February 2014

California Bar Examination

Performance Test B

INSTRUCTIONS AND FILE

ROCK v. DAVIS

ROCK v. DAVIS

INSTRUCTIONS

1. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a File and a Library.
4 The File contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5 The Library contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page citations.
6. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin preparing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

ANDREWS and OUELLETTE

Attorneys at Law

12 Jordan Lane

Grafton, Columbia

MEMORANDUM

TO: Applicant

FROM: Penny Andrews

RE: Rock v. Davis and Bond

DATE: February 27, 2014

Our firm represents Gerald Rock in an action against detectives of the Grafton City Police Department for violation of his civil rights. Defense counsel filed a motion *in limine* to have certain evidence excluded at trial as hearsay. I need to prepare our position, in anticipation of defendants' argument supporting their motion.

Before I write my reply, please draft an objective memorandum that identifies and discusses the arguments, resolution of which will determine whether the evidence in question should be admitted. Ultimately, motions *in limine* are won or lost on how well we use the facts. Therefore, your objective memorandum should relate specific facts to the potential arguments and conclude how your analysis establishes whether the evidence will be admitted.

United States District Court
Southern District of Columbia

Gerald Rock, Plaintiff v. Detective Richard Davis and Detective Thomas Bond, Defendants.	C.A. No. 2182 COMPLAINT AND DEMAND FOR JURY TRIAL

JURISDICTION

1. Plaintiff, Gerald Rock, is a citizen of the State of Columbia and a resident of Grafton City, Columbia.
2. Jurisdiction is based on 42 U.S.C. §§ 1983 and 1988. The amount in controversy exceeds $75,000.00 excluding costs and attorneys' fees.

CLAIM I

3. Defendant, Detective Richard Davis, was and is an employee of the Grafton City Police Department.
4. Defendant, Detective Thomas Bond, was and is an employee of the Grafton City Police Department.
5. On August 29, 2011, Plaintiff was lawfully present in the Grafton City Courthouse in the State of Columbia.
6. While at the Grafton County Courthouse on August 29, 2011, Plaintiff was, unlawfully and without just cause, falsely arrested and imprisoned by Defendants.
7. Each Defendant acted maliciously, willfully and wantonly, and outside the scope of his jurisdiction, although under color of law, and violated the right of Plaintiff to be free from unreasonable search and seizure, from warrantless search and seizure, and from summary punishment without trial and due process of law.

8. Defendants, by their conduct, intentionally, willfully and without justification, and under color of law, did deprive Plaintiff of his rights, privileges and immunities secured to him by the Constitution and the laws of the United States, and by 42 U.S.C. §§ 1983 and 1988.

CLAIM II

9. Plaintiff realleges and incorporates by reference the facts contained in paragraphs 1 through 8.
10. That after the accosting of Plaintiff by Defendants, Plaintiff was falsely arrested and imprisoned while awaiting trial for approximately nine months by the City of Grafton.

CLAIM III

11. Plaintiff realleges and incorporates the facts contained in paragraphs 1 through 10.
12. After the false arrest, imprisonment and violation of his civil rights, Plaintiff was maliciously prosecuted by the Defendants in Grafton County Superior Court.
13. Defendants knew the prosecution was false when commenced.
14. The false charge was eventually dismissed by Judge Charles Heffernan June 11, 2012.

WHEREFORE, Plaintiff prays judgment as follows:

1. General and special damages in the amount of fifteen million dollars ($15,000,000);
2. Punitive and exemplary damages in an amount that this Court shall consider to be just and fair;
3. Attorneys' fees in an amount that this Court shall consider just and fair; and
4. Costs and disbursements of this action and such other and further relief as this Court may deem just and proper.

ANDREWS and OUELLETTE

By: ____*Penny Andrews*_____
Penny Andrews
Attorney for Plaintiff

Dated: June 3, 2013

United States District Court
Southern District of Columbia

Gerald Rock, Plaintiff v. Detective Richard Davis and Detective Thomas Bond, Defendants.	C.A. No. 2182 ANSWER TO COMPLAINT

ANSWER

1. Defendants deny each and every allegation in paragraphs 1 and 6-14, except admit that Plaintiff was arrested by Defendants, subsequently tried and acquitted.
2. Defendants admit to the allegations in paragraphs 3-5.
3. Defendants lack sufficient information and belief of the allegations in paragraph 1 and therefore deny each and every allegation.
4. Defendants deny each and every allegation in paragraph 2, except admit that Plaintiff purports to invoke the jurisdiction of this court as stated therein.

FIRST AFFIRMATIVE DEFENSE

5. The complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

6. Any injury alleged to have been sustained resulted from Plaintiff's own culpable or negligent conduct and/or the intervening culpable or negligent conduct of others and was not the proximate result of any act of Defendants.

THIRD AFFIRMATIVE DEFENSE

7. There was probable cause for Plaintiff's arrest and prosecution.

FOURTH AFFIRMATIVE DEFENSE

8. Defendants have not violated any clearly established constitutional or statutory right of which a reasonable person should have known, and therefore are protected by qualified immunity.

FIFTH AFFIRMATIVE DEFENSE

9. At all times relevant to the incident, Defendants acted reasonably and in the proper and lawful exercise of their discretion.

WHEREFORE, Defendants request judgment dismissing the complaint in its entirety, together with the costs and disbursements of this action and such other and further relief as the Court may deem just and proper.

____*Mary Lynch*_____

Mary Lynch
Attorney for Defendants

Dated: July 5, 2013

United States District Court
Southern District of Columbia

Gerald Rock, Plaintiff v. Detective Richard Davis and Detective Thomas Bond, Defendants.	C.A. No. 2182 NOTICE OF MOTION *IN LIMINE*

PLEASE TAKE NOTICE that, upon all previous papers and proceedings in this matter, the undersigned will move this Court at the Courthouse located at 677 Pearl Street, Columbia, on March 6, 2014 at 9:00 a.m., or as soon thereafter as counsel can be heard, for an order:

> Excluding as hearsay, evidence of all transcripts or testimony concerning the prior testimony of the witness Joe Watts in the criminal trial of Plaintiff, out of which Plaintiff alleges his cause of action arose.

____*Mary Lynch*_____

Mary Lynch
Attorney for Defendants

Dated: February 26, 2014

EXCERPTS OF INTERVIEW BETWEEN PENNY ANDREWS AND CRIMINAL DEFENSE ATTORNEY DIDI HILL

March 1, 2013

. . . . .

HILL: Thanks for agreeing to meet with me, Penny.

ANDREWS: No problem. So, I understand you want to talk about a client of yours.

HILL: Yes, actually a former client, I guess. I know you'll have to talk directly to him, but he asked me to run this by you first. He's a little wary of the justice system at the moment.

ANDREWS: No problem.

HILL: I represented Gerald Rock in a criminal matter. He was charged with shooting someone, was acquitted, and now I think he may have a good civil claim against two of the police detectives involved.

ANDREWS: You aren't interested in taking it?

HILL: Not really. You know my partner died last year and he handled the civil stuff in the office. I am pretty much sticking to the criminal side.

ANDREWS: Okay, so tell me what happened?

HILL: On August 29, 2011, a shooting took place at the Grafton County Courthouse. Apparently a stray bullet struck and wounded a fifteen-year-old girl, Margaret Terry.

ANDREWS: Was this at night?

HILL: No. It was about 5:00 p.m.

ANDREWS: Who was this Margaret Terry?

HILL: That's part of the tragedy. She was just an innocent bystander who never saw the person who shot her.

ANDREWS: Okay, so then what happened?

HILL: The shooting was investigated by a couple of detectives named Richard Davis and Thomas Bond. The story is that someone called 911 and eventually Davis and Bond were assigned to investigate. Bond went to the scene to interview any witnesses and Davis went to pick up a guy named Joe Watts.

ANDREWS: Why Watts?

HILL: The detectives claimed later that the 911 caller, anonymous of course, said he might have seen Watts at the scene.

ANDREWS: I assume Watts has issues with the police?

HILL: Yeah, mostly petty stuff, but he was clearly on the police radar screen.

ANDREWS: So, then what happened?

HILL: Bond went to the crime scene and Davis found Watts and took him to the police station, where he interviewed him.

ANDREWS: Let me guess. He denied everything.

HILL: Close. He admitted he was near the courthouse at the time of the shooting, but denied being involved. The problem was he identified Rock as one of the shooters. Rock was then arrested and he called me.

ANDREWS: Go on.

HILL: The grand jury indicted Rock, charging him with various counts of assault, reckless endangerment, and criminal possession of a weapon.

ANDREWS: Did Watts testify at the grand jury?

HILL: Yes, and he again said my client was one of the shooters.

ANDREWS: What happened at trial?

HILL: Watts recanted his prior statements, both to Davis and the grand jury, identifying Rock as a shooter. Long story short, my client was released approximately nine months after his arrest.

ANDREWS: I assume this surprised you.

HILL: The renunciation? No. All along we claimed Davis and Bond coerced Watts into falsely accusing Rock as one of the shooters on the day of the shooting, and then pressured Watts into repeating the false accusation before the grand jury.

ANDREWS: So what is the story with Watts?

HILL: At trial, Watts, the sole witness against my client by the way, recanted under oath and in open court before the jury, and stated that the detectives had forced him to falsely testify against my guy.

ANDREWS: The District Attorney must not have been happy. Did the DA get in the grand jury testimony or try to rehabilitate Watts in any way?

HILL: The District Attorney made no effort to rehabilitate him with his grand jury testimony, despite prompting from the Court. I've got the trial transcript right here.

ANDREWS: Thanks. Why would the DA do nothing?

HILL: You're never sure what the other side is thinking, but my best guess is that he knew the case was lost and he just wanted it to end. There certainly were a lot of dirty looks between the DA and the two detectives. I think the DA just wanted to cut his losses before Watts could say anything more that could subject the city to civil liability.

ANDREWS: Okay, so back to Davis questioning Watts. After Watts fingered your guy, what happened?

HILL: After interviewing Watts, Davis called Bond at the crime scene. Davis told Bond that Rock was a suspect in the investigation and should be apprehended, which he was.

ANDREWS: Did Davis and Bond testify at trial?

HILL: No, neither testified at the criminal trial.

ANDREWS: Who signed the criminal complaint?

HILL: Detective Davis.

ANDREWS: You said your theory all along was that Watts was coerced. What led you to that theory?

HILL: Well, of course, to begin with you look at Watts's motivation. He was at the scene. He had a criminal record; given, it was minor. He had to be scared and was looking for a way to get Davis off his back. But then something else happened.

ANDREWS: What?

HILL: I got a phone call from Watts on my answering machine. He said he needed to talk to me. I called him back and he told me that he had been pressured to identify someone, so he did. He denied ever seeing Rock shoot a gun that day. I've got transcripts of those conversations I can give you.

ANDREWS: Thanks. When did this happen?

HILL: It was a couple of days after the grand jury indicted Rock.

ANDREWS: Where is Watts now?

HILL: Well, that's a problem. Rock tried to contact Watts to thank him for being a stand-up guy, but he found out Watts died last week in a liquor store robbery.

. . . . .

STATE OF COLUMBIA

GRAFTON COUNTY
SUPERIOR COURT

State of Columbia v. Gerald Rock	Criminal Division 2011-2341

TRIAL TRANSCRIPT

BY THE DISTRICT ATTORNEY: The State calls Joe Watts.

. . . . .

DIRECT EXAMINATION OF **JOE WATTS** BY THE DISTRICT ATTORNEY:

. . . . .

DA: Are you now telling us you did not see the defendant shoot the victim?

WATTS: Yes.

DA: After you were arrested, did you give a statement to the police?

WATTS: Yes, sir.

DA: What did you tell the police?

WATTS: I told them I had nothing to do with it.

DA: Did you give them any other statements?

WATTS: Yes, sir.

DA: What else did you tell them?

WATTS: What happened -- I told them what they wanted to hear, sir.

DA: What was that?

WATTS: That I had nothing to do with it.

DA: What did you -- what did you think they wanted to hear?

WATTS: Who did the shooting.

DA: Did you tell them?

WATTS: Yes.

DA: Who did you tell them did the shooting?

WATTS: I said I saw one of them and it was Gerry Rock.

DA: You told them you saw defendant do the shooting?

WATTS: Yes, sir.

DA: Why did you testify to that?

WATTS: Because I was forced under pressure, sir.

DA: Were you lying then?

WATTS: Yes, sir.

DA: I have no further questions, your honor.

. . . . .

CROSS-EXAMINATION BY DEFENSE COUNSEL DIDI HILL:

HILL: It's your testimony here in Court under oath that you did not see Mr. Rock with a gun. Is that correct?

WATTS: Yes, ma'am.

HILL: It's your testimony here under oath that you did not see Mr. Rock place a gun in the car. Is that correct?

WATTS: I didn't see him do anything like that.

HILL: But did you ever tell that to the police?

WATTS: Yes, ma'am.

HILL: When you were questioned by the police, did you feel pressured by the police?

WATTS: Yes, ma'am.

HILL: Tell us how you felt pressured by the police?

WATTS: Because they said my mom's house could get –

BY THE DISTRICT ATTORNEY: Objection.

. . . . .

BY DEFENSE COUNSEL:

HILL: You called my office the day after your grand jury appearance. Is that correct?
WATTS: Yes
HILL: You left a voice message?
WATTS: Yes.
HILL: I then returned your phone call. Correct?
WATTS: Yes.

BY DEFENSE COUNSEL: Your honor, at this point we would like to introduce what have been previously marked as Defense Exhibits 1 and 2. They are transcripts of the audio recordings of both the voice message left by Mr. Watts and our subsequent phone conversation. The prosecution has previously stipulated to the accuracy of these recordings.

BY THE COURT: I think we should excuse the jury for a few minutes. Bailiff, will you please escort the jury back to the jury room? . . . . . The jury has been removed, so let's hear those tapes. . . . Well, now that we have heard those tapes — let me just say for the record that the jury is still out of the courtroom -- let me ask the government, where are you going after this witness?

DA: This is our last witness.
THE COURT: Do you have any other evidence at all?
DA: No, your honor.
THE COURT: Then if defense counsel is done with Mr. Watts, the prosecution will rest?
DA: Yes.
THE COURT: I assume the defense is done with Mr. Watts. Correct?
HILL: Yes.
THE COURT: And the prosecution rests? Your only witness is Watts?
DA: Yes.

THE COURT: Let me go out on a limb here now and guess that defense counsel wants to make a motion for a directed verdict. Is that safe to say?

HILL: Yes, your honor.

THE COURT: Granted.

DEFENSE EXHIBIT 1

TRANSCRIPT OF VOICE MAIL MESSAGE LEFT BY JOE WATTS TO DEFENSE ATTORNEY DIDI HILL, SEPTEMBER 9, 2011

BY JOE WATTS: Um, you know um, this is Joe Watts. I'm the guy who was arrested and the police took me down to the station. I, um, am the one who fingered Gerry for the shooting. I told them the wrong story. They were trying to blame me. They said that I needed to confess or tell them who did it. They were trying to use my story against my friend and it's not true. Now I just testified at the grand jury and I get the same pressure before I go in and, um, I lied again. I told them it was Gerry that did it. So I just want to correct my story because the police told it wrong. Can you call me back, please?

DEFENSE EXHIBIT 2

TRANSCRIPT OF TELEPHONE CONVERSATION BETWEEN JOE WATTS AND DEFENSE ATTORNEY DIDI HILL, SEPTEMBER 9, 2011

. . . . .

HILL: So you saw someone in your backyard shoot toward the courthouse?

WATTS: Yeah.

HILL: Was it Gerald who fired the gun?

WATTS: I never even saw him. I never saw him there. I couldn't even see him down the block, even if he was down the block.

HILL: Now I'm confused. You didn't see who?

WATTS: Um, Gerry.

HILL: He wasn't in the backyard?

WATTS: Nah.

HILL: Did you ever see Gerald Rock fire a shot?

WATTS: No.

. . . . .

HILL: Okay, just so I make sure that there's nothing bad going on. Are you being threatened by anybody? Is anyone telling you to say something?

WATTS: Yes.

HILL: Tell me about that.

WATTS: The detective, ma‘am.

HILL: What did the detective say?

WATTS: He said, “Oh, I know what happened -- blah, blah, blah,” and told me, “You better start talking -- blah, blah, blah,” and he slapped me.

HILL: Really?

WATTS: Yeah.

. . . . .

HILL: Okay. Are you being threatened at all -- I just have to ask you this -- by Gerald?

WATTS: No.

February 2014

California Bar Examination

Performance Test B

LIBRARY

ROCK v. DAVIS

LIBRARY

Selected Provisions of the Federal Rules of Evidence

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

. . . . .

Rule 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

. . . . .

Rule 804. Exceptions to the Rule Against Hearsay -- When the Declarant Is Unavailable as a Witness

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant: . . . . .

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or . . . .

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

(1) *Former Testimony.* Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had -- or, in a civil case, whose predecessor in interest had -- an opportunity and similar motive to develop it by direct, cross, or redirect examination.

. . . . .

(3) *Statement Against Interest.* A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.

. . . . .

Rule 807. Residual Exception

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

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

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

(4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Hannah v. City Of Overland

United States Court of Appeals, Fifteenth Circuit (1986)

Plaintiff, David Hannah, filed suit under 42 U.S.C. § 1983, against the City of Overland and two members of its police force alleging that he was arrested and detained without probable cause on a capital murder charge and that the arresting officers used unreasonable and excessive force in arresting him. The District Court found in favor of all defendants. On appeal Hannah contends that the District Court erred in excluding the deposition testimony of two persons not parties to the action.

Robert “Red” Musgrove was murdered on June 18, 1981, in the City of Overland. Evidence was introduced that a life insurance policy on the victim's life had been purchased just prior to the murder, and that the named beneficiary under the policy was the victim's estranged wife, Sharon Musgrove. Mrs. Musgrove's boyfriend at the time of the murder was David Hannah.

The two police officer defendants interviewed Danny Beede as part of their investigation into the murder. Beede told the police officers that on June 27, 1981, he was drinking at a local bar with David Hannah. According to Beede, Hannah had told him that he had shot a man four times in the chest with a .38 from an alley, and had silenced the shots by placing a baby bottle nipple over the revolver. Based in large part on Beede's statement, a grand jury indictment was obtained and Hannah was arrested and charged with capital murder.

As part of its continuing investigation following Hannah’s arrest, the Overland police interviewed Robert Mesko. During that interview Mesko provided evidence corroborating Beede’s version of his conversation with Hannah.

Subsequent to the police interview, Hannah’s defense counsel deposed Mesko. Overland’s city prosecutor was present at the taking of that deposition.

Hannah was detained in the Overland jail for approximately eleven months until the criminal charge was dropped on June 25, 1982. According to the city prosecutor's office, the capital murder charge was dropped when Danny Beede refused to testify or cooperate with the prosecutor unless he was given some kind of “deal” regarding a prison sentence he then was serving in Ohio on an unrelated conviction.

Citing Federal Rule of Evidence 804(b)(1), Hannah sought to introduce the deposition testimony of Mesko. Mesko stated in his deposition that he felt he was "pressured" and "threatened" by Overland police officers to cooperate in the Musgrove investigation and to implicate Hannah in the murder. Hannah sought to admit the deposition into evidence to establish defendants' bad faith in arresting and detaining him. Mesko himself died just before this action was commenced. Hannah's counsel stated at trial that the deposition "will show that the police did their damnedest to put David Hannah in jail in spite of the fact that Mesko said he wasn't guilty...." Hannah argues that the jury reasonably could infer that police officers who were willing to threaten third parties to gain evidence against Hannah acted in bad faith.

We affirm the District Court's exclusion of the deposition testimony of Mesko. Under Rule 804(b)(1), former deposition testimony taken in another proceeding is not excluded by the hearsay rule if, in a civil action, a "predecessor in interest had an opportunity and *similar motive* to develop the testimony by direct, cross, or redirect examination." (emphasis added)

The proper approach, therefore, in assessing similarity of motive under Rule 804(b)(1) must consider whether the party resisting the offered testimony at a pending proceeding had at a prior proceeding an interest of substantially similar intensity to prove (or disprove) the same side of a substantially similar issue. The nature of the two proceedings—both what is at stake and the applicable burden of proof—and, to a lesser extent, the cross-examination at the prior proceeding—both what was undertaken and what was available but forgone—will be relevant though not conclusive on the ultimate issue of similarity of motive.

An attorney from the Overland prosecutor's office represented the State at the depositions. There were no representatives on behalf of any of the defendants herein present. Assuming *arguendo* that the State was a "predecessor in interest" of the defendants in the present action -- a proposition that is by no means clear -- the prosecutor did have an "opportunity" to develop the testimony of Mesko. We do not believe, however, that he had a "similar motive" to develop his testimony.

When the deposition was taken, Hannah already had been indicted by a grand jury for capital murder, and was awaiting trial in the criminal prosecution. The State's case rested in large part on the testimony of Danny Beede. The fact Mesko testified he

was “threatened” and “pressured” by the police to implicate Hannah in the murder was of little, if any, concern to the State at that time. The State apparently thought it had sufficient credible evidence to prove Hannah's guilt beyond a reasonable doubt. The testimony of Mesko posed little danger, if any, to the State's case against Hannah. We do not believe that the State had any significant motive, much less a “similar” motive, to develop the testimony of Mesko regarding threats by the police. It follows that the deposition testimony of Mesko would not have been admissible under Rule 804(b)(1).

Affirmed.

United States v. Cabrera

United States Court of Appeals, Fifteenth Circuit (2004)

Luis G. Cabrera was found guilty of two counts of first-degree murder and now appeals.

In January, 1996, a pedestrian discovered the bodies of Brandon Saunders and Vaughn Rowe in a wooded area of Rockford National Park. Investigators eventually regarded the defendant, Luis Cabrera, as a suspect. Several items of physical evidence linked Cabrera to the victims, including a belt seized from the Cabrera residence.

Dr. Richard Callery testified that during the autopsy of Mr. Rowe he observed an injury that resembled the imprint of a belt buckle. The government then introduced expert testimony that drew a connection between the patterned injuries observed on Rowe and the belt seized from Cabrera's residence. Finally, regarding the belt, Milly Mathis testified at trial that she met Cabrera in 1994 and had sporadic sexual encounters with him over the course of several years. Mathis testified that she was familiar with Cabrera's clothing style and identified a distinctive belt seized from his residence as one that he likely would have worn. She also stated, however, that she did not specifically recognize the belt.

Several months after his conviction, Cabrera moved for a new trial based on post-trial, out-of-court statements made by Milly Mathis. In statements given to Cabrera's counsel after trial, Mathis purported to recant her testimony and claimed that she had been coerced into giving perjured testimony at trial. At an evidentiary hearing on the motion for a new trial conducted by the trial judge, Mathis declined to testify on grounds of self-incrimination. Thus, she became “unavailable” as a witness.

Cabrera's attorneys then sought to introduce Mathis' post-conviction statements. Those statements of the unavailable declarant, Mathis, constitute hearsay because they were offered to prove the truth of their contents. The question before the trial judge, therefore, was whether the post-conviction statements should be admitted under either of two exceptions to the hearsay rule: Federal Rule of Evidence 804(b)(3) that pertains to statements against interest, and Rule 807, the “residual exception” relating to statements not covered by other exceptions “but having equivalent circumstantial guarantees of trustworthiness.”

The trial judge ruled that Cabrera failed to carry this burden sufficiently to justify a new trial because the hearsay statements were inadmissible and the other evidence at the hearing suggested that it was Mathis' recantation, and not her trial testimony, that was false. Thus, the key issue is whether the trial judge abused his discretion in refusing to admit Mathis' post-conviction statements in evidence.

Hearsay statements are generally not admissible unless the statement falls within a recognized exception to the hearsay rule. Rule 804(b)(3) allows the admission of a statement against interest if the declarant is unavailable to testify as a witness. Rule 804(b)(3) also imposes two conditions to the admissibility of hearsay evidence in addition to the declarant's unavailability. First, a statement against interest will be admissible only if it so far tended to subject the declarant to civil or criminal liability that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. Second, a statement tending to expose the declarant to criminal liability and offered to exculpate the accused may be admitted only if corroborating circumstances clearly indicate the trustworthiness of the statement.

Mathis became unavailable to testify when she invoked her Fifth Amendment privilege at the evidentiary hearing. Mathis' statement that she did not testify truthfully at trial was against her penal interest because it amounted to a squarely self-inculpatory confession. A reasonable person would know that admitting to giving false testimony would subject the person to criminal liability for perjury. In addition, the government had not offered Mathis immunity from any potential perjury charges and had even threatened to bring perjury charges against her if she recanted her trial testimony.

Mathis' statements, nonetheless, fail the test of admissibility under Rule 804(b)(3) because they lack corroborating evidence. The trial judge also focused on the fact that Mathis' recanting statement was made more than six months after she testified at trial. Mathis corresponded with Cabrera numerous times before meeting with his attorney. Thus, Mathis' recantation was not spontaneous, but was part of her attempt to build a relationship with Cabrera. The trial judge concluded that such a large temporal gap and lack of spontaneity did not support the admissibility of the statement.

The District Court did not abuse its discretion by finding that Mathis' statement was inadmissible under Rule 804(b)(3). Cabrera failed to meet his burden of clearly demonstrating with corroborating circumstances the trustworthiness of the statement.

Mathis' statements also were not admissible under Rule 807. That Rule provides an exception to the hearsay rule where a statement has sufficient circumstantial guarantees of trustworthiness if the court determines (1) the statement is offered as evidence of a material fact, (2) 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 (3) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The requirements are construed narrowly so that the exception does not swallow the hearsay rule. Mathis' post-trial statements fail to satisfy the requirement that the evidence have circumstantial guarantees of trustworthiness for the same reasons that they were not admissible under Rule 804(3)—they were not supported by sufficient corroborating evidence. In addition, excluding the evidence does not pose a great risk of miscarriage of justice, because Mathis' trial testimony was weak and related to only one small link among several implicating Cabrera in the crime. The District Court did not abuse its discretion by denying Cabrera's motion for a new trial because it had no admissible evidence on which to base the granting of a new trial.

Affirmed.

United States v. Bryce

United States Court of Appeals, Fifteenth Circuit (2000)

Ewan Bryce appeals from the judgment of the United States District Court convicting him, after a jury trial, of (i) conspiracy to possess with intent to distribute, and distribution of, cocaine; and (ii) possession with intent to distribute, and distribution of, cocaine.

In 1997, federal law enforcement officers in Connecticut conducted surveillance of several persons suspected of narcotics trafficking, including the appellant, Ewan Bryce, and his co-defendant, Darren Johnson. On August 5 and 6, 1997, agents intercepted and recorded a number of telephone conversations, eight of which are relevant to this case: seven calls between Bryce and Johnson (the Bryce–Johnson tapes), and one between Johnson and another individual, Edwin Gomez (the Johnson–Gomez tape).

During their conversations, Bryce and Johnson used guarded and coded phrases to arrange a transaction in which Bryce would sell powder cocaine to Johnson for $22,500 per kilogram. In their initial call on August 5, Bryce claimed to possess a quantity of what he called “straight.” Johnson expressed interest in buying some of this “straight,” and Bryce told Johnson to call him back later that night, presumably to arrange a meeting. But when Johnson called Bryce's cellular phone, there was no answer.

In a call early the next morning, August 6, Bryce told Johnson that he had already “let off” “like 6 of 'em . . . at 22–5.” Approximately three hours later, Johnson telephoned Gomez and informed him, in less cryptic language, that Bryce was selling “straight powder” for “deuce deuce” and had “off’ed 7 of 'em yesterday [August 5].” Johnson and Gomez expressed concern that the price being quoted would depress the price in other transactions.

After discussing matters with Gomez, Johnson called Bryce back and said he would buy “two,” to which Bryce responded: “Okay. Alright I'm gonna, um, call you back then.” Two minutes later, before Bryce could return Johnson's call, Johnson called Bryce again and told him that he would actually buy more than two, so long as Bryce was indeed selling “straight.” They agreed to meet at Bryce's home in fifteen minutes.

That meeting apparently never happened, however, because Bryce called Johnson several hours later to say that he really only had “one” left, and that he did not “really wanna get rid of this one,” but Johnson (by now quite put out) pleaded with Bryce to sell the “one” to him. Reluctantly, Bryce agreed, and they arranged to meet later that day. It is apparent that this meeting also never happened, because Johnson called Bryce on August 11 and asked him whether he still had “it.” Bryce said he did, and they again agreed to meet.

On August 26, 1997, federal agents arrested Johnson and another individual, one Michael McCausland. The next day, Bryce terminated the service on his pager; less than a month later, he began using a new cellular telephone. Soon thereafter, Bryce was also arrested.

Bryce and Johnson were charged in a two-count indictment. Count One alleged that the two conspired together and with others to possess with intent to distribute, and to distribute, cocaine; Count Two alleged that between, on, or about August 5 and 6, 1997, Bryce possessed with intent to distribute, and distributed, cocaine.

A jury convicted Bryce on both counts. The district court then sentenced Bryce to 124 months of imprisonment on each count (to be served concurrently) and five years of supervised release, plus a fine and an assessment.

Bryce challenges his conviction on the ground that the district court erred in admitting certain hearsay evidence—specifically, the Johnson–Gomez tape, on which Johnson repeats Bryce's claim that he has cocaine for sale and has already distributed some to others. The district court admitted the tape pursuant to the catch-all exception to the hearsay rule, Fed.R.Evid. 807, which permits admission of hearsay if (i) it is particularly trustworthy; (ii) it bears on a material fact; (iii) it is the most probative evidence addressing that fact; (iv) its admission is consistent with the rules of evidence and advances the interests of justice; and (v) its proffer follows adequate notice to the adverse party.

Bryce does not dispute that the statements in the Johnson–Gomez tape were material, that the declarants were unable to testify, or that the government complied with the Rule's notice requirement. The resolution of this argument is therefore linked most importantly to an evaluation of trustworthiness or reliability.

Under the hearsay rules, courts must evaluate the totality of the circumstances to determine whether a statement contains particular guarantees of trustworthiness that make the declaration especially worthy of belief. The Court listed several factors to consider in determining reliability including 1) the spontaneity of the statement; 2) the consistency of the statement; 3) the lack of motive to fabricate; 4) the reason the declarant will not testify; and 5) the voluntariness of the statement.

The statements at issue in the Johnson–Gomez tape have a high degree of trustworthiness. As we noted in *United States v. Matthews* (15th Cir. 1994):

> [O]rdinarily, a confession of an accomplice resulting from formal police interrogation cannot be introduced as evidence of the guilt of an accused, absent some circumstance indicating authorization or adoption. On the other hand, if the statement is made to a person whom the declarant believes is an ally rather than a law enforcement official, and if the circumstances surrounding the portion of the statement that inculpates the defendant provide no reason to suspect that that inculpatory portion is any less trustworthy than the part of the statement that directly incriminates the declarant, the trustworthiness of the portion that inculpates the defendant may well be sufficiently established that its admission does not violate the hearsay rule.

Several factors prove particularly relevant in this case: (i) the statements were obtained via a covert wiretap of which neither Johnson nor Gomez was aware; (ii) the statements were made during the same time period that Johnson was conversing with Bryce; (iii) Johnson's statements implicated both himself and Bryce as participants in a narcotics conspiracy; and (iv) Gomez was Johnson's colleague in the narcotics trade. Based on these factors, there is little reason to believe that Johnson and Gomez had any motive to lie, or were lying, during this telephone conversation. Accordingly, the district court's decision to admit the Johnson–Gomez tape was proper under Rule 807. Affirmed.