The Busy Lawyer's Evidence Update

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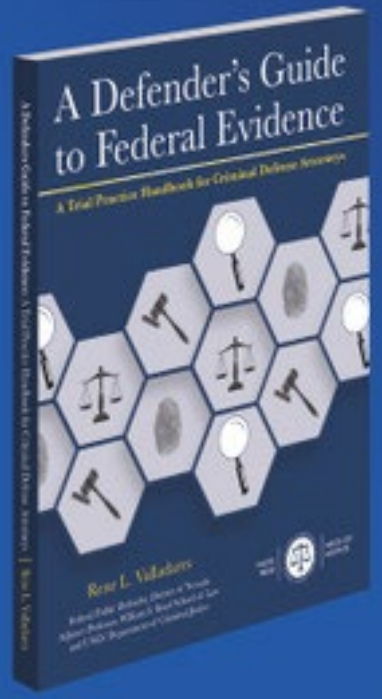
FEDERAL PUBLIC DEFENDER
District of Nevada

A Defender's Guide to Federal Evidence

A Trial Practice Handbook for Criminal Defense Attorneys



Written by Rene L. Valladares

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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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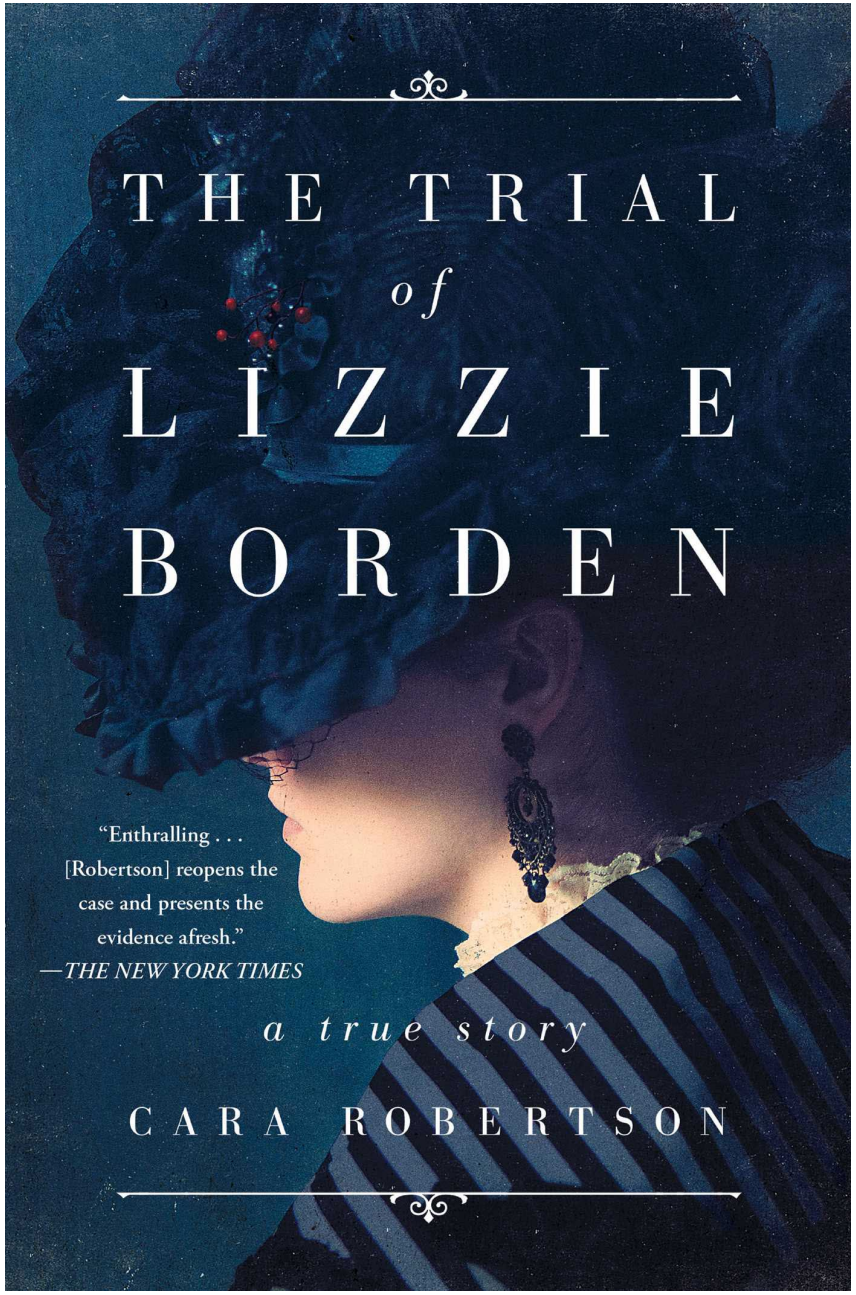
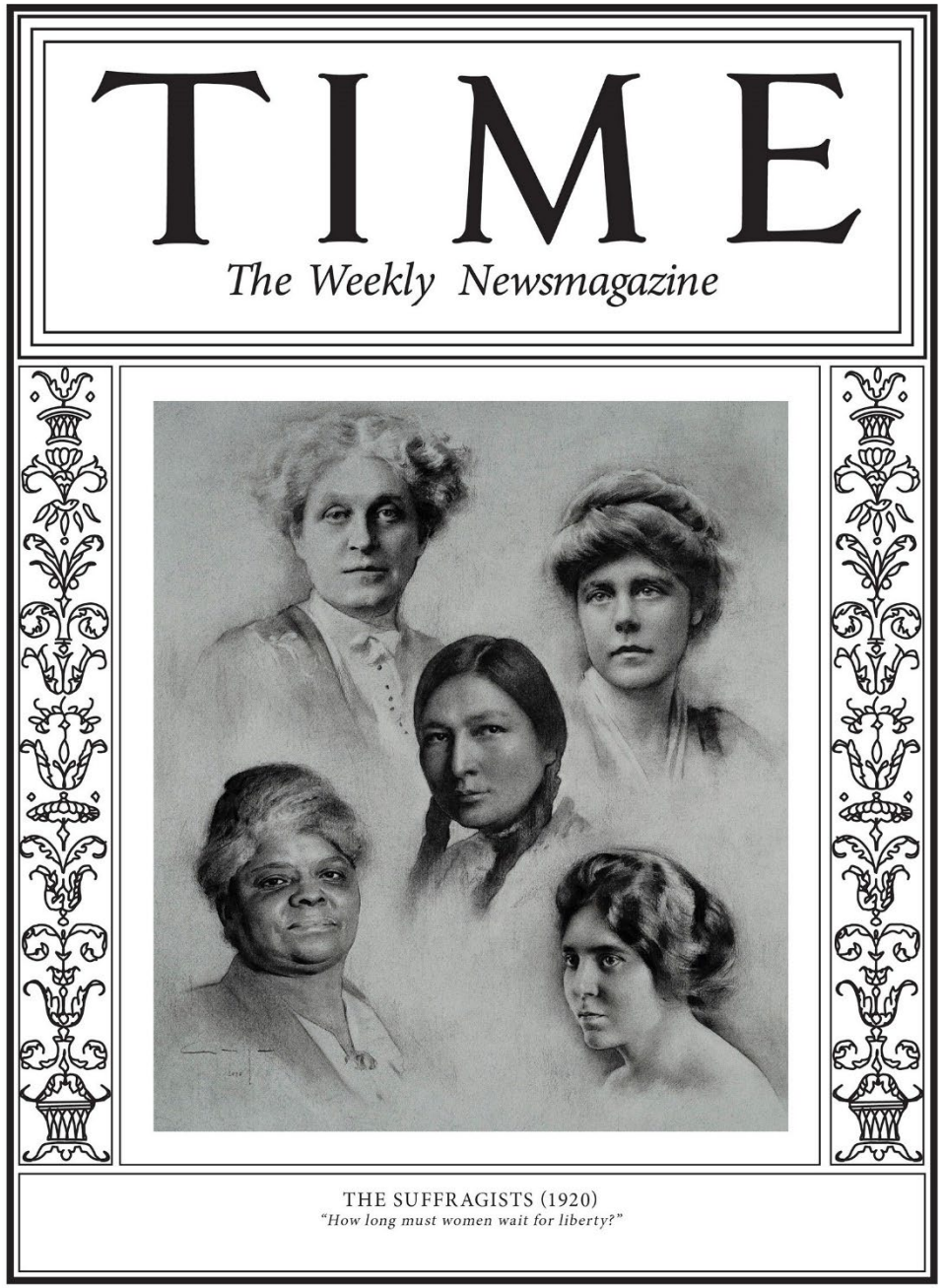

THE TRIAL
of
LIZZIE
BORDEN
"Enthralling . . .
[Robertson] reopens the
case and presents the
evidence afresh."
—THE NEW YORK TIMES
a true story
CARA ROBERTSON


TIME
The Weekly Newsmagazine
THE SUFFRAGISTS (1920)
"How long must women wait for liberty?"

VOTES
FOR
WOMEN

Update

- Rule of Completeness-FRE 106
- Illustrative Aids-FRE 611(d)
- Juror Questions for Witnesses-FRE 611(e)
- Witness's Prior Statement-FRE 613
- Testimony by Expert Witnesses-FRE 702
- Hearsay Exception-Statements Against Interest-FRE 804(b)(3)
- Summaries to Prove Content-FRE 1006
- Other Crimes, Wrongs, or Acts FRE 404(b)

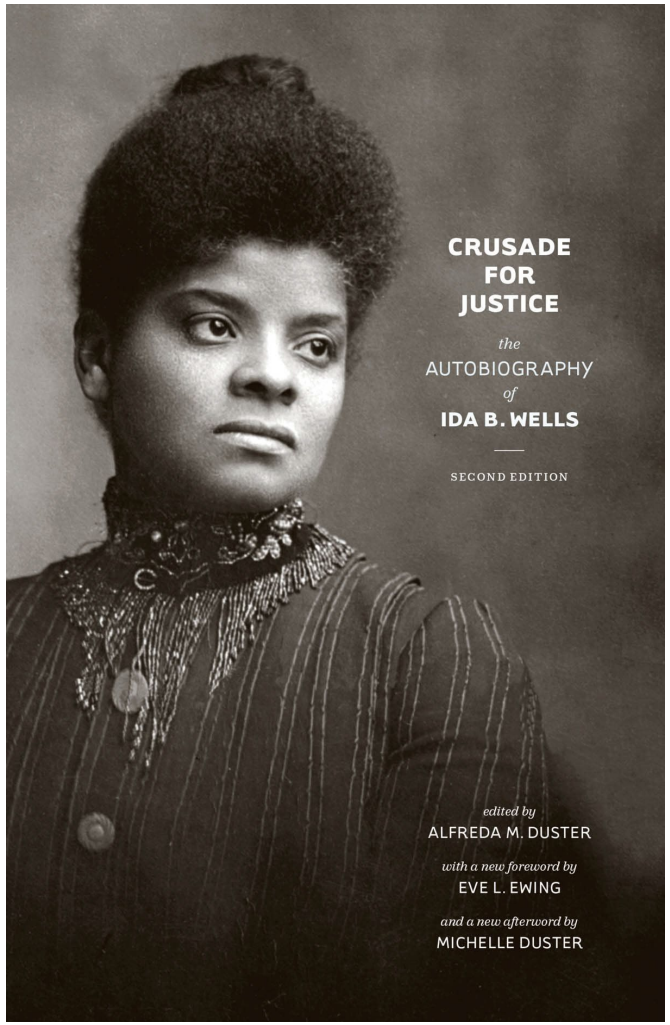
Amendment Process

- Advisory Committee on FREs
- Judicial Conference Committee on Rules and Procedure (Standing Committee)
- Transmitted to Judicial Conference
- Transmitted to SCOTUS
- Transmitted to Congress
- Becomes effective

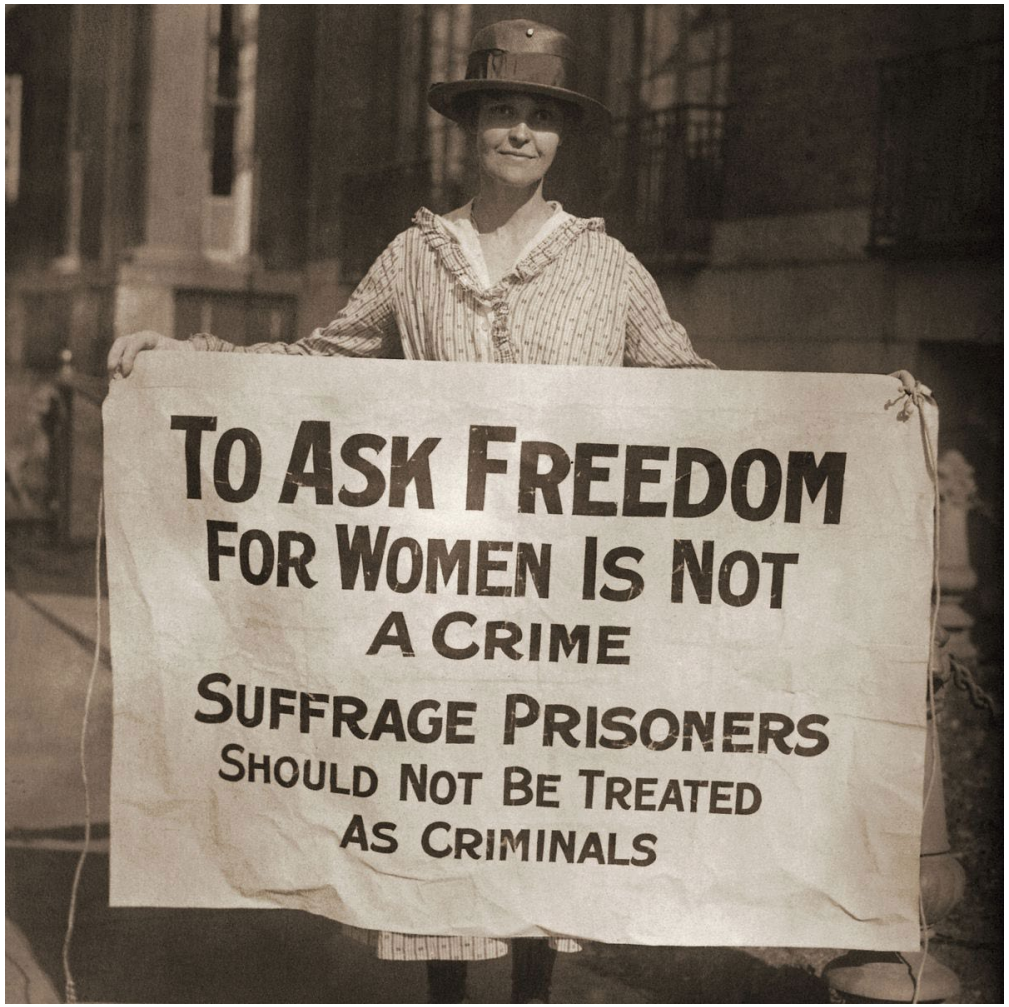
- https://www.uscourts.gov/sites/default/files/evidence_rules_report_-_may_2022_0.pdf

Approach

- Rule
- Background
- Problem
- Proposed Amendment
- Status



Rule of Completeness-FRE 106

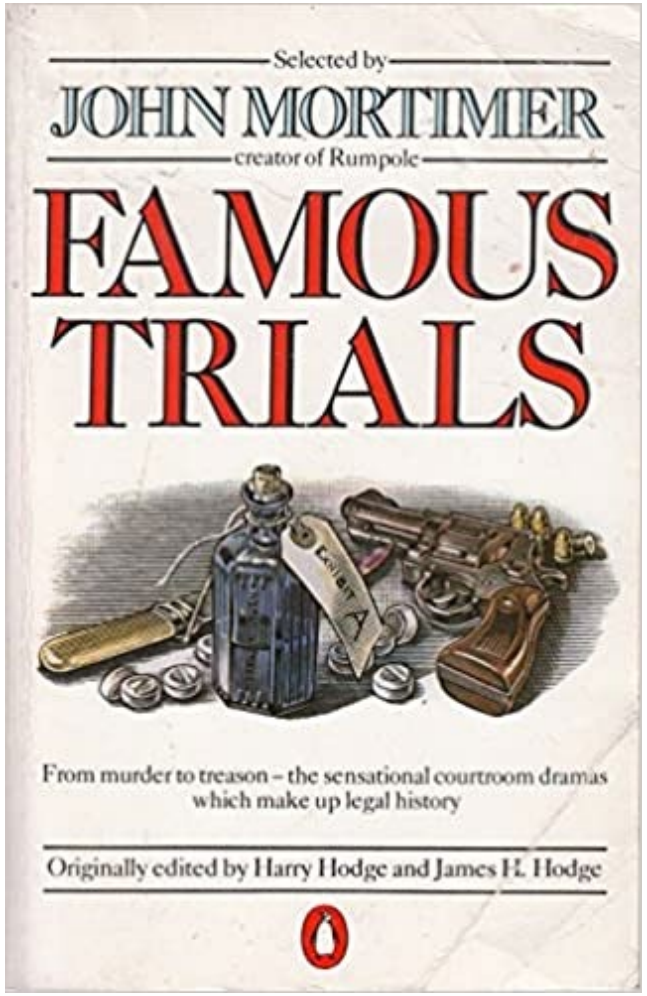


FRE 106-Rule of Completeness

- If a party introduces all or part of a **writing or recorded statement**,
- an adverse party may require the introduction of any other part-or any other writing or recorded statement
- that **in fairness ought to be considered at the same time**

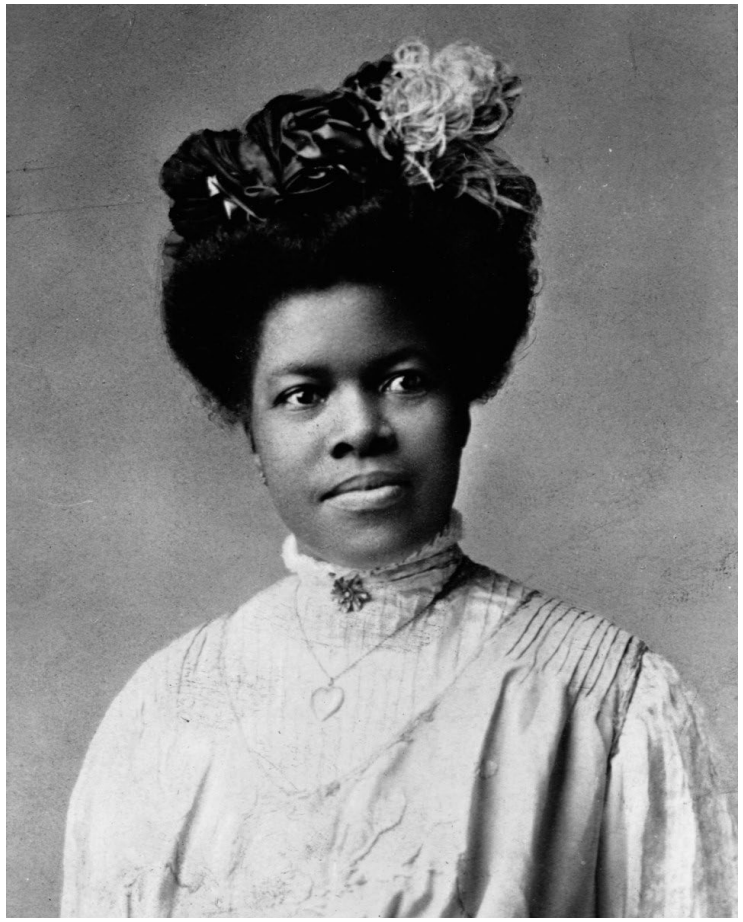
Background

- **FRE 106** is a codification of the common law rule of completeness
- When a party introduces part of a statement at trial, and that partial statement may be misleading,
- Adverse party can introduce other parts of the statement that **in fairness ought to be considered**



SCOTUS: Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 172 (1988)

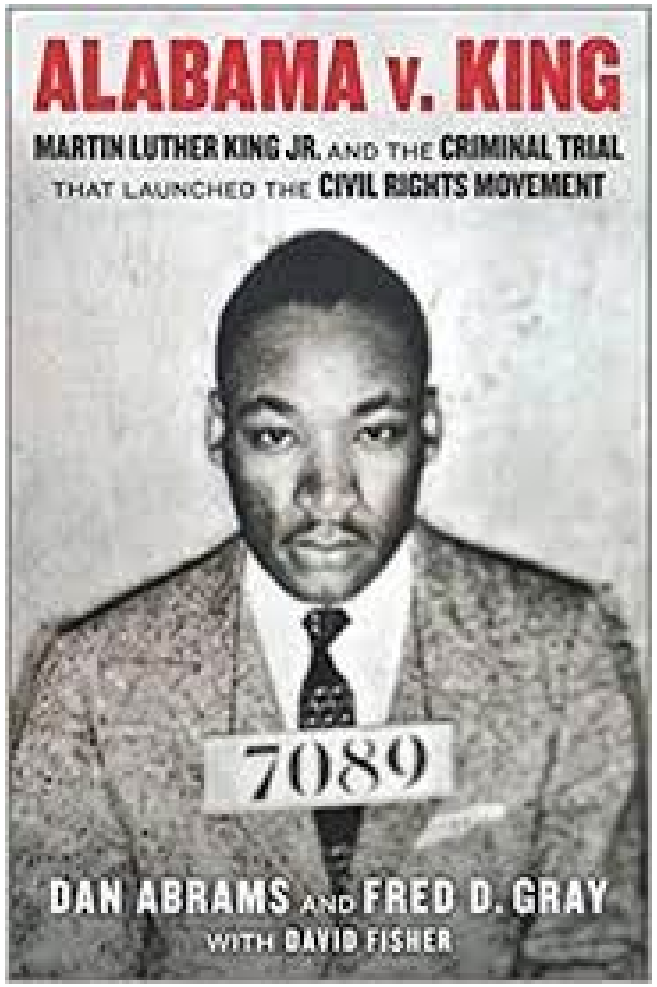
- Noting that under **FRE 106**, "when one party has made use of a portion of a document, such that misunderstanding or distortion can be averted only through presentation of another portion, **the material required for completion is *ipso facto* relevant and therefore admissible under Rules 401 and 402.**"



D. Favorable Case-United States v. Walker, 652 F.2d 708 (7th Cir. 1981)

Problems

- Rule is **limited to introduction of writing or recorded statement**
- **Oral statements not covered** (court and litigants must rely on common law)



Problems (cont.)

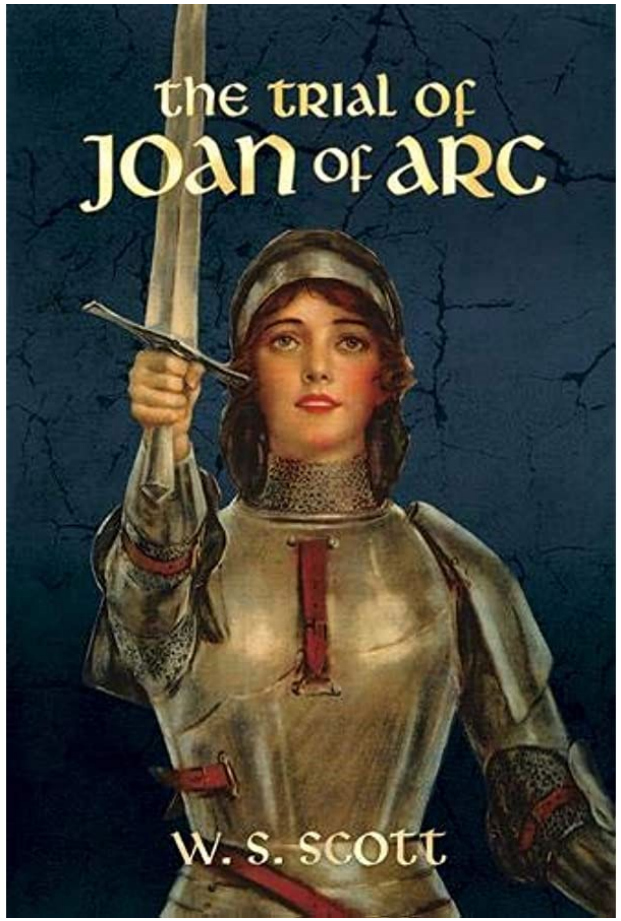
- Assertive conduct not covered
- Many jurisdictions already allow oral statements
- **Hearsay not allowed**

Example-United States v. Liera-Morales, 759 F.3d 1105 (9th Cir. 2014)

Example-United States v. Faruki, 803 F.3d 847 (7th Cir. 2015)

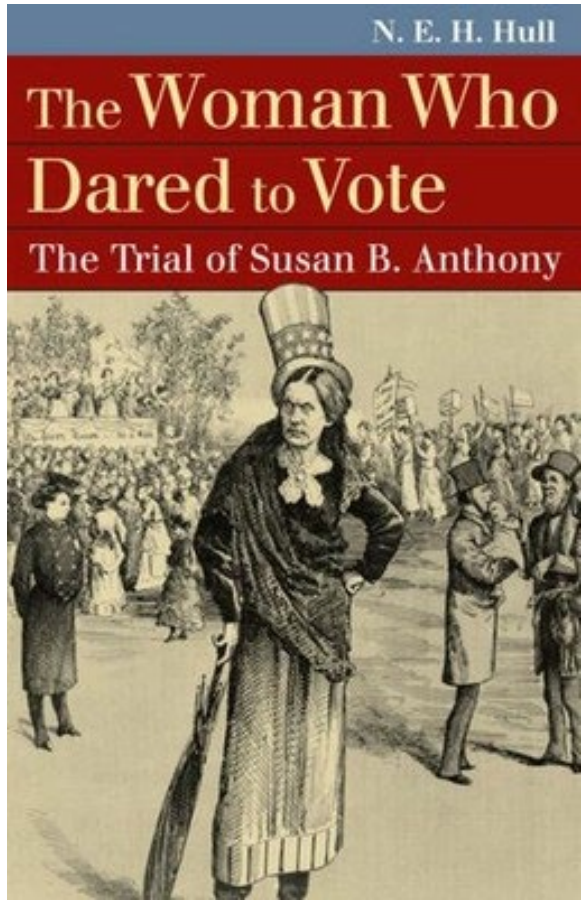
Proposed Amendment

- Amendment would allow completion of **all statements in any form** (not just written or recorded statements)
- **Amendment would allow completion over a hearsay objection**
- Party who presents a portion of a statement in a manner that distorts the meaning of that statement **forfeits the right to object to completion based upon hearsay**

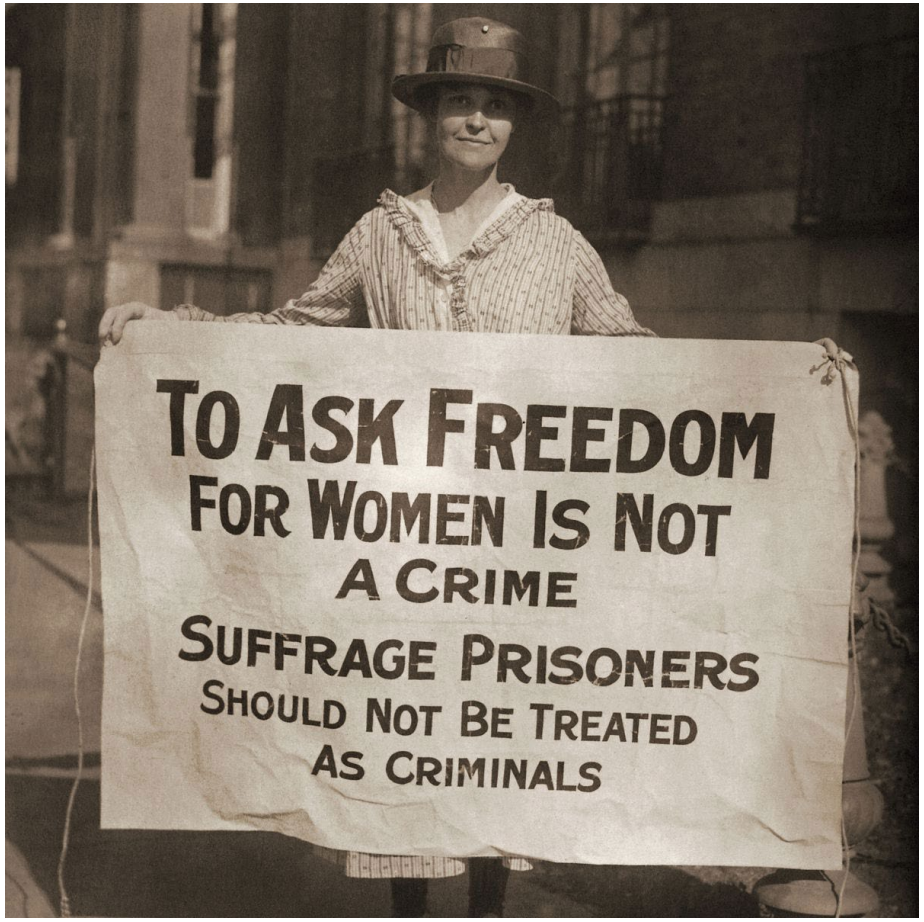


Status

- Proposed Amendment approved by Advisory Committee on Evidence Rules
- Comment period closed
- Proposed Amendment approved by Standing Committee
- Proposed Amendment transmitted to SCOTUS/Congress
- **Effective no earlier than December 1, 2023**



Illustrative Aids-FRE 611(d)

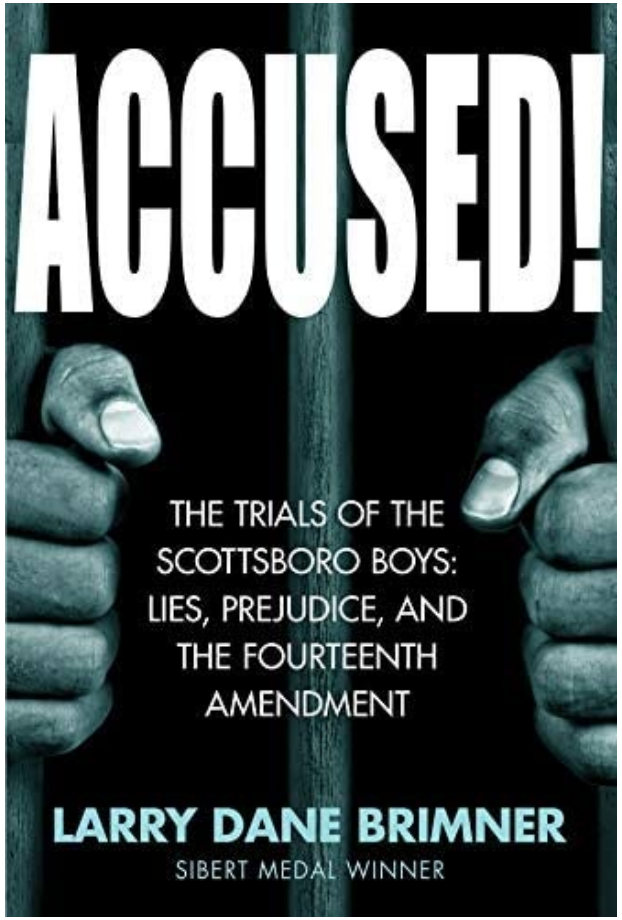


FRE 611-Illustrative Aids

- **FRE 611 deals with mode and order of examining witnesses and presenting evidence**
- It outlines three topics:
  - Control by the court
  - Scope of cross examination, and
  - Leading questions
- **It does not address illustrative aids**

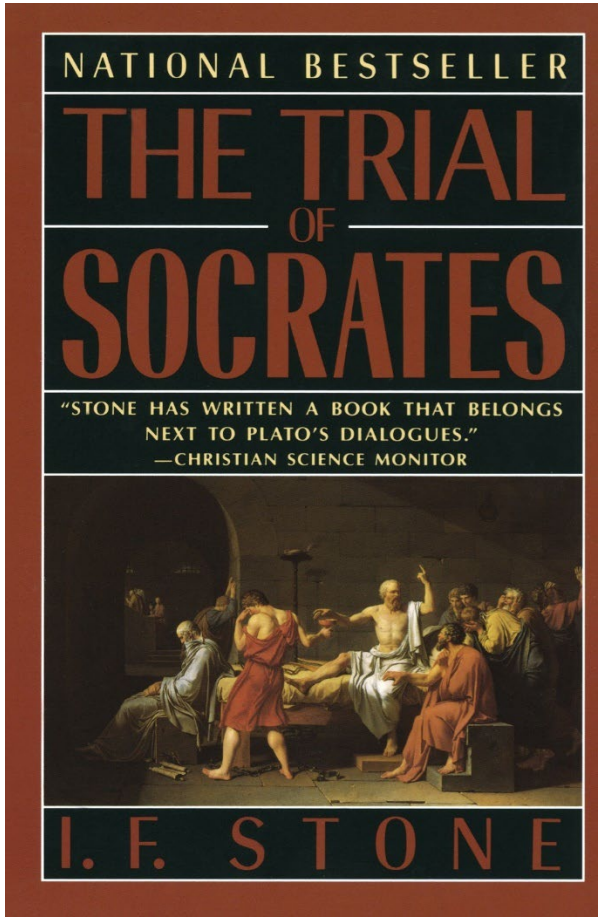
Examples of Illustrative Aids

- Examples include:
  - blackboard drawings,
  - diagrams,
  - PowerPoint,
  - video depictions,
  - charts,
  - graphs, and
  - computer simulations



Problems

- **Illustrative aids are used routinely, but no rule directly controls them**
- There is **court confusion** between exhibits that are evidence and illustrative aids



Proposed Amendment

- **Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence**
- **(d) Illustrative Aids**
- **(1) Permitted Uses.** The court may allow a party to present an illustrative aid to help the finder of fact understand admitted evidence if:
  - (A) its utility in assisting comprehension is not [substantially] **outweighed by the danger of unfair prejudice**, confusing the issues, misleading the jury, undue delay, or wasting time; and
  - (B) all parties are **given notice** and a reasonable opportunity to object to its use, unless the court, for good cause, orders otherwise

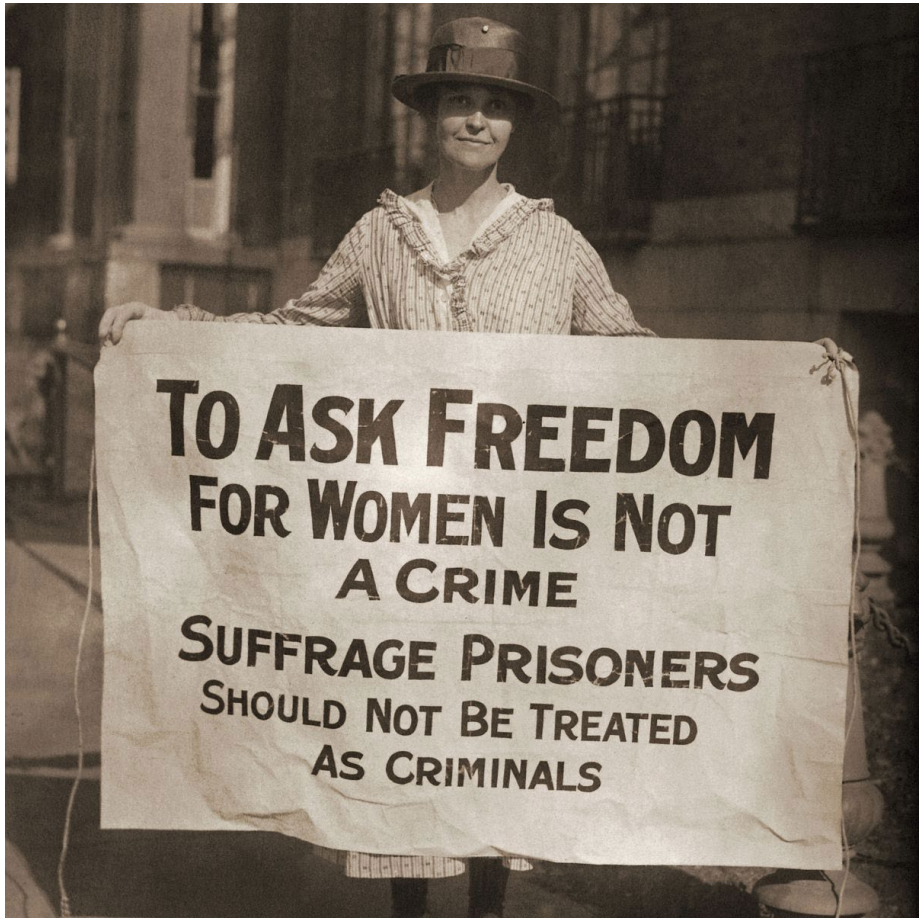
Proposed Amendment (cont.)

- (2) Use in Jury Deliberations. An illustrative aid **must not be provided to the jury during deliberations unless**:
- (A) all parties consent; or
- (B) the court, for good cause, orders otherwise
- (3) Record. When practicable, an illustrative aid that is used at trial must be entered into the record

Status

- Proposed Amendment approved by Advisory Committee on Evidence Rules
- Standing Committee approved proposed Amendment for publication for public comment
- Period of publication and public comment open
- Public comment period closes February 16, 2023

Juror Questions for Witnesses- FRE 611(e)

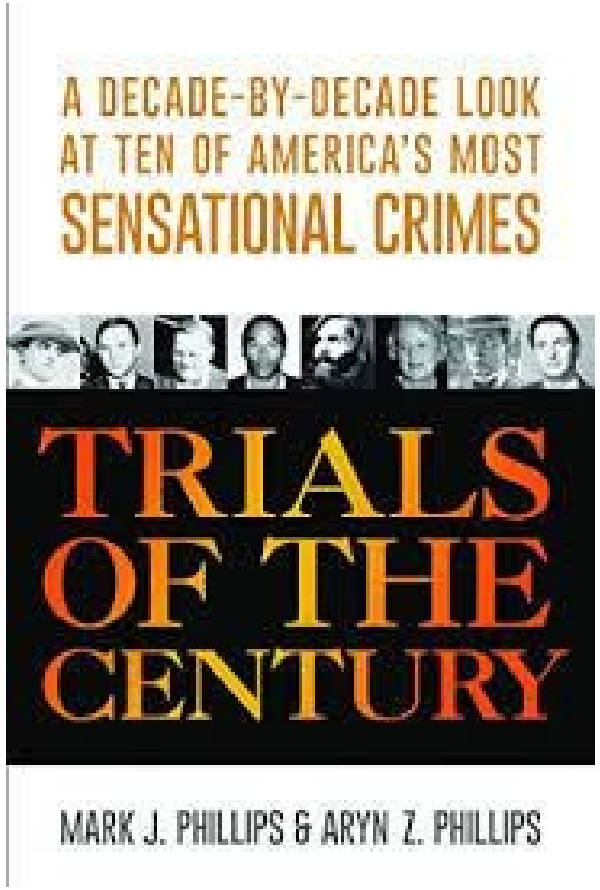


Jury Questions-FRE 611(e)

- **FRE 611** deals with mode and order of examining witnesses and presenting evidence
- It outlines three topics:
  - Control by the court
  - Scope of cross examination, and
  - Leading questions
- **It does not address juror questions**

Problems

- Practice of allowing jurors to ask questions has been controversial
- No rule governs the practice
- There is a need for a rule to address practice



Proposed Amendment

- Proposed rule would be designed to better regulate practice of juror questions
- Proposed rule **would not take a position on whether court should or should not allow questions**
- Instead, purpose of proposed rule is to provide **procedures and safeguards** for judges who wish to allow jurors to pose questions for witnesses
- Proposed rule **would not allow jurors to question witnesses directly** and would require that the court or counsel pose the questions
- Proposed rule would not allow disclosure of which juror asked question

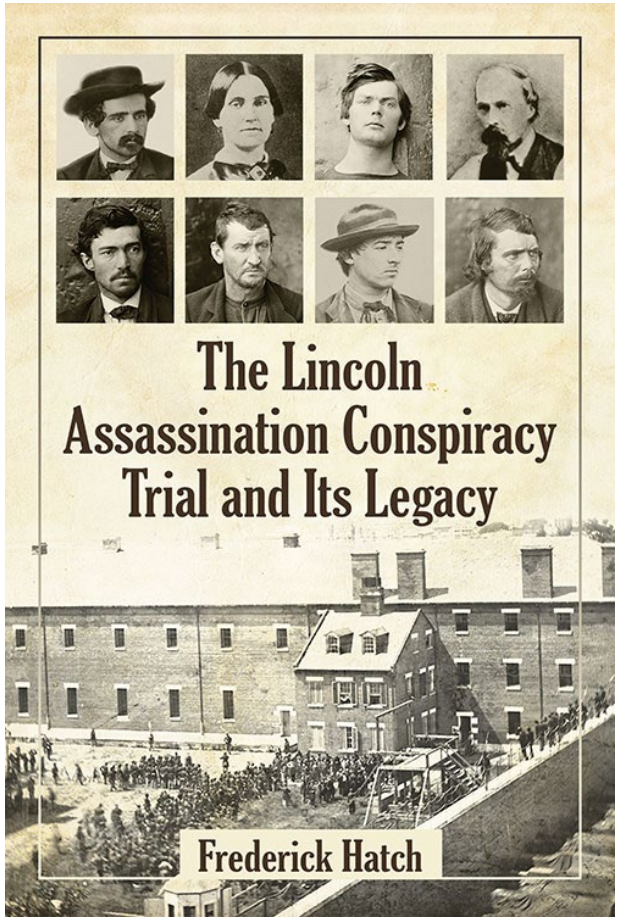
- **Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence**
- **(e) Juror Questions for Witnesses.**
- **(1) Instructions to Jurors If Questions Are Allowed.** If the court allows jurors to submit questions for witnesses during trial, then the court must instruct the jury that:
- (A) any question must be submitted to the court in writing;
- (B) a juror must not disclose a question's content to any other juror;
- (C) the court may rephrase or decline to ask a question submitted by a juror;
- (D) a juror must draw no inference from the fact that a juror's question is asked, rephrased, or not asked;
- (E) an answer to a juror's question should not be given any greater weight than an answer to any other question; and
- (F) the jurors are neutral factfinders, not advocates

Proposed Amendment (cont.)

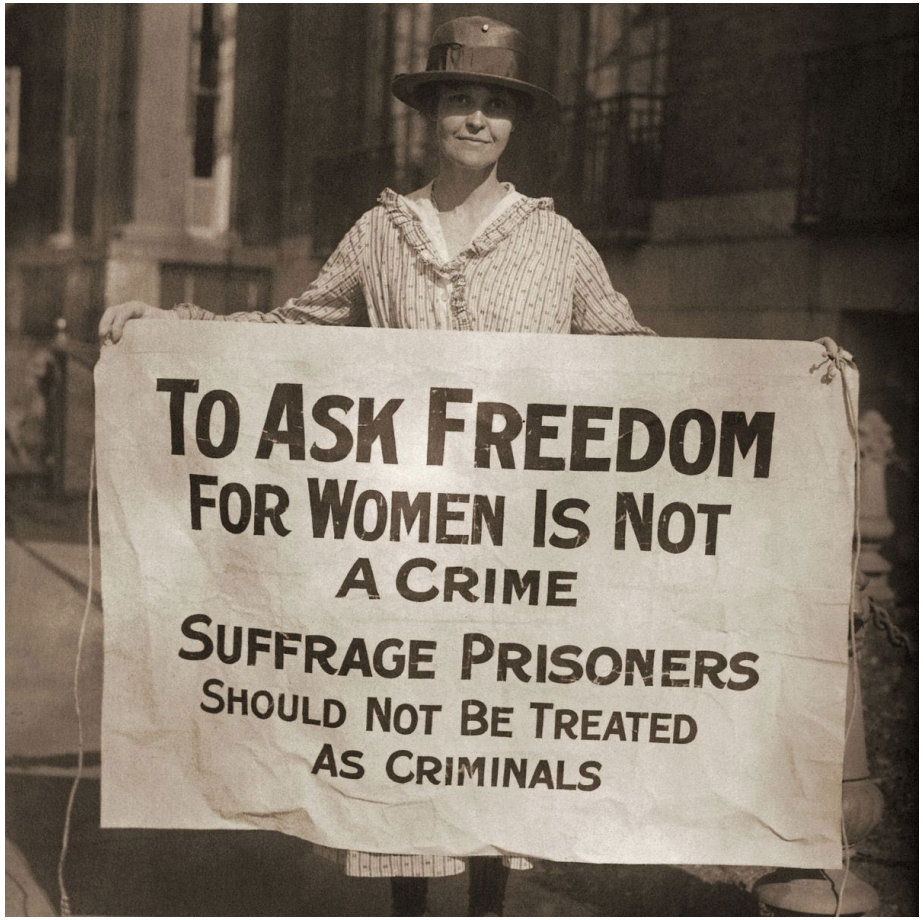
- **(2) Procedure When a Question Is Submitted.**
- When a question is submitted by a juror, the court must, outside the jury's hearing:
- (A) review the question with counsel to determine whether it should be asked, rephrased, or not asked; and
- (B) allow a party to object to it.
- **(3) Posing the Question to a Witness.**
- If the court allows a juror's question to be asked, the court must pose it to the witness or permit one of the parties to do so

Status

- Proposed Amendment approved by Advisory Committee on Evidence Rules
- Proposal before Standing Committee
- As a result of the comments and suggestions received from the Standing Committee, **the Advisory Committee withdrew the request for publication for public comment**
- **Proposed Amendment back to Advisory Committee on Evidence Rules**

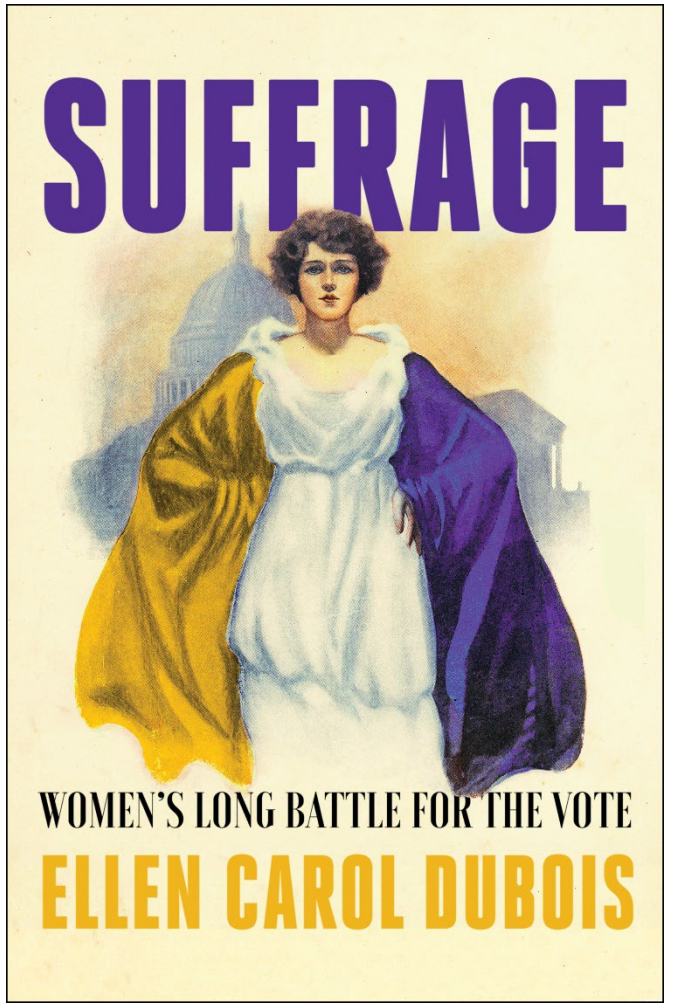


Witness's Prior Statement-FRE 613



Witness's Prior Statement-FRE 613

- **FRE 613** has two parts:
- Showing or disclosing statement to W during examination **(FRE 613(a))**, and
- Extrinsic evidence of a prior inconsistent statement **(FRE 613(b))**



Witness's Prior Statement-FRE 613 (cont.)

- **FRE 613(b)** deals with **extrinsic evidence of a W's prior inconsistent statement**
- Foundational requirements: According to the Rule, extrinsic evidence of a prior inconsistent statement is admissible only if opposing party is given the opportunity to examine the W about it

"The Suffragette," July 16, 1915. Registered at the G.P.O. as a Newspaper.

The Suffragette

Edited by Christabel Pankhurst — Official Organ of the Women's Social and Political Union

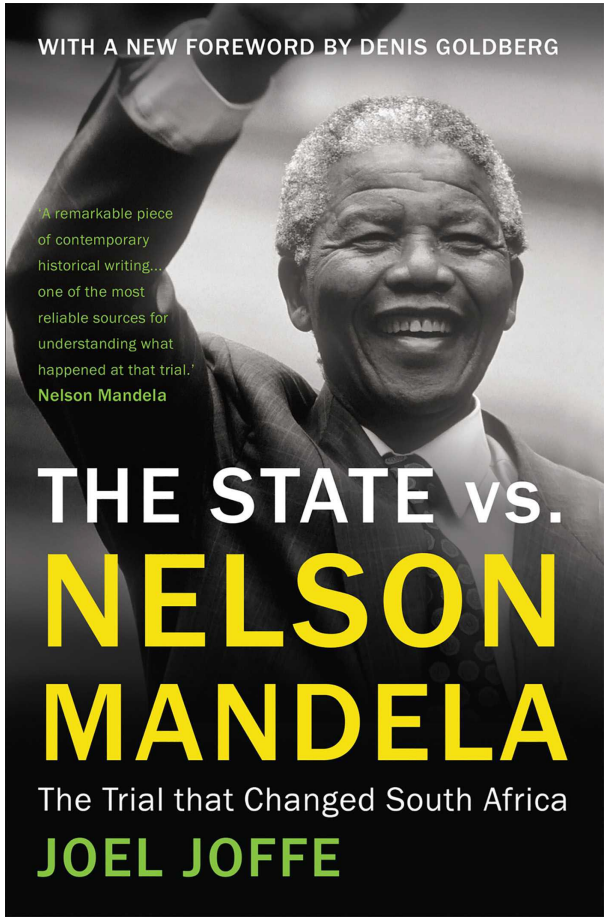
No. 110. Vol. IV. FRIDAY, JULY 16, 1915 Price 1d. Weekly

"And I saw when the Lamb opened one of the seals, and I heard, as it were the noise of thunder, one of the four beasts saying, Come and see.

"And I saw, and behold a white horse: and he that sat on him had a bow; and a crown was given unto him: and he went forth conquering and to conquer."—Rev. vi. 1 & 2.

Witness's Prior Statement-FRE 613 (cont.)

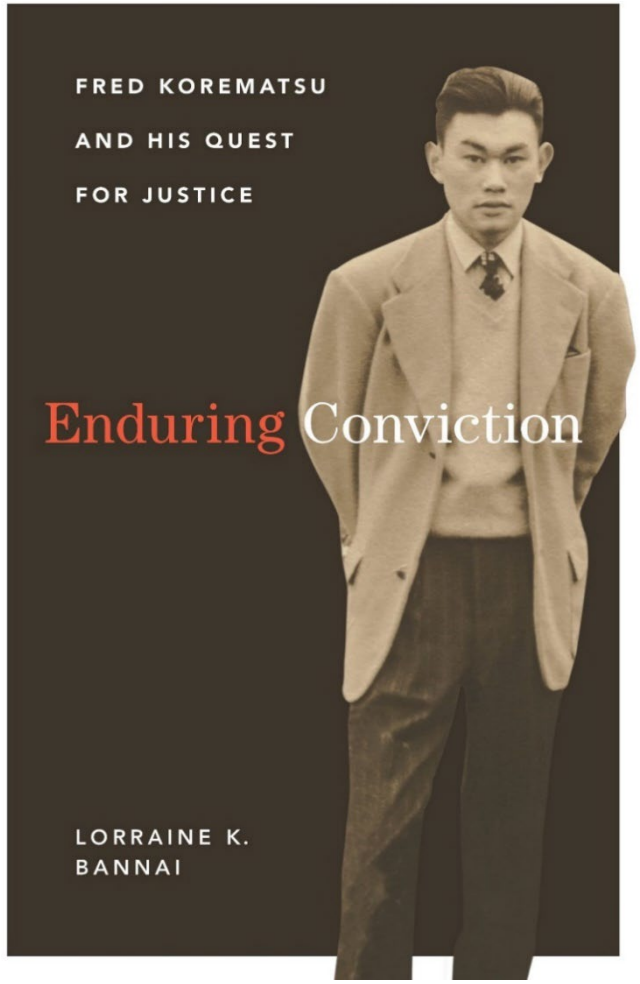
- To qualify as an inconsistency, direct contradiction is not necessary
- Omission's can qualify
- Evasive answers can qualify
- Inconsistent statements subject to **FRE 403** balancing rule



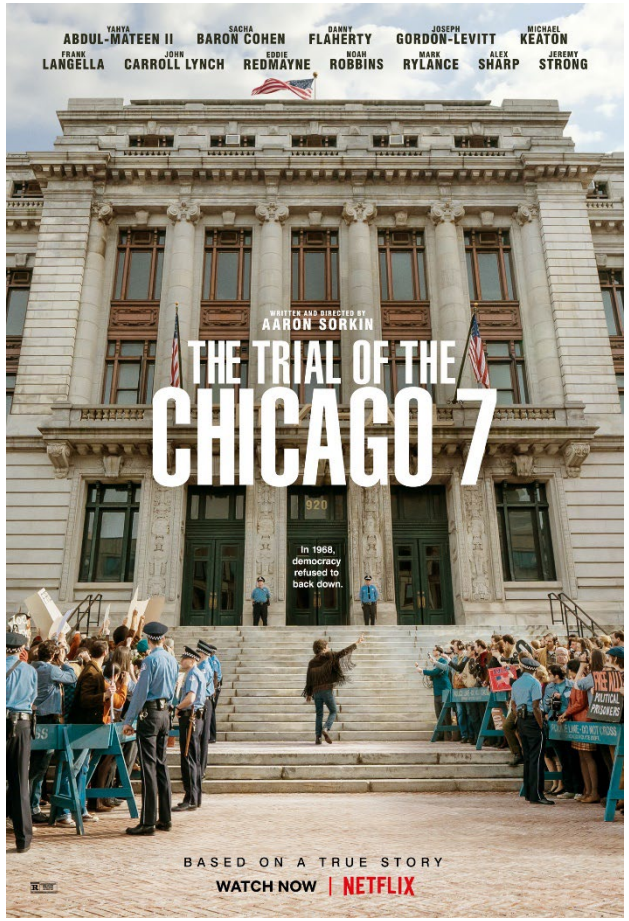
D Favorable Case-United States v. Tory, 52 F.3d 207 (9th Cir. 1995)

Problem

- At common law, **prior to introduction of extrinsic evidence** of a prior inconsistent statement for impeachment purposes, **the witness must be given an opportunity to explain or deny the statement**
- By contrast, current **FRE Rule 613(b)** allows this opportunity to be given **at any time, whether prior or subsequent to introduction of extrinsic evidence of the statement**



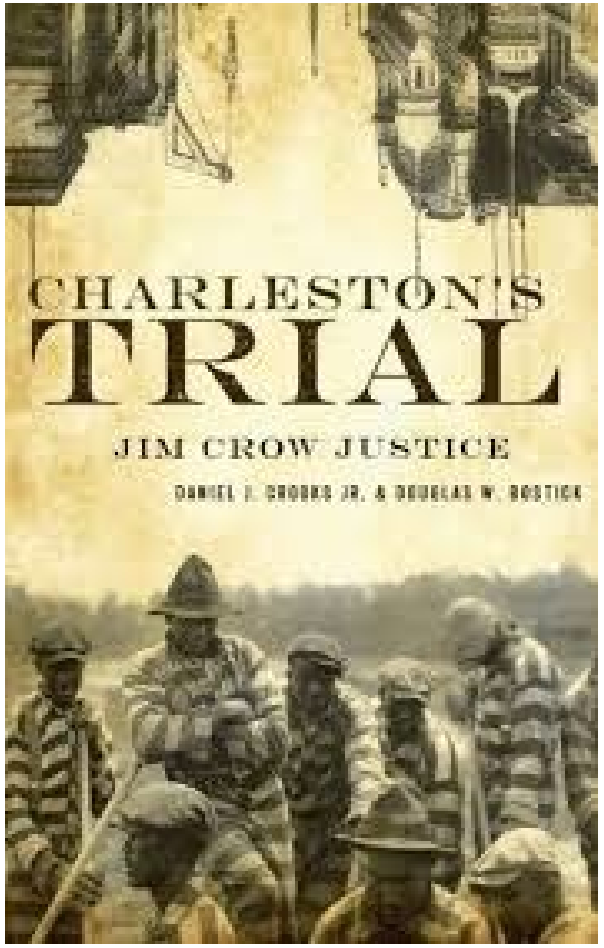
- However, judges tend to follow the old common law practice
- The Advisory Committee agreed with that practice as a policy matter
- Most of the time, the witness will admit to making the statement, obviating the need to introduce the extrinsic evidence in the first place



Example- United States v. Feliciano, 761 F.3d 1202 (11th Cir. 2014)

Proposed Amendment

- The proposed amendment would still give the judge discretion in appropriate cases to allow the witness an opportunity to explain or deny the statement after introduction of extrinsic evidence,
- such as when the inconsistent statement is only discovered after the witness finishes testifying and has been excused



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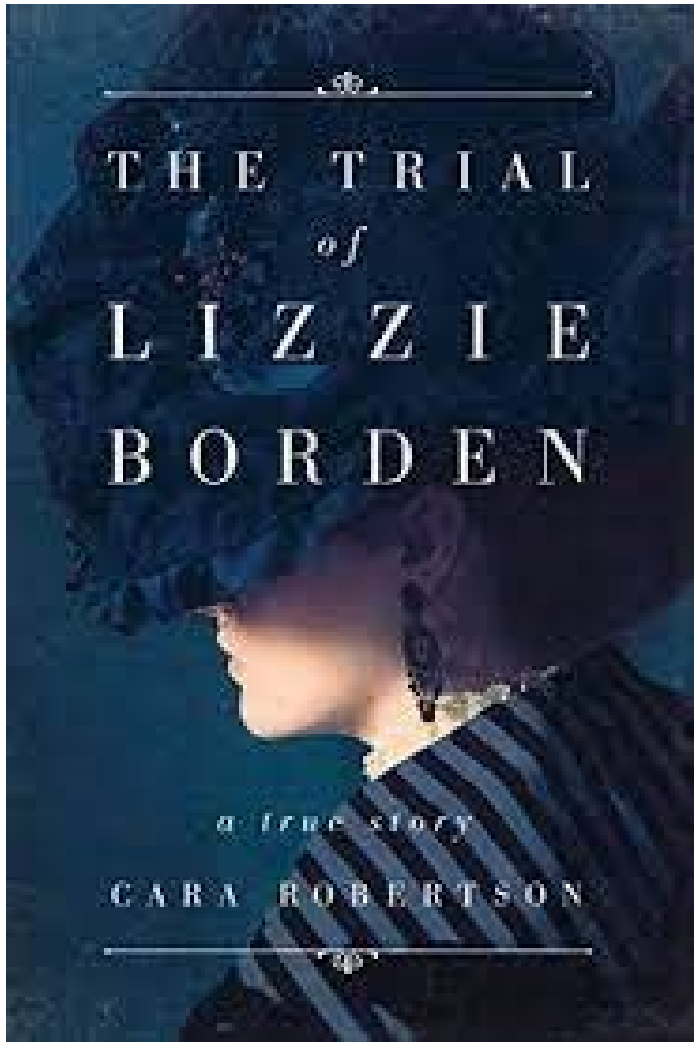
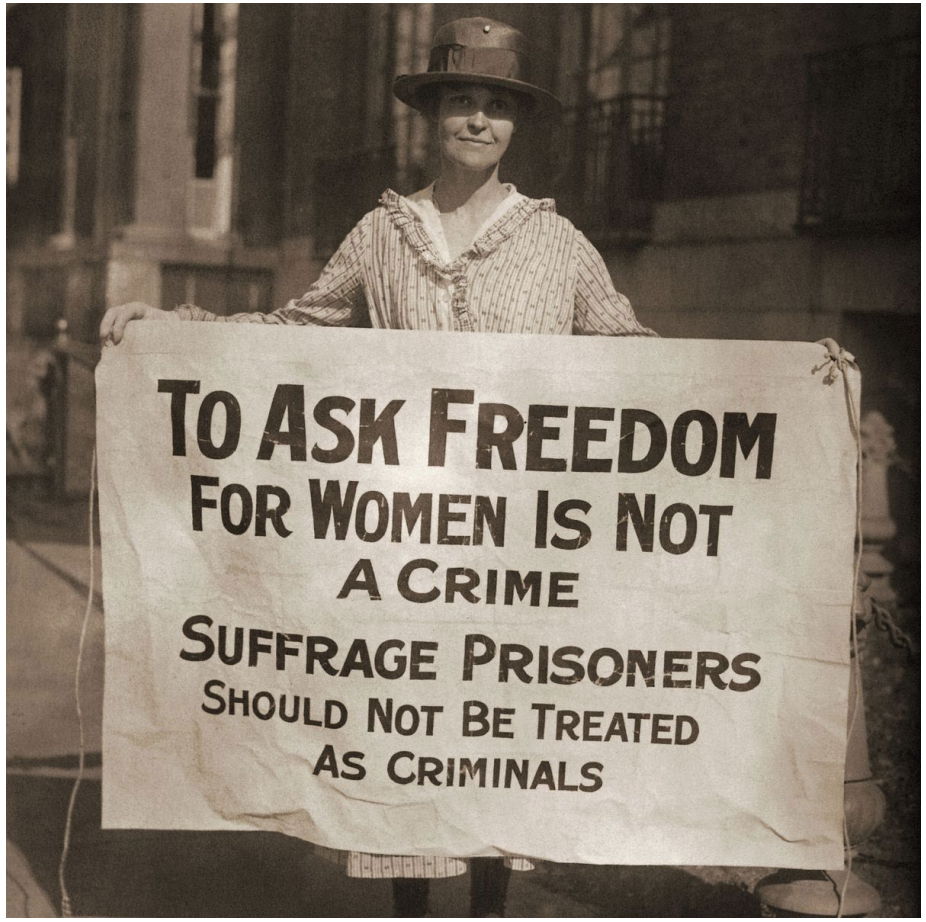
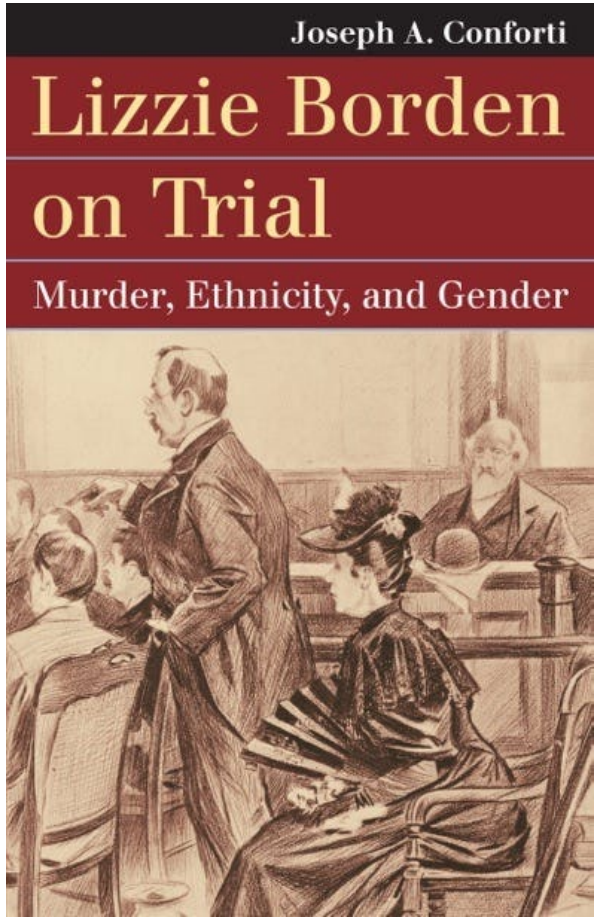


Rule of Sequestration-FRE 615



Rule of Sequestration-FRE 615

- **FRE 615** states that at a party's request (or at the court's initiative), **the court must order witnesses excluded so that they cannot hear other witnesses' testimony**
- The Rule does not allow for the exclusion of:
- A party who is a natural person
- An officer of a party that is not a natural person
- A person whose presence is essential

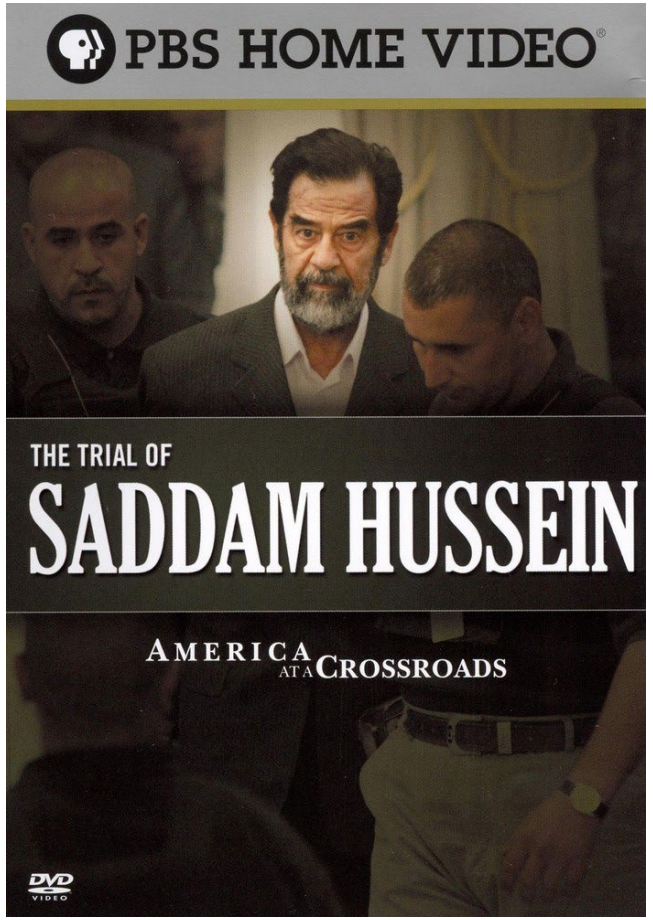


Problems

- The current rule **does not speak to instances where a witness learns of others' testimony from counsel, a party, or the witness's own inquiries**
- In some circuits, if the court enters a **FRE 615** order without spelling out any additional limits, **the sole effect is to physically exclude the witness from the courtroom**
- But other circuits have held that a **FRE 615** order **automatically forbids recounting others' testimony to the witness, even when the order is silent on this point**
- In those circuits, a person could be held in contempt for behavior not explicitly prohibited by either rule or court order

Proposed Amendment

- The proposed amendment would add a new subdivision (b) stating that the court's order **can cover disclosure of or access to testimony, but it must do so explicitly (thus providing fair notice)**



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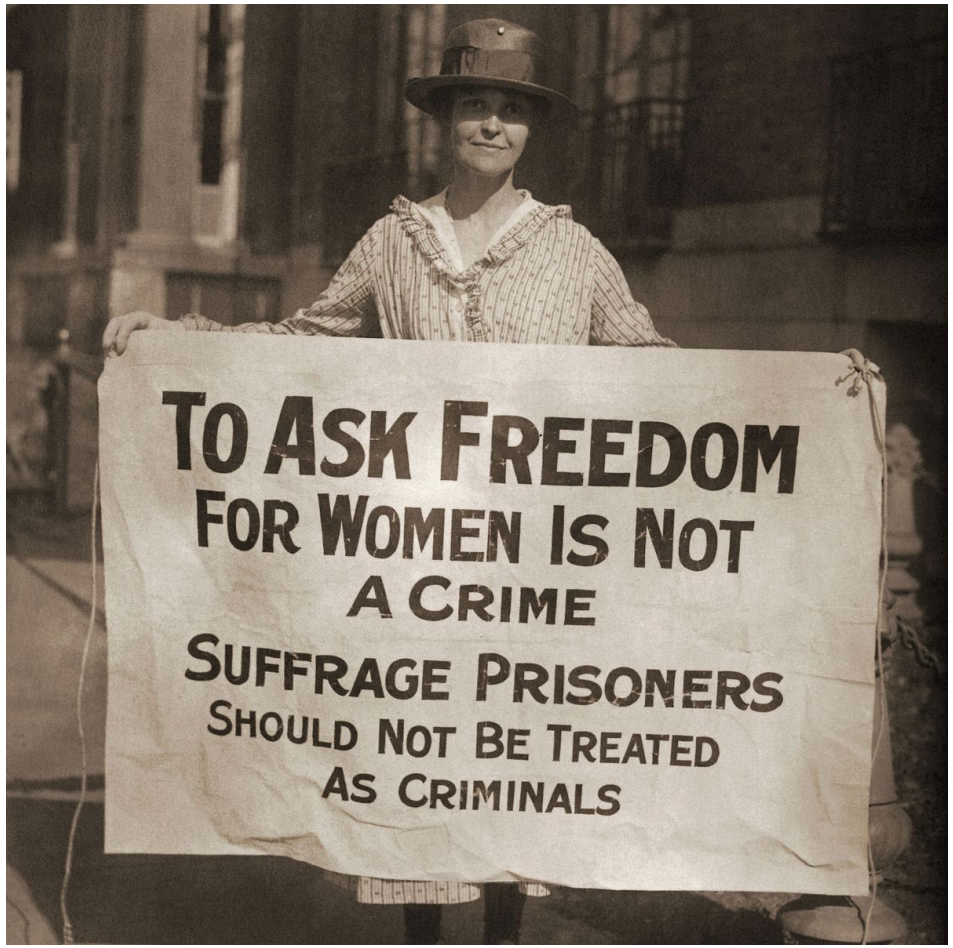
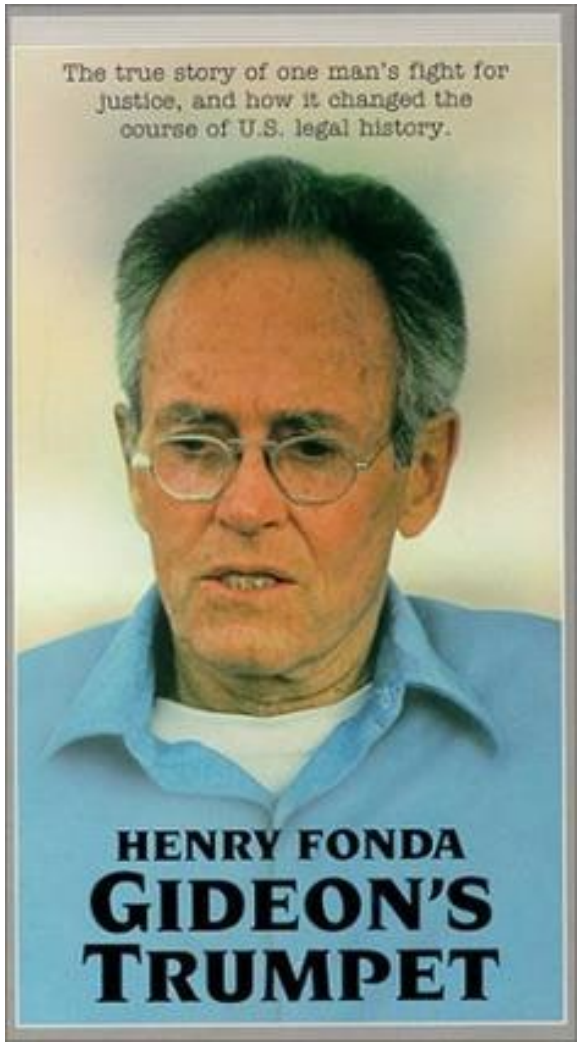
D Favorable Case- United States v. Farnham, 791 F.2d 331(4th Cir. 1986)

Testimony by Expert Witnesses- FRE 702



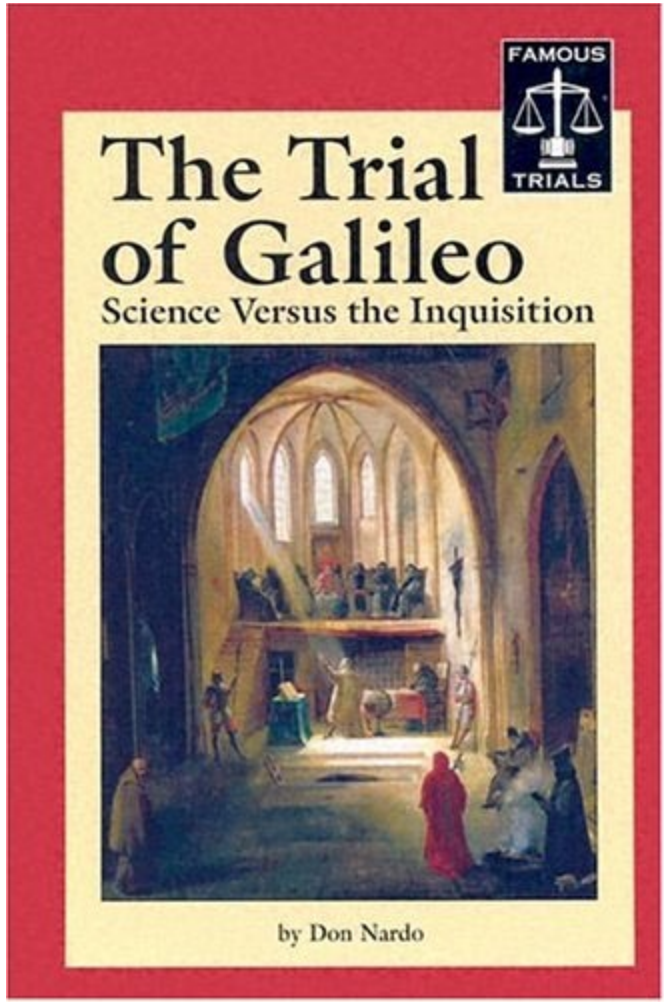
FRE 702-Expert witness testimony

- The witness must **qualify** as an expert.
- The expert knowledge must be **helpful** to the trier of fact. **FRE 702 (a)**
- It must be based on "**sufficient facts or data**." **FRE 702 (b)**
- It must be the product of "**reliable principles and methods**." **FRE 702(c)**
- The expert must have "**reliably applied the principles and methods** to the facts of the case." **FRE (d)**



FRE 702(c)-Expert testimony is product of reliable principles and methods

- Reliability is measured by the non-exclusive checklist in Daubert v. Merrell Dow, 509 U.S. 579, 592-593 (1993).
- The factors outlined in Daubert can also apply in cases involving non-scientific evidence. Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).



Daubert checklist

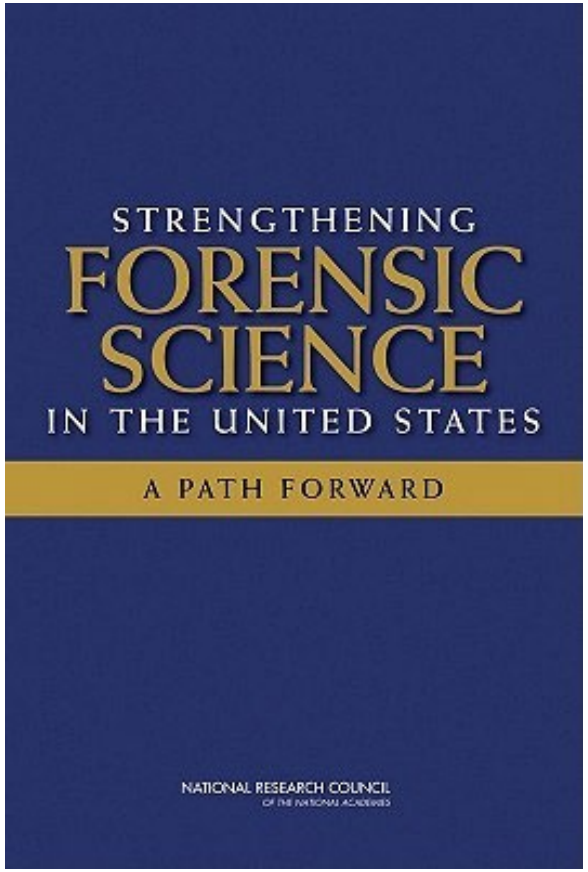
- **1.** Whether the theory or technique in question can and has been **tested**
- **2.** Whether the theory of technique has been subjected to **peer review and publication**
- **3.** The theory or technique's known or potential **rate of error**
- **4.** The existence and maintenance of **standards** controlling the theory or technique's operation
- **5.** Whether the theory or technique has attracted **widespread acceptance** within a relevant scientific community

"Junk" science

- National epidemic of faulty forensic science.
- Judges have largely disregarded Daubert in criminal cases.
- 1. E.G. "Gerry" Morris: *Flawed Science in the Courtroom. Is Excluding it Really that Difficult?*, **THE CHAMPION**, Nov. 2015.
- 2. Janis C. Puracal and Aliza B. Kaplan: *Science in the Courtroom: Challenging Faulty Forensics*, **THE CHAMPION**, Jan.-Feb. 2020.
- 3. Aliza B. Kaplan and Janis C. Puracal, *It's not a Match: Why the Law Can't Let Go of Junk Science*. ALBANY LAW REVIEW, Vol 81:3, 895.
- 4. Brandon L. Garrett, *Unpacking the Source of Error in Forensic Evidence*, **THE CHAMPION**, June 2021.

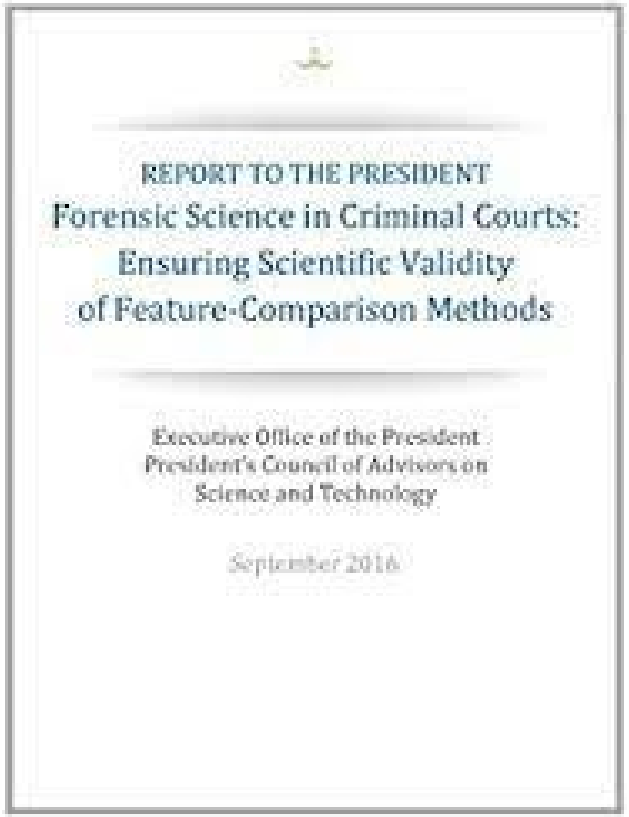
2009 NAS Report

- 2009 NAS released groundbreaking report on the state of forensic science in courtroom
- With the exception of nuclear DNA analysis, no forensic method has been thoroughly shown to have capacity to connect forensic evidence to specific individuals/sources
- Report concluded significant problems with scientific validation of bitemark, hair, fingerprint, firearm and toolmark identification



2016 PCAST Report

- PCAST 2016 Report reemphasized weaknesses continued to plague forensic science.
- Many forensic methods lack validation studies.
- PCAST opposed by DOJ, FBI, and the National Association of District Attorneys.

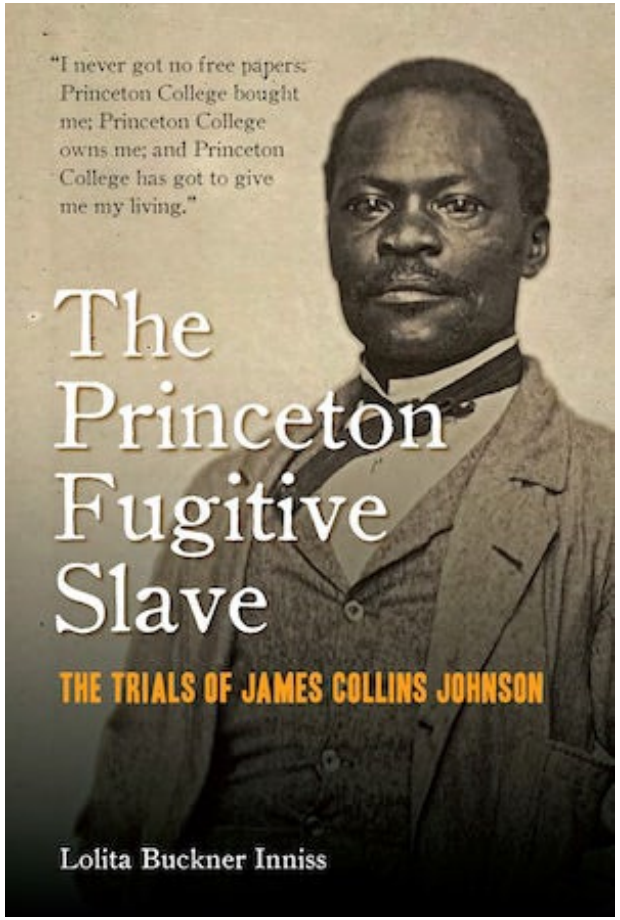


- Courts are not performing "gate-keeping" function
- Expected "sea change" in the admissibility of faulty forensic science did not materialize
- Little change in law to prevent admissibility of faulty forensic science
- Instead, courts are leaving "scientific validity" determinations in hands of the jury and cross-examination by defense counsel
- Courts turn blind eye to advances in science insisting on **precedent**

- Appellate courts more willing to question admissibility of scientific evidence in civil cases
- Vast majority of reported opinions in crim. cases show courts rarely exclude or restrict expert testimony offered by prosecutors
- Courts more willing to exclude or restrict expert testimony offered by the defense

Problem areas-"Junk science"

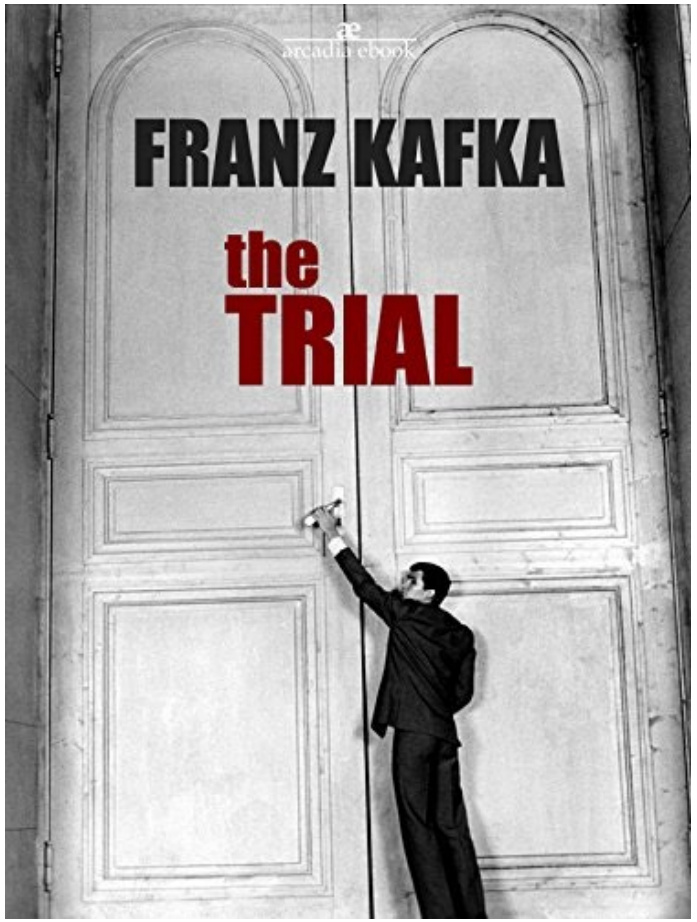
- Problem areas:
- DNA Analysis of complex mixtures
- Bitemark analysis
- Latent fingerprint analysis
- Firearms analysis
- Footwear analysis
- Hair analysis



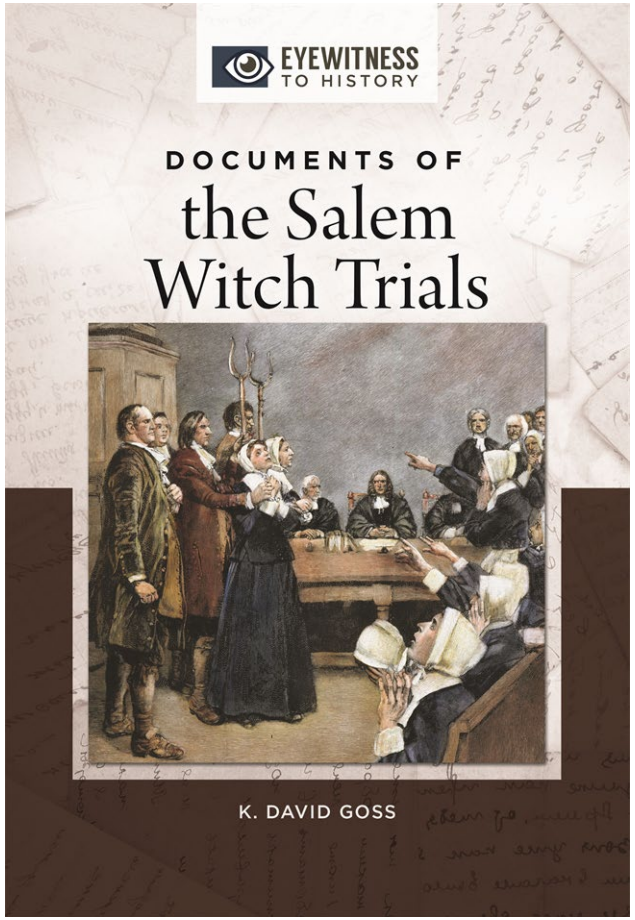
Problem areas-Committee

- **FRE 702** sets requirements that must be met before a witness may give expert testimony
- It is clear under the caselaw and the current **FRE 702** that the judge should not admit expert testimony **until the judge— not the jury—finds by a preponderance of the evidence that the requirements of FRE 702 are met**
- However, there are a lot of decisions from numerous circuits that fail to follow that requirement, and the most common mistake is that the judge instead asks whether a jury could find by a preponderance of the evidence that the requirements of **FRE 702** are met
- As a result, very often jurors are hearing expert testimony that they should not be permitted to hear

- Second problem is overstatement:, **where an expert expresses conclusions that go beyond what a reliable application of the methods to the facts would allow**

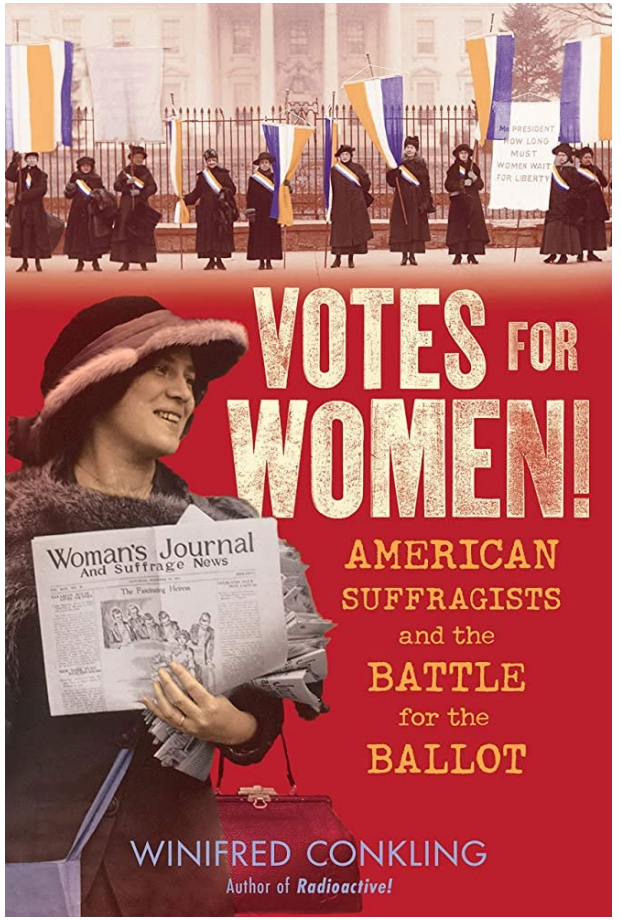


- Overstatement issues typically arise with respect to forensic testimony in criminal cases
- Example: that the bullet came from the defendant's gun, when that level of certainty is not supported by the underlying science

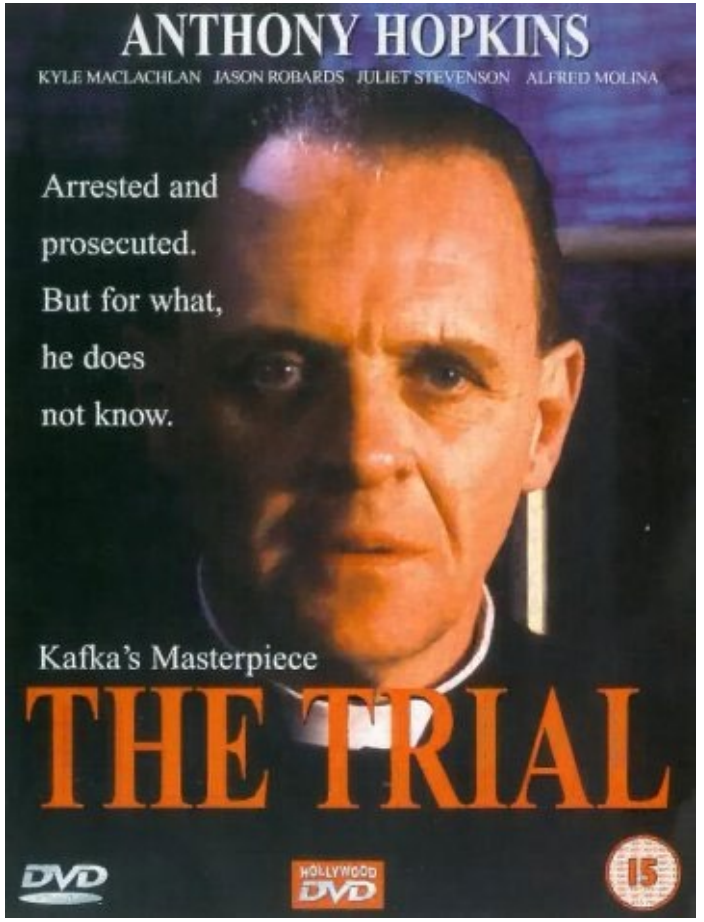


Proposed Amendment

- Under a correct interpretation of current **FRE 702**, the proposed amendment does not change the law; it merely makes clear what the rule already says

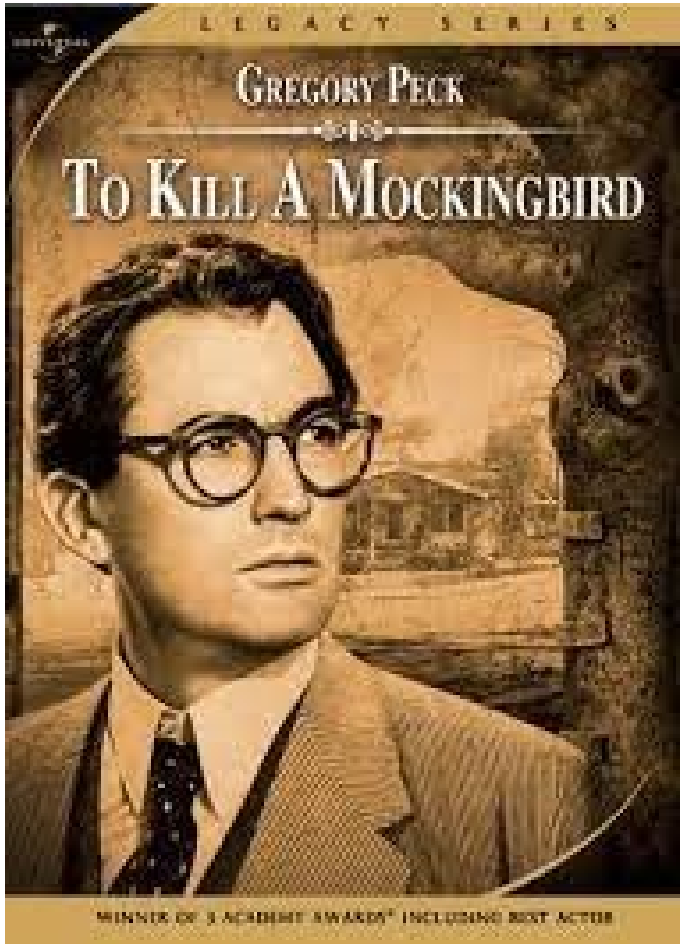


- The proposed amendment would emphasize that **FRE 104(a)** applies to **FRE 702**, **requiring a trial judge to find the admissibility requirements satisfied before submitting expert opinion testimony to the trier of fact over objection**
- The proposed amendment would require that "the expert's opinion reflects a **reliable application of the principles and methods to the facts of the case**."

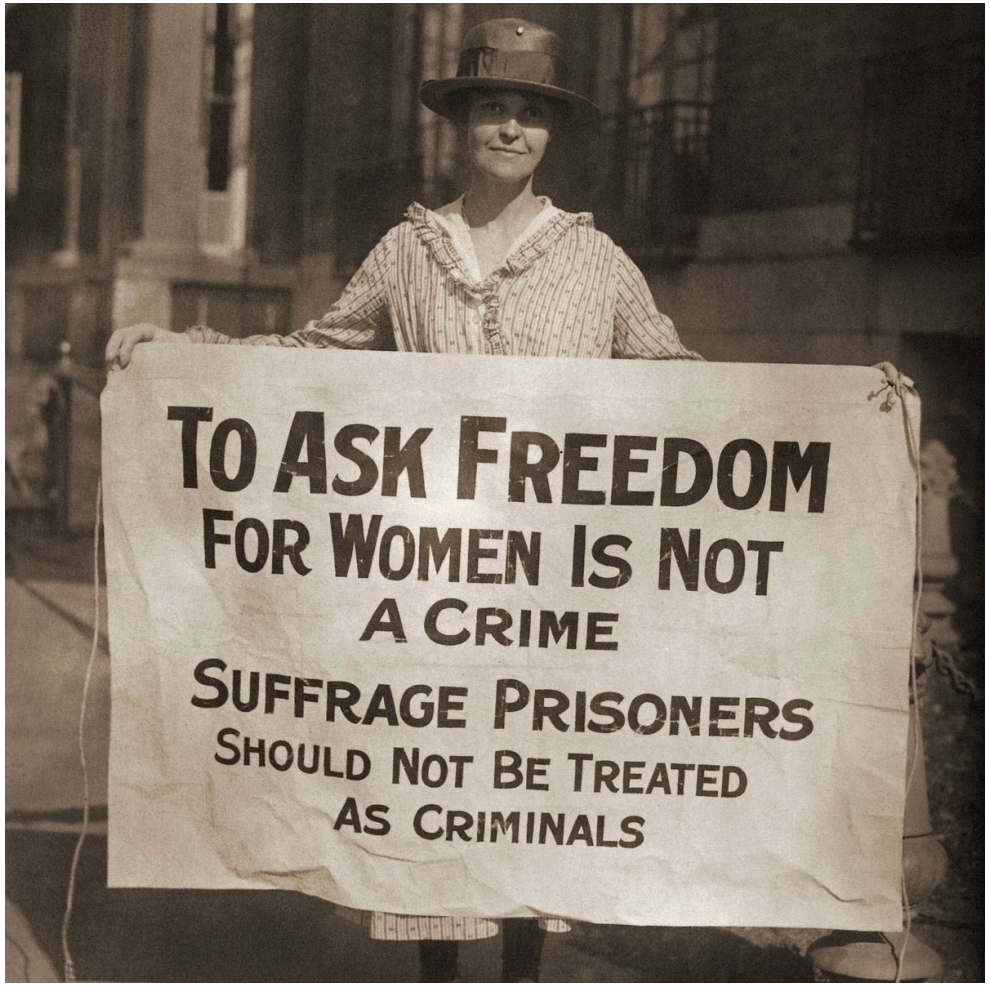


Status

- Proposed Amendment approved by Advisory Committee on Evidence Rules
- Comment period closed
- Proposed Amendment approved by Standing Committee
- Proposed Amendment transmitted to SCOTUS/Congress
- **Effective no earlier than December 1, 2023**



Hearsay Exception-Statement Against Interest-FRE 804(b)(3)



FRE 804(a): "Unavailable"

- W is absent and proponent of E cannot procure W's attendance
- W invokes privilege
- W refuses to testify **despite a court order**
- Lack of memory
- Forfeiture by wrongdoing (only if defendant **intended to prevent testimony**)

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

- 1. **Statement against interest**
- 2. Contrary to declarant's pecuniary or proprietary
- 3. Subjects declarant to civil or criminal liability

- If declarant inculpated but offered to exculpate accused, need corroborating circumstances **"clearly indicative of trustworthiness."**

Compare:

Party Admissions

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

Statement Against Interest

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

Example:

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

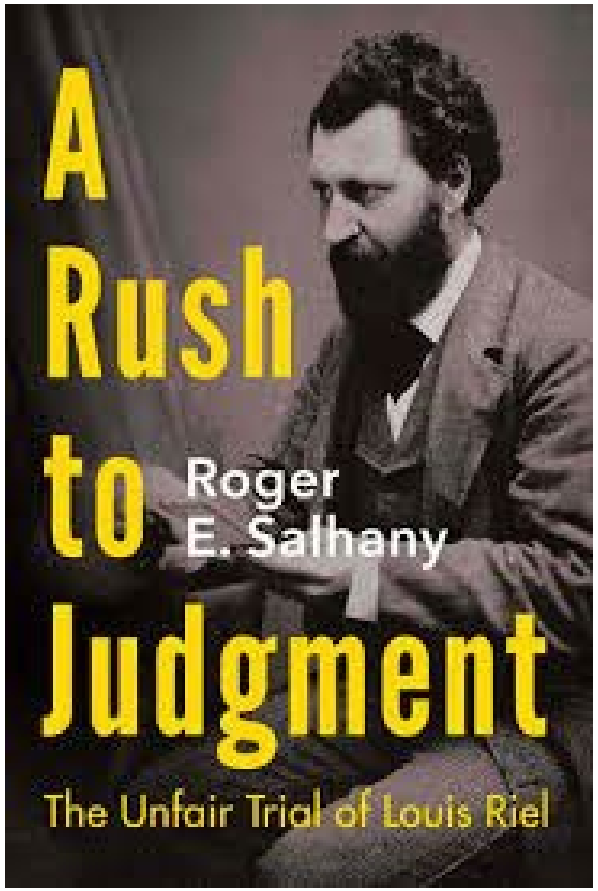
D. Favorable Case: United States v. Mendoza, 85 F.3d 1347 (8th Cir.1996)

Problem

- **FRE 804(b)(3)(B)** requires that defendant provide **"corroborating circumstances that clearly indicate [the] trustworthiness"** of the statement
- The circuits are split **concerning the meaning of "corroborating circumstances."**
- Some circuits have said the court may only consider the guarantees of trustworthiness **inherent in the statement itself**
- Other circuits allow the judge to **consider other evidence of trustworthiness, even if extrinsic to the statement**

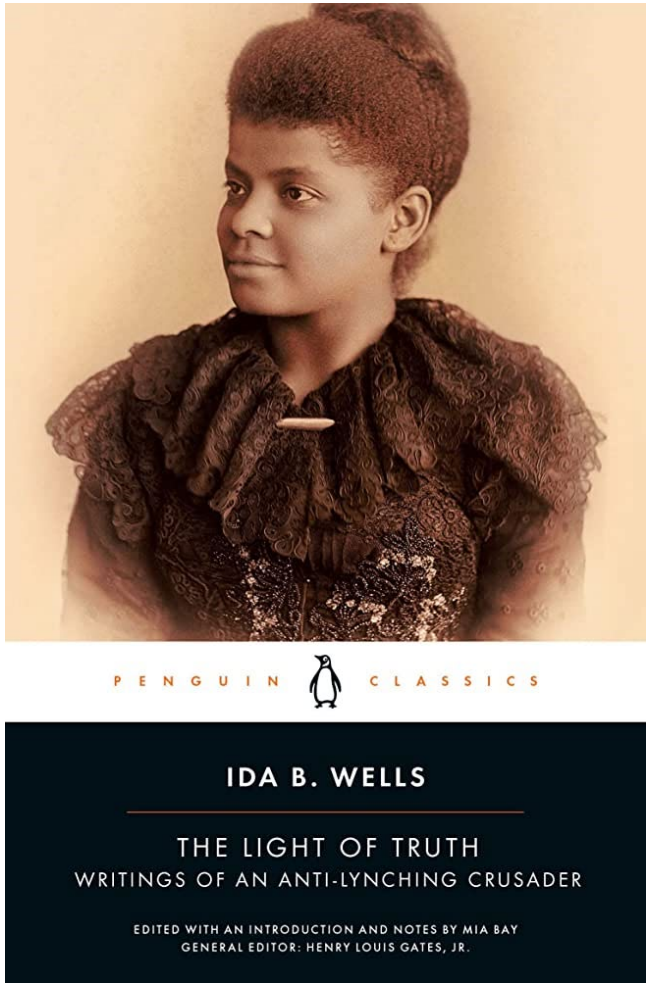
Proposed Amendment

- The proposed amendment would direct judges to consider **all the evidence, both inherent in the statement itself and any evidence independent of the statement**

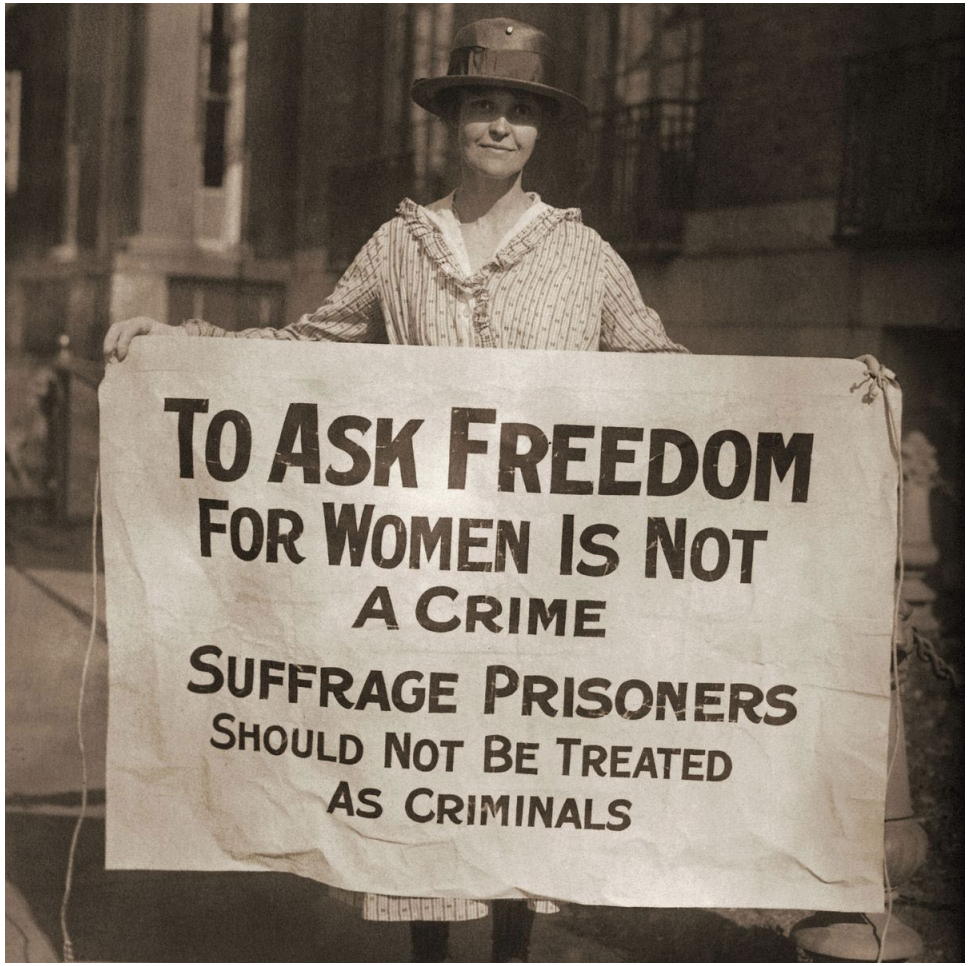


Status

- Proposed Amendment approved by Advisory Committee on Evidence Rules
- Standing Committee approved proposed Amendment for publication for public comment
- Period of publication and public comment open
- **Comment period closes February 16, 2023**

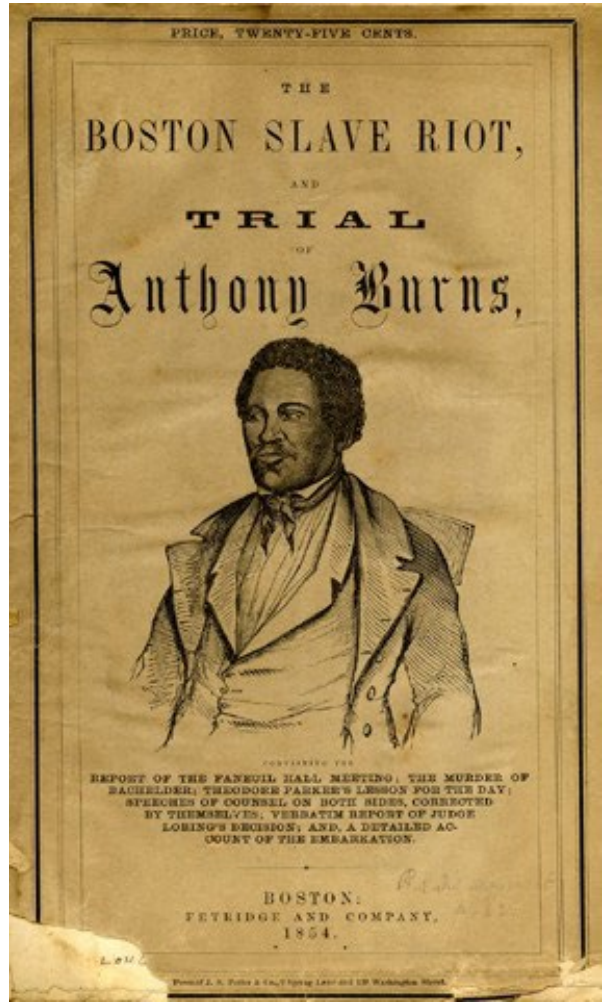


Summaries to Prove Content- FRE 1006



Summaries to Prove Content- FRE 1006

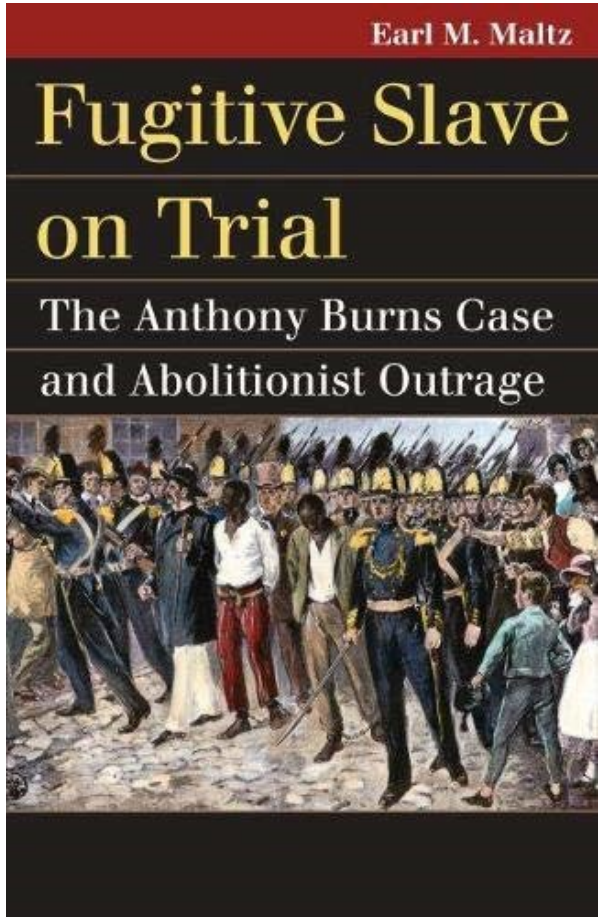
- According to **FRE 1006** a party might use a summary, chart, or calculation **to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court**
- Proponent must make the originals or duplicates available for examination or copying



D Favorable Case-United States v. Oros, 578 F.3d 703 (7th Cir. 2009)

Problem

- Some courts do not properly distinguish between summaries of evidence under **FRE 1006** (which are admitted into evidence) and summaries that are illustrative aids (which are not evidence at all)
- Other courts have stated that summaries under **FRE 1006 are not evidence**
- Other courts have stated that all the **underlying evidence must be admitted before summary can be admitted**



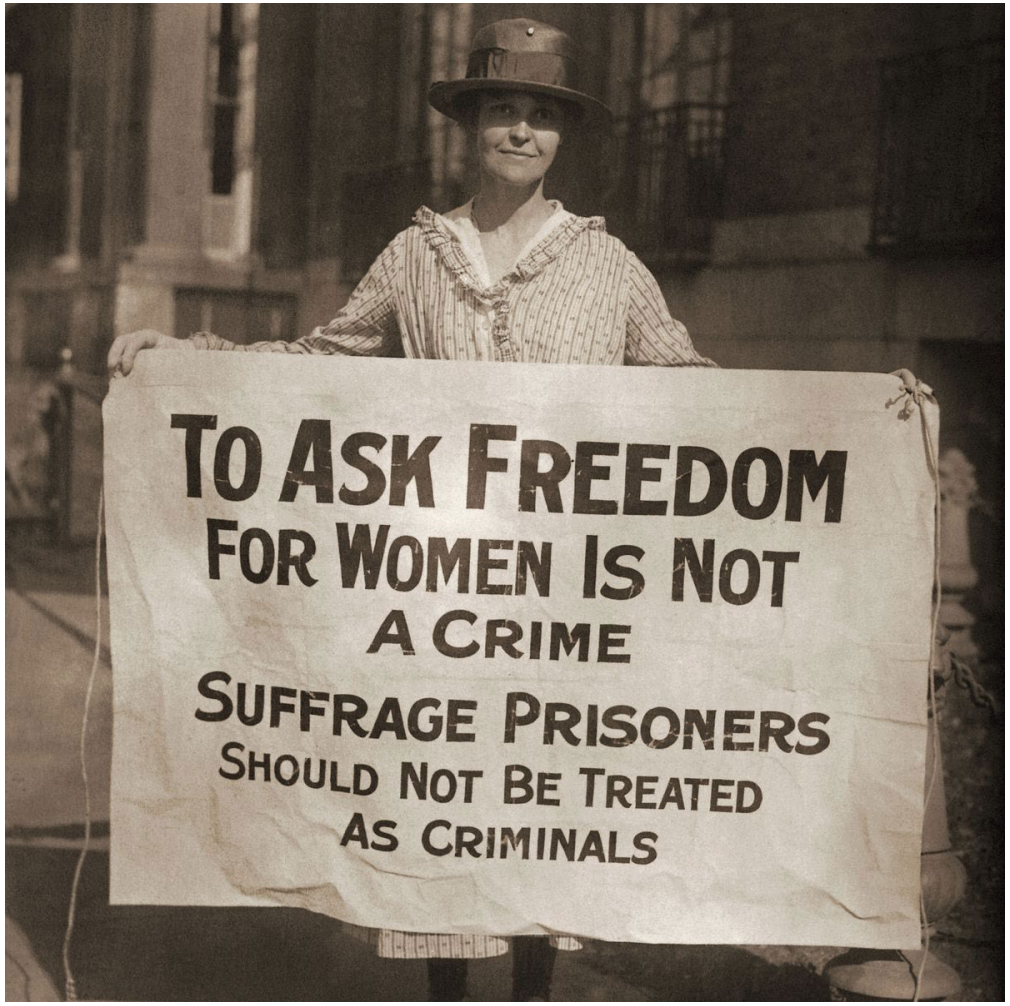
Proposed Amendment

- Proposed amendment would provide a cross-reference to **FRE 611(d)** on illustrative aids
- The proposed amendment to **FRE 1006** would clarify that a **summary is admissible whether the underlying evidence has been admitted**
- Proposed amendment is treated as companion to proposed amendment on illustrative aids (**FRE 611(d)**)

Status

- Proposed amendment approved by Advisory Committee on Evidence Rules
- Standing Committee approved proposed amendment for publication for public comment
- Period of publication and public comment open
- **Comment period closes February 16, 2023**

Honorable Mention: Other Crimes, Wrongs, or Acts-FRE 404(b)



FRE 404(b)(1)-Propensity prohibition

- **FRE 404(b)(1)** sets out prohibition on use of other crimes, wrongs or acts to establish propensity

- **FRE 404(b)(2),** however, permits other crimes, wrongs or acts E to establish **(MIMIC)**:
  - Motive
  - Intent
  - Modus operandi
  - Identity
  - Common scheme or plan
- FRE 404(b)(3)-Rule subject to **notice requirement**
- **Can be used by D**

FRE 404(b)(3)-Important changes to Notice requirement

- A. **FRE 404(b)** was amended effective **Dec. 1, 2020,** in ways that should benefit defendants in criminal cases.

- B. Under the Amended Rule:

  - 1. Defendant **does not have to request 404(b) notice anymore**

  - Prosecution has to provide it if they want to use any 404(b) evidence

- 2. Prosecution now has to:

  - a. **Identify** the bad act,

  - b. **Articulate** the non-propensity reason for which the evidence is offered,

  - c. Provide the basis for concluding **why the evidence is relevant**,

  - d. Do the above in **writing before trial** (unless excused, for good cause, by the court)

FRE 404(b)(3)-Important changes to Notice requirement (cont.)

- In arguing that other acts evidence does not fall under the exception under **Fed. R. Evid. 404(b)(2)**, defense counsel should argue that:

- The evidence is **propensity evidence.**

- The evidence is **not relevant** to a consequential issue

- The evidence **does not support a conclusion** that act was committed by the defendant.

- Other acts evidence is not **sufficiently similar**

- Other acts evidence might be excluded under **FRE 403** if its probative value is **substantially outweighed** by the potential for unfair prejudice, confusion of issues, or undue delay

Update

- Rule of Completeness-FRE 106
- Illustrative Aids-FRE 611(d)
- Juror Questions for Witnesses-FRE 611(e)
- Witness's Prior Statement-FRE 613
- Testimony by Expert Witnesses-FRE 702
- Hearsay Exception-Statements Against Interest-FRE 804(b)(3)
- Summaries to Prove Content-FRE 1006
- Other Crimes, Wrongs, or Acts FRE 404(b)

WOMEN OF THE WORLD UNITE !

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District of Nevada