

Murder 101: Using Technology to Prove Your Case



CASSANDRA MONTALTO

What is Digital Evidence?

- ▶ **Definition:** digital evidence or electronic evidence is any probative information stored or transmitted in digital form that a party to a court case may use at trial.
- ▶ **Examples**
 - ▶ Cellphone evidence – call logs, text messages, emails, photographs/videos, locator information, etc.
 - ▶ Contents of social media accounts – posts, friends lists, photographs, private messages, etc.
 - ▶ Computer evidence – stored documents, photographs/videos, spreadsheets, browser history, etc.

Obtaining/Collecting Digital Evidence

▶ Preservation

- ▶ Letters or law enforcement portal
- ▶ Cellphone – airplane mode and special storage
- ▶ Non-disclosure orders

▶ Search Warrants

- ▶ Warrant to seize evidence v. warrant to search for digital evidence
- ▶ Consent

Forensic Analysis of Electronic Devices

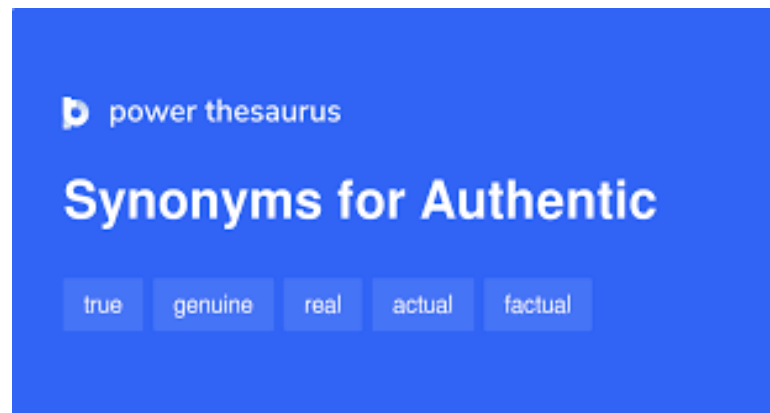
- ▶ Compelling passcodes
 - ▶ Fifth Amendment Concerns
 - ▶ Courts split on issue
 - ▶ United States v. Wright, 431 F. Supp. 3d 1175
 - ▶ State v. Andrews, 243 N.J. 447
- ▶ Probable cause considerations
 - ▶ Time period
 - ▶ What can I search for?
- ▶ Taint Teams
 - ▶ Privileged information

SOCIAL MEDIA EVIDENCE

- ▶ Prospective v. Historical
 - ▶ Wiretap v. search warrant
- ▶ What types of evidence can I obtain from social media?
 - ▶ Posts, photographs, video, private messages, locator information, etc.
- ▶ Social media content from electronic device v. third party company (i.e. Meta)
 - ▶ iCloud warrants
- ▶ Apps – WhatsApp, Kik, Snapchat, etc.

Rule 901 - Authentication

- ▶ **F.R.E. 901:** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must present evidence sufficient to support a finding that the item is what its proponent claims.



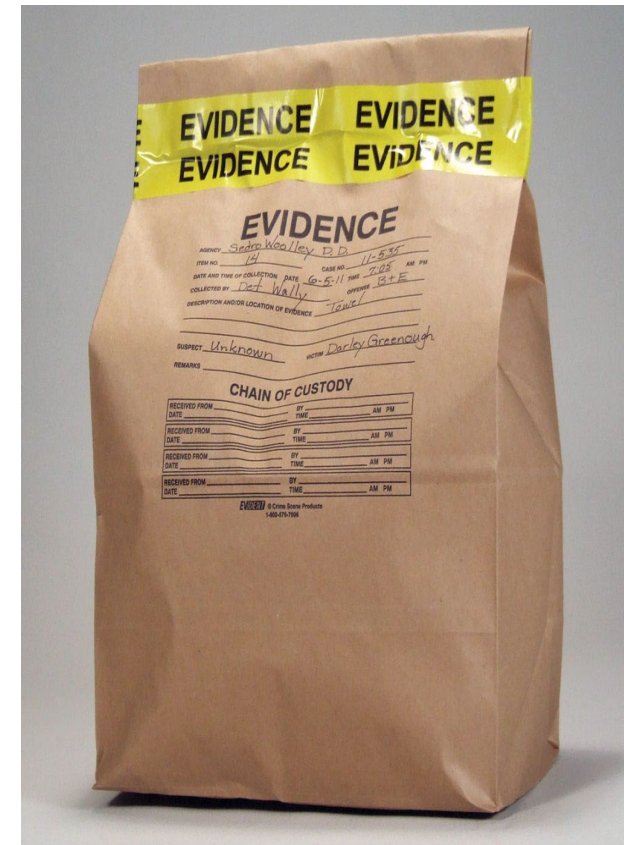
Federal Rule of Evidence 901

- ▶ **(a) In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.
- ▶ **(b) Examples.** The following are examples only—not a complete list—of evidence that satisfies the requirement:
 - (1) Testimony of a Witness with Knowledge.** Testimony that an item is what it is claimed to be.
 - (2) Nonexpert Opinion About Handwriting.** A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.
 - (3) Comparison by an Expert Witness or the Trier of Fact.** A comparison with an authenticated specimen by an expert witness or the trier of fact.
 - (4) Distinctive Characteristics and the Like.** The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.
 - (5) Opinion About a Voice.** An opinion identifying a person's voice—whether heard firsthand or through mechanical or electronic transmission or recording—based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

▶ USCS Fed Rules Evid R 901

Authenticating Evidence

- ▶ Types of Evidence that Require Authentication
 - ▶ Pictures
 - ▶ Audio Recordings
 - ▶ Documents
 - ▶ Videos
 - ▶ Locator Information



Trial Witnesses

- ▶ Fact Witness v. Expert Witness
 - ▶ F.R.E. 701 and F.R.E. 702
- ▶ Business Records – F.R.E. 803 (17)
- ▶ Confrontation Clause
 - ▶ Testimonial v. non-testimonial documents
 - ▶ *Crawford v. Washington*, 541 U.S. 36 (2004) and *Davis v. Washington*, 547 U.S. 813 (2006).

CERTIFICATION OF DOCUMENTS

I, Irene A. Szczech, being of full age, upon my oath do
certify that the annexed records concerning:

[REDACTED]

Name

were made in the regular course of business of this
facility,

University Hospital, Newark, NJ

Name of Facility

I have authority to make duplicates of these records.

These records were made at the time of the condition and/or
occurrences reported therein or within a reasonable time
thereafter.

I certify that the foregoing statements made by me are
true. I am aware that if any of the foregoing statements
made by me are willfully false I am subject to punishment.

Signature: Irene A. Szczech

Date: 10/13/2011

Print Name: Irene A. Szczech, MBA, RHIA, CCS

Title: Director, Health Information Management

Demonstrative Exhibits

- ▶ F.R.E. 107 – Illustrative Aids (effective December 1, 2024)
- ▶ **a) Permitted Uses.** The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's 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.
- ▶ **(b) Use in Jury Deliberations.** An illustrative aid is not evidence and must not be provided to the jury during deliberations unless:**(1)** all parties consent; or
- ▶ **(2)** the court, for good cause, orders otherwise.
- ▶ **(c) Record.** When practicable, an illustrative aid used at trial must be entered into the record.
- ▶ **(d) Summaries of Voluminous Materials Admitted as Evidence.** A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

Other Trial Considerations

- ▶ Hearsay
- ▶ F.R.E. 403
- ▶ F.R.E. 404b
- ▶ Intrinsic Evidence
- ▶ Chain of Custody

Federal Rule of Evidence 801 (d)

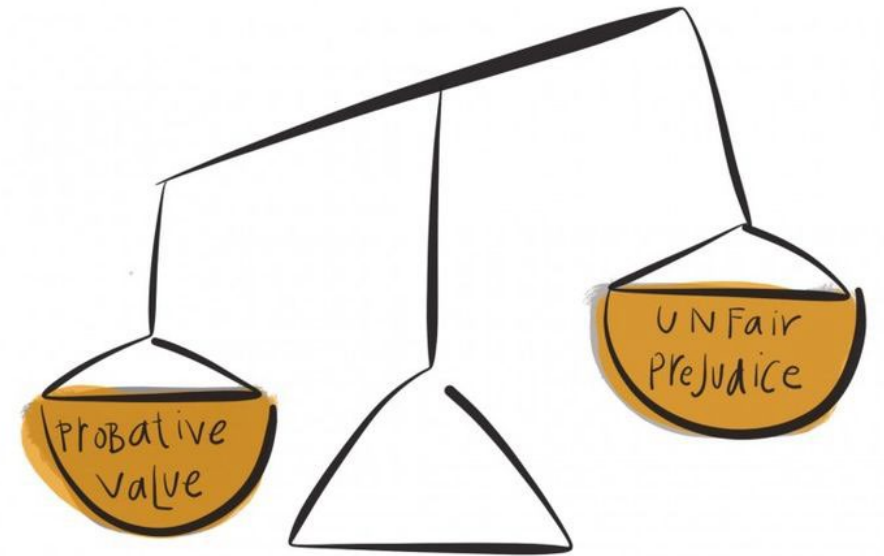
- ▶ **(d) Statements That Are Not Hearsay.** A statement that meets the following conditions is not hearsay:
- ▶ **(1) A Declarant-Witness's Prior Statement.** The declarant testifies and is subject to cross-examination about a prior statement, and the statement:
 - ▶ **(A)** is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;
 - ▶ **(B)** is consistent with the declarant's testimony and is offered: **(i)** to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
 - ▶ **(ii)** to rehabilitate the declarant's credibility as a witness when attacked on another ground; or
 - ▶ **(C)** identifies a person as someone the declarant perceived earlier.
- ▶ **(2) An Opposing Party's Statement.** The statement is offered against an opposing party and:
 - ▶ **(A)** was made by the party in an individual or representative capacity;
 - ▶ **(B)** is one the party manifested that it adopted or believed to be true;
 - ▶ **(C)** was made by a person whom the party authorized to make a statement on the subject;
 - ▶ **(D)** was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or
 - ▶ **(E)** was made by the party's coconspirator during and in furtherance of the conspiracy.

Relevant But Is it Admissible??

► F.R.E. 403

- The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

[USCS Fed Rules Evid R 403](#)



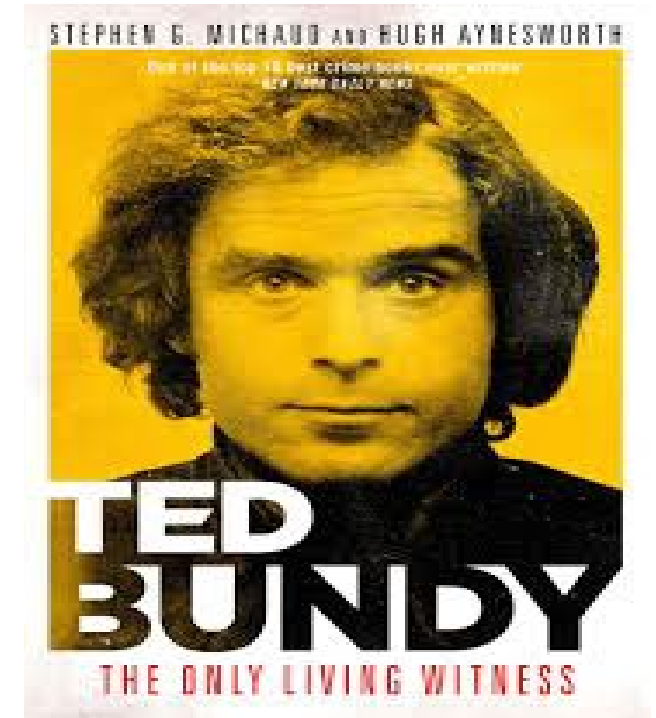
Evidence WILL Be INcluded

F.R.E. 404(b) evidence

► (b) Other Crimes, Wrongs, or Acts.

- (1) *Prohibited Uses*. Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
- (2) *Permitted Uses*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

USCS Fed Rules Evid R 404



Intrinsic Evidence

- ▶ **State v. Rose, 206 N.J. 141 (2009)**
 - ▶ Evidence that is intrinsic to the charged crime is exempt from the strictures of *Rule 404(b)* even if it constitutes evidence of uncharged misconduct that would normally fall under *Rule 404(b)* because it is not "evidence of *other* crimes, wrongs, or acts."
- ▶ **United States v. Green. 617 F.3d 233 (3d Cir.2010) (cited in Rose)**

we . . . reserve the "intrinsic" label for two narrow categories of evidence. First, evidence is intrinsic if it "directly proves" the charged offense. This gives effect to *Rule 404(b)*'s applicability only to evidence of "*other* crimes, wrongs, or acts." If uncharged misconduct directly proves the charged offense, it is not evidence of some "other" crime. Second, "uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime." But all else must be analyzed under *Rule 404(b)*.



Chain of Custody

- ▶ "The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims." *N.J.R.E.* 901. "A party introducing tangible evidence has the burden of laying a proper foundation for its admission." ***State v. Brunson*, 132 N.J. 377, 393, 625 (1993).** This foundation should include a showing of an uninterrupted chain of custody. *Ibid.* (citing *State v. Brown*, 99 N.J. Super. 22, 27, (App.Div.), *certif. denied*, 51 N.J. 468, 242 A.2d 16 (1968)). The determination of whether the State sufficiently established the chain of custody is within the discretion of the trial court. *Brown, supra*, 99 N.J. Super. Generally, evidence will be admitted if the court finds "in reasonable probability that the evidence has not been changed in important respects or is in substantially the same condition as when the crime was committed." *Id.* at 28, 238 A.2d 482 (citations omitted). "[A] **defect in the chain of custody goes to the weight, not the admissibility, of the evidence introduced.**" ***State v. Morton*, 155 N.J. 383, 446, (1998).** *State v. Mosner*, 407 N.J. Super. 40, 62 (App. Div. 2009)
- ▶ **Federal case law mirrors NJ case law**

CHAIN OF POSSESSION			
Received from:			
By:			
Date:	Time:	AM/PM	
Received from:			
By:			
Date:	Time:	AM/PM	
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Contact Information

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