguish between incoming/outgoing
 - a. For outgoing:**
 - ❑ Establish reliable knowledge of recipient's e-mail (or other circumstantial e)
 - b. For incoming:**
 - ❑ Establish reliable knowledge of sender's e-mail (or other circumstantial e)
- **Hearsay**
- Hearsay exclusion (typically party admission)
- Hearsay exception (typically business record)

Top 12 Foundations

Testimonial E

- ❑1. Conversations
- ❑2. Telephone conversations
- ❑3. Characters E
- ❑4. Opinion E
- ❑5. Refreshing recollection

Exhibits

- ❑6. Real E
- ❑7. Photos/videos
- ❑8. Business records
- ❑9. Public records
- ❑10. E-mails
- ❑11. Recorded recollection
- ❑12. Summaries

11. Recorded recollection-FRE 803(5)

- **FRE 803(5)**
 - ❑1. W once had personal knowledge of event
 - ❑2. W cannot recall events accurately
 - ❑3. W previously made accurate memo of event
 - ❑4. At a time when event fresh in her mind
- **Record read into E, but not admitted unless by opposing party requests**

D. Favorable case-U.S. v. Dazey, 403 F.3d 1147 (10th Cir. 2005)



Top 12 Foundations

Testimonial E

- ❑1. Conversations
- ❑2. Telephone conversations
- ❑3. Characters E
- ❑4. Opinion E
- ❑5. Refreshing recollection

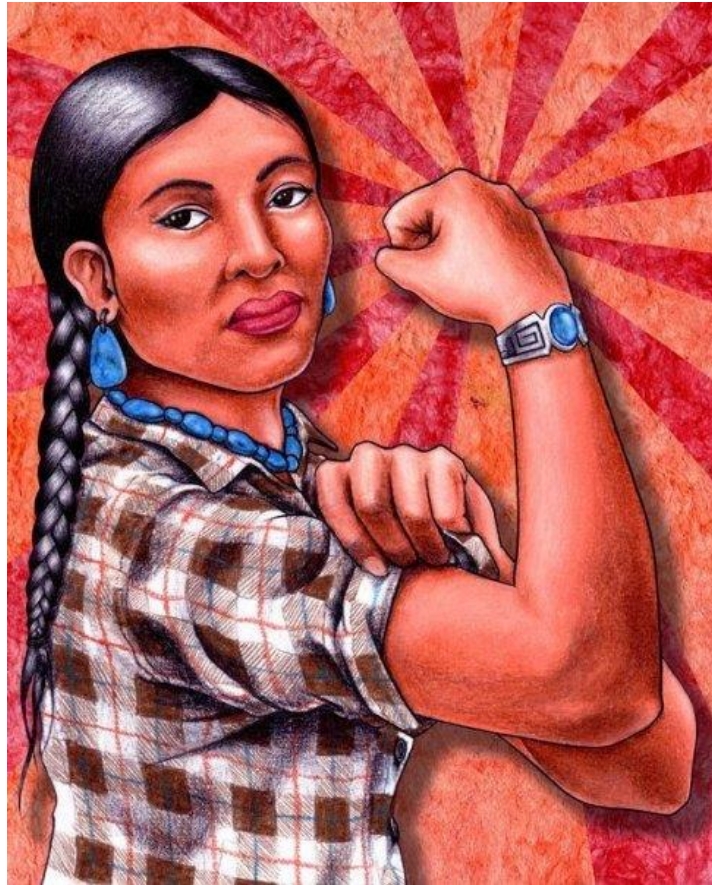
Exhibits

- ❑6. Real E
- ❑7. Photos/videos
- ❑8. Business records
- ❑9. Public records
- ❑10. E-mails
- ❑11. Recorded recollection
- ❑12. Summaries

12. Summaries-FRE 1006

- Summary to prove **voluminous content**
 - ❑1. Original documents so voluminous, they cannot be conveniently examined in court
 - ❑2. W has examined data
 - ❑3. W able to produce a summary
 - ❑4. Exhibit is fair and accurate summary of underlying information
- Proponent must make originals or duplicates available for examination or copying
- **Underlying E must be admissible**

**D. Favorable case-U.S. v. Oros,
578 F.3d 703 (7th Cir. 2009)**



D. Favorable case-U.S. v. Nguyen, 504 F.3d 561 (5th Cir. 2007)



We Can Do It!





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