

A DECADE OF EVIDENCE
IN THE SIXTH CIRCUIT

Judicial Conference

Louisville

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D. Paine

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Bogus offers of hearsay

By Donald F. Paine

At issue is whether defendant ran the stop sign. Plaintiff calls a witness to testify that she heard a neighbor say defendant ran the stop sign. Defense counsel objects that the evidence is hearsay. Plaintiff's counsel announces in stentorian tones: "May it please the Court, I would never offer inadmissible hearsay in your Honor's courtroom; I offer this statement, not for its truth, but simply to show that the statement was made."

Have you ever heard such blather? Of course you have; we all have. There is a cure. You as defense counsel should politely request that the court ask opposing counsel to locate the material issue to which mere making of the statement has relevance. It's an insurmountable task, and even Stentor isn't up to it.

Here's another bit of balderdash that makes me crazy. In a bank robbery prosecution the government wants to prove defendant was the robber. After establishing that the FBI agent on the stand interviewed defendant's neighbor, the prosecutor cautions: "Now don't repeat to the jury what that neighbor said to you, because that would be hearsay and we can't have that; you just tell the jury what you did." The answer, of course, is "I imme-

diately arrested the defendant for bank robbery." Any juror not asleep can fill in the blank. Obviously this is an illegal ploy to bring hearsay through the back door.

Finally, we have the disappointingly prevalent "why" excuse. Judge Joe

**"Finally, we have
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prevalent 'why' excuse."**

Tipton correctly dealt with this illegitimate concept while reviewing a conviction for aggravated sexual battery and rape of a child.¹ The child's mother offers to repeat the victim's statement: "Defendant has touched me in my privates." Isn't that the very issue on trial? Isn't the only possible purpose to prove the truth of the child's assertion?

It was argued on appeal, I assume with a straight face, that the statement was admissible nonhearsay "to show why the victim's mother reported the abuse to the police." For a million dol-

lars, what is the transparent fallacy of that theory? After polling the audience and calling your lifeline, is that your final answer?

Congratulations, you've just become a millionaire. You are correct to conclude that "why" Mama reported was not a material issue under the indictment and substantive law. It almost never is. Remember that even an officer's subjective reason for a traffic stop is no longer material.²

There is an important area of litigation where "why" can indeed be material — employment discrimination. To prove that the boss did not fire an employee because of age, the employer can introduce complaints from coworkers that the now cashiered employee had said and done violent things. That's "why" he was fired.³ Retaliatory discharge actions would also involve the "why" defense. ¶

1. *State v. Calloway*, 24 TAM 52-30 (Tenn. Crim. App. at Knoxville, Nov. 23, 1999).

2. *State v. Vineyard*, 958 S.W.2d 730 (Tenn. 1997), citing *United States v. Whren*, 116 S.Ct. 1769 (1996).

3. See Judge Gilman's opinion in *Bush v. Dictaphone Corporation*, 161 F.3d 363 (6th Cir., Gilman, 1998).

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EVIDENCE–Hearsay–confrontation

Crawford v. Washington, 124 S.Ct. 1354 (U.S., Scalia, 2004).

“Petitioner Michael Crawford stabbed a man who allegedly tried to rape his wife, Sylvia. At his trial, the State played for the jury Sylvia’s tape-recorded statement to the police describing the stabbing, even though he had no opportunity for cross-examination. The Washington Supreme Court upheld petitioner’s conviction after determining that Sylvia’s statement was reliable. The question presented is whether this procedure complied with the Sixth Amendment’s guarantee that, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.””

“On August 5, 1999, Kenneth Lee was stabbed at his apartment. Police arrested petitioner later that night. After giving petitioner and his wife Miranda warnings, detectives interrogated each of them twice. Petitioner eventually confessed that he and Sylvia had gone in search of Lee because he was upset over an earlier incident in which Lee had tried to rape her. The two had found Lee at his apartment, and a fight ensued in which Lee was stabbed in the torso and petitioner’s hand was cut.

“Petitioner gave the following account of the fight:

Q. Okay. Did you ever see anything in [Lee’s] hands?

A. I think so, but I’m not positive.

Q. Okay, when you think so, what do you mean by that?

A. I coulda swore I seen him goin’ for somethin’ before, right before everything happened. He was like reachin’, fiddlin’ around down here and stuff . . . and I just . . . I don’t know, I think, this is just a possibility, but I think, I think that he pulled somethin’ out and I grabbed for it and that’s how I got cut . . . but I’m not positive. I, I, my mind goes blank when things like this happen. I mean, I just, I remember things wrong, I remember things that just doesn’t, don’t make sense to me later.

“Sylvia generally corroborated petitioner’s story about the events leading up to the fight, but her account of the fight itself was arguably different—particularly with respect to whether Lee had drawn a weapon before petitioner assaulted him:

Q. Did Kenny do anything to fight back from this assault?

A. (pausing) I know he reached into his pocket . . . or somethin’ . . . I don’t know what.

Q. After he was stabbed?

A. He saw Michael coming up. He lifted his hand . . . his chest open, he might [have] went to go strike his hand out or something and then (inaudible).

Q. Okay, you, you gotta speak up.

A. Okay, he lifted his hand over his head maybe to strike Michael's hand down or something and then he put his hands in his . . . put his right hand in his right pocket . . . took a step back . . . Michael proceeded to stab him . . . then his hands were like . . . how do you explain this . . . open arms . . . with his hands open and he fell down . . . and we ran (describing subject holding hands open, palms toward assailant).

Q. Okay, when he's standing there with his open hands, you're talking about Kenny, correct?

A. Yeah, after, after the fact, yes.

Q. Did you see anything in his hands at that point?

A. (pausing) um um (no).

“The State charged petitioner with assault and attempted murder. At trial, he claimed self-defense. Sylvia did not testify because of the state marital privilege, which generally bars a spouse from testifying without the other spouse's consent. See Wash. Rev. Code §5.60.060(1) (1994). In Washington, this privilege does not extend to a spouse's out-of-court statements admissible under a hearsay exception, . . . so the State sought to introduce Sylvia's tape-recorded statements to the police as evidence that the stabbing was not in self-defense. Noting that Sylvia had admitted she led petitioner to Lee's apartment and thus had facilitated the assault, the State invoked the hearsay exception for statements against penal interest. . . .

“Petitioner countered that, state law notwithstanding, admitting the evidence would violate his federal constitutional right to be ‘confronted with the witnesses against him.’ Amdt. 6. According to our description of that right in *Ohio v. Roberts*, 448 U.S. 56 (1980), it does not bar admission of an unavailable witness's statement against a criminal defendant if the statement bears ‘adequate “indicia of reliability.”’ To meet that test, evidence must either fall within a ‘firmly rooted hearsay exception’ or bear ‘particularized guarantees of trustworthiness.’ The trial court here admitted the statement on the latter ground, offering several reasons why it was trustworthy: Sylvia was not shifting blame but rather corroborating her husband's story that he acted in self-defense or ‘justified reprisal’; she had direct knowledge as an eyewitness; she was describing recent events; and she was being questioned by a ‘neutral’ law enforcement officer. The prosecution played the tape for the jury and relied on it in closing, arguing that it was ‘damning evidence’ that ‘completely refutes [petitioner's] claim of self-defense.’”

“The Sixth Amendment's Confrontation Clause provides that, ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.’ We have held that this bedrock procedural guarantee applies to both federal and state prosecutions.”

“[N]ot all hearsay implicates the Sixth Amendment's core concerns. An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation

Clause targeted. On the other hand, ex parte examinations might sometimes be admissible under modern hearsay rules, but the Framers certainly would not have condoned them.

“The text of the Confrontation Clause reflects this focus. It applies to ‘witnesses’ against the accused—in other words, those who ‘bear testimony.’ 1 N. Webster, *An American Dictionary of the English Language* (1828). ‘Testimony,’ in turn, is typically ‘[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.’ An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not. The constitutional text, like the history underlying the common-law right of confrontation, thus reflects an especially acute concern with a specific type of out-of-court statement.

“Various formulations of this core class of ‘testimonial’ statements exist: ‘ex parte in-court testimony or its functional equivalent—that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially,’ Brief for Petitioner 23; ‘extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,’ *White v. Illinois*, 502 U.S. 346, 365 (1992) (Thomas, J., joined by Scalia, J., concurring in part and concurring in judgment); ‘statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial,’ Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 3. These formulations all share a common nucleus and then define the Clause’s coverage at various levels of abstraction around it. Regardless of the precise articulation, some statements qualify under any definition—for example, ex parte testimony at a preliminary hearing.

“Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard.”

“In sum, even if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object, and interrogations by law enforcement officers fall squarely within that class.”

“We do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements. They suggest that this requirement was dispositive, and not merely one of several ways to establish reliability. . . . [T]here is scant evidence that exceptions were invoked to admit testimonial statements against the accused in a criminal case. [Footnote:] The one deviation we have found involves dying declarations. The existence of that exception as a general rule of criminal hearsay law cannot be disputed. . . . We need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations. If this exception must be accepted on historical grounds, it is sui generis. [End footnote] Most of the hearsay exceptions covered statements that by their nature were not testimonial—for example, business records or statements in furtherance of

a conspiracy. We do not infer from these that the Framers thought exceptions would apply even to prior testimony.”

“Our case law has been largely consistent with these two principles. Our leading early decision, for example, involved a deceased witness’s prior trial testimony. *Mattox v. United States*, 156 U.S. 237 (1895). In allowing the statement to be admitted, we relied on the fact that the defendant had had, at the first trial, an adequate opportunity to confront the witness. . . .”

“Even our recent cases, in their outcomes, hew closely to the traditional line. *Ohio v. Roberts*, 448 U.S., at 67-70, admitted testimony from a preliminary hearing at which the defendant had examined the witness. *Lilly v. Virginia*, supra, excluded testimonial statements that the defendant had had no opportunity to test by cross-examination. And *Bourjaily v. United States*, 483 U.S. 171, 181-184 (1987), admitted statements made unwittingly to an FBI informant after applying a more general test that did not make prior cross-examination an indispensable requirement.”

[Footnote:] “One case arguably in tension with the rule requiring a prior opportunity for cross-examination when the proffered statement is testimonial is *White v. Illinois*, 502 U.S. 346 (1992), which involved, inter alia, statements of a child victim to an investigating police officer admitted as spontaneous declarations. It is questionable whether testimonial statements would ever have been admissible on that ground in 1791; to the extent the hearsay exception for spontaneous declarations existed at all, it required that the statements be made ‘immediat[ely] upon the hurt received, and before [the declarant] had time to devise or contrive any thing for her own advantage.’ *Thompson v. Trevanion*, Skin. 402, 90 Eng. Rep. 179 (K. B. 1694).”

“Our cases have thus remained faithful to the Framers’ understanding: Testimonial statements of witnesses absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine.”

“The *Roberts* test allows a jury to hear evidence, untested by the adversary process, based on a mere judicial determination of reliability. It thus replaces the constitutionally prescribed method of assessing reliability with a wholly foreign one. In this respect, it is very different from exceptions to the Confrontation Clause that make no claim to be a surrogate means of assessing reliability. For example, the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds; it does not purport to be an alternative means of determining reliability.”

“Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers’ design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of ‘testimonial.’ Whatever else the term covers, it applies at a minimum to prior

testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.

“In this case, the State admitted Sylvia’s testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her. That alone is sufficient to make out a violation of the Sixth Amendment. *Roberts* notwithstanding, we decline to mine the record in search of indicia of reliability. Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.

“The judgment of the Washington Supreme Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.”

CRAWFORD V. WASHINGTON:
CONFRONTATION REVOLUTION?

Neil Cohen and Don Paine

On March 8, 2004, the U.S. Supreme Court decided Michael Crawford's appeal from a Washington State conviction for assault, 124 S.Ct. 1354 (2004), and totally revised the modern approach to the Confrontation Clause. Anyone handling a criminal case must now become familiar with a new conceptual framework for the admission of hearsay evidence by the prosecution.

The facts in *Crawford v. Washington* are not remarkable, but the analytic approach the Court adopted is. The defendant Crawford stabbed a man who allegedly tried to rape defendant's wife, Sylvia Crawford. Defendant claimed self defense. To rebut this, at trial the government introduced a statement by Sylvia (who did not testify) providing a version of the altercation that differed from her husband's. The defendant objected on Confrontation grounds. The United States Supreme Court reversed the conviction, holding Sylvia's tape recorded statement to police inadmissible because of the Sixth Amendment Confrontation Clause: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

Justice Scalia's opinion, joined by six other members of the Court, treated the case as an opportunity to disapprove of *Ohio v. Roberts*, 448 U.S. 56 (1980), which had long provided the framework for analyzing Confrontation Clause cases. Scalia concisely expressed the Court's holding:

Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law—as does *Roberts*, and as would an approach that exempted such statements from Confrontation Clause scrutiny altogether. Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination. We leave for another day any effort to spell out a comprehensive definition of 'testimonial.' Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, at a grand jury, or at a former trial; and to police interrogations.

The *Crawford v. Washington* holding can be summarized as follows:

- A. The Confrontation Clause only limits admission of prosecution "testimonial evidence."
- B. "Testimonial" is not defined but several illustrations are given.
- C. Testimonial evidence is admissible against the criminal accused only if
 1. The declarant is available for cross-examination at trial; or

2. The declarant is unavailable for cross at trial, and
 - a. The government made reasonable efforts to procure presence, and
 - b. The testimonial statement was previously subject to cross-examination, such as at a preliminary hearing or in a deposition.
- D. Non-testimonial evidence is governed by evidence rules, not the Confrontation Clause.

The critical issue now is whether a statement is considered to be “testimonial” since non-testimonial evidence presents no Confrontation issue. In an effort to shed light on the meaning of this critical and elusive term, Scalia’s *Crawford* opinion suggests that “an accuser who makes a formal statement to government officers” has made a “testimonial” statement, while someone who makes “a casual remark to an acquaintance” does not. The Court also favorably quotes language from an *amicus* brief that says a statement is testimonial if “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use later at a trial.” The Court’s other illustrations of “testimonial” proof include: statements taken by police officers during interrogations; and prior testimony at a preliminary hearing, grand jury, or trial. The Court also mentions two hearsay exceptions that are not considered testimonial: business records and co-conspirator admissions. Justice Rehnquist’s concurring opinion adds public records to this short list.

To illustrate these principles and the ambiguities of *Crawford*, consider how several Tennessee hearsay exceptions will fare under the decision. A prior identification under TRE 803(1.1) and recorded recollection under TRE 803(5) do not present any Confrontation problem since, by definition, the declarant must testify at the trial. Also, a footnote in *Crawford* hinted that the dying declaration may well be sufficiently unique that it is admissible despite the lack of cross examination.

By way of contrast, former testimony under TRE 804(b)(1) is certainly testimonial and is admissible under the Confrontation Clause only if the declarant is absent. This presents no practical issue since the former testimony exception itself requires unavailability.

Some hearsay exceptions are far more difficult to analyze. For example, the excited utterance of TRE 803(2) is illustrative of some disturbing uncertainties created by the *Crawford* Court. It is quite possible that *some* excited utterances are testimonial and subject to the Confrontation Clause. For example, if a witness to a crime makes an excited utterance to a police officer at the scene of the crime, the statement may well be testimonial. But if the bystander makes the same excited utterance to another bystander at the scene, it is arguable that the statement is not testimonial. If this dichotomy occurs, it is an odd resolution because the statement to the officer may be more reliable than that to the bystander.

A similar issue is presented by a statement for purposes of medical diagnosis and treatment under TRE 803(4) or a statement of then existing mental, emotional or physical condition under TRE 803(3). Perhaps a routine statement about a person’s physical condition to a friend or medical professional would be non-testimonial, but what about a

child molestation victim who talks to emergency room personnel trained to obtain evidence for a possible criminal prosecution, perhaps even using a “rape kit” to gather and preserve evidence? *Crawford* raises the possibility that the latter may be so closely analogous to police interrogation (since arguably the medical personnel are acting as agents of the police) that the victim’s statement becomes testimonial.

Business records also present an interesting set of issues. Scalia’s opinion in *Crawford* cites business records, TRE 803(6), as not being testimonial. Justice Rehnquist adds official records, TRE 803(8), in his list of nontestimonial evidence. But could these statements be too sweeping? What about a chemist in a private laboratory who makes an analysis of a quantity of drugs and then writes a report which the government would like to introduce in a criminal trial? This report may qualify as a business record, but is it testimonial? If not, as suggested by Justice Scalia, the prosecution may introduce it without regard to the Confrontation Clause.

Crawford presents many other questions that will have to be resolved over time. For example, *Crawford* says that testimonial evidence is admissible only if the declarant is “unavailable,” but does not define that term. Is it the same as the definition in TRE 804(a)? Also, surely the prosecution must make some effort to get the declarant to testify, but how heroic do those efforts have to be? Another important issue is whether *Crawford* is retroactive. Ordinarily the answer would be no, but the *Crawford* Court actually suggested it was not changing the law, only redefining it. Finally, the usual rule is that a party cannot benefit from procuring a declarant’s unavailability at trial, then using that unavailability to argue the declarant’s hearsay statement may not be admitted at that trial. Surely subsequent decisions will apply this rule as an exception to *Crawford*’s holding that unavailability is a prerequisite to the admissibility of testimonial government hearsay.

In sum, *Crawford* changes dramatically the way the Confrontation Clause is analyzed. The interesting issue is whether the results of the now-defunct *Ohio v. Roberts* approach will differ from those of the new model once ambiguities in *Crawford* get resolved in future cases.

Pull quote: “The Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination.”

Bio: Cohen and Paine share Evidence teaching duties at U.T. They are best of friends but political enemies.

EVIDENCE—Other Crimes—“person” not limited to accused

United States v. Lucas, 357 F.3d 599 (6th Cir., Boggs, 2004).

“Robin Rochelle Lucas was indicted by a grand jury for knowingly and intentionally possessing with the intent to distribute 500 grams or more of a mixture containing cocaine, in violation of 21 U.S.C. §841(a)(1). In September 2001, Lucas was convicted by a jury as charged in the indictment and was subsequently sentenced to 121 months in prison, four years of supervised release, a \$100 special assessment, and a \$15,000 fine. . . . We affirm Lucas’s conviction and sentence.”

“Robin Rochelle Lucas was arrested on May 9, 2001 in Tennessee. At the time, she was living in California with her grandmother, her nephew, and two nieces. Lucas testified at her trial that she was on vacation with two friends, Angelina Watts and Kimberly Quinney, on her way to visit another friend, Jackie Parker, who lived in Memphis, and to attend the ‘Memphis in May’ festival. On May 8, 2001, Lucas, Watts, and Quinney flew from California to Nashville. At the Nashville airport, Watts obtained a rental car. As they left the airport, Lucas says she saw a sign for Knoxville and Chattanooga (which are over 200 miles away), which she followed, thinking that Knoxville was only a few minutes away from Nashville. The three women stopped off at a liquor store a few minutes down the road and purchased two bottles of Hennessy. Lucas then paid for a room at a Residence Inn, which she claims she thought was in Knoxville, but was actually still in Nashville. The group decided to go to Walgreens, where Quinney purchased several items, including food and utensils for cooking dinner in the room’s small kitchenette. The three went back to the hotel, prepared food, and drank.

“The three women said that they had planned to drive to Memphis the next morning, May 9, but they got up late and Lucas wasn’t able to get in touch with her friend, Parker, the woman she was to meet in Memphis. Lucas then claims to have called Morrell Presley, a man she claims to have met twice before (very briefly) through a friend, and asked him for directions to Memphis. Lucas testified that she told Presley that she was in Knoxville, and then gave him the address and name of the hotel. Presley apparently recognized the hotel and said he would come over to see her, but did not tell her that she was not in Knoxville. Lucas awakened the other women, telling them to get dressed because Presley was going to be visiting them shortly.

“Presley came over, they watched a movie, and eventually the group decided they were hungry. Presley volunteered to go for food and Quinney prepared a shopping list for him, including chicken and cooking oil. Presley said he was low on gas and so Watts allegedly gave him the keys to the rental car, which he took instead of his own car, leaving the room at about 2:30 p.m.

“Presley returned to the hotel room approximately five hours later, at about seven-thirty at night, and although he brought some groceries, he did not return with the chicken or cooking oil, allegedly the main reason for his trip. Lucas had been teased by Watts and Quinney, who suggested that Presley had ‘made off’ with the rental car, leaving his old car behind. When Presley finally returned, without the chicken, Lucas testified that she grabbed the keys out of frustration and started driving towards Memphis. At around eight, Lucas called Parker and told her that she was on her way to pick her up in Memphis.

“At the hotel, Presley became upset, asking where Lucas had gone with the rental car. According to Quinney’s testimony at trial, Presley was ranting and raving, calling everyone names. Presley urged Quinney and Watts to call Lucas and convince her to drive back, specifically stating to Quinney that she should ‘[c]all that B and tell her to come back’ and that his cell phone was in the car. Quinney called Lucas and told her ‘[t]hat she needed to come back because she had . . . Morell’s cell phone. She needed to bring him his cell phone.’ At some point Presley even got on the phone and started yelling at Lucas to come back, telling her that ‘she didn’t know who he was’ and calling her names. Phone records verified that phone calls were made consistent with this testimony, although the only evidence presented as to what was said during the calls and, indeed, of any interaction with ‘Presley,’ was the testimony of Lucas and her two friends: Quinney and Watts.

“At 9:25 pm, Lucas was pulled over by Trooper Ollie Parker for speeding at 92 miles per hour near mile marker 104 on I-40 going west towards Memphis. As Parker was copying information down for Lucas’s ticket, he realized that her driver’s license was expired, called it in, and found out that it was suspended. When Parker went back to Lucas and told her of his findings, she explained to him that she had ‘taken care’ of the suspended license, but Parker was unable to verify this fact.

“Trooper Earl Hammett drove up at around 10 pm, and parked behind Parker’s cruiser, which was behind Lucas’s rental car. He activated the cruiser’s video camera at 10:03 pm, and this video was played for the jury at trial. About five minutes later, Lt. Linuel Allen arrived. Both troopers were filled in on what was going on by Parker.

“At some point Lt. Allen retrieved Lucas’s coat from the car, and found in it \$2,855, mostly in twenty-dollar bills. Lucas volunteered that this was her traveling money and that she had started off the trip with \$3,000. Lucas further explained that she had been driving for about two hours and was on her way from Knoxville to Memphis in order to pick up a relative and take them back to a Knoxville family reunion. It was obvious to the officers that this was not true, since they were not two hours from Knoxville.

“Prior to being handcuffed, Lucas was told to remove her belongings from the car, because she was unlikely to get the car back. Hammett escorted Lucas to the front passenger door, and she leaned in to gather her things. Lucas walked back to the trooper’s car with her hands full. Shortly thereafter, the troopers realized that the car was locked and that Lucas did not have the keys. Hammett began shining his flashlight into the vehicle, looking for the keys, when he spotted two bags wrapped in cellophane and stuck under the front driver’s seat. The bags were eventually retrieved from the vehicle and later

determined to contain 2.2 kilograms of cocaine. A number of items were found in the car during a subsequent search. Three cell phones were seized, registered to Angelita Watts (Vallejo, California), Robyn McPherson (Vallejo, California), and Cathy Jefferson (Nashville, Tennessee) respectively. Thirteen credit cards were recovered, eleven in Lucas's name and two in the name of Robyn McPherson, along with a Visa Gold Card application in Robyn McPherson's name and a receipt from Walgreens. Lucas explained that Robyn McPherson is her niece and that she had taken her niece's credit cards and telephone calling cards because her niece had written over \$7000 in insufficient fund checks, which Lucas had covered, and her niece had run up a phone bill of \$800."

"Lucas contends that the district court erred in prohibiting the defense from presenting evidence of Presley's prior conviction for possessing and distributing cocaine, on the basis that it was irrelevant. Lucas claims that not only was this an erroneous application of the Federal Rules of Evidence, but that this exclusion unconstitutionally prevented her from mounting a complete defense."

"Although the district court did not explicitly rule that the evidence was inadmissible pursuant to Rule 404(b), it did address this line of reasoning:

Court: [W]hy is it relevant that he's been convicted of a cocaine offense?

Defense Attorney: *Because it shows his propensity to leave the cocaine in the car.* He's the one that had the car for several hours before Ms. Lucas had the car.

The Court: Aren't prior convictions inadmissible to show propensity?

. . . .

Well, this is an interesting question, gentlemen. I have never in thirty years had this one come up. It seems to me though that this is still the type of evidence that is far more prejudicial than probative. Whether Mr. Presley had a prior cocaine conviction or not doesn't mean that he did or did not put the cocaine in this car. I'm going to sustain the government's objection to the testimony that Mr. Presley was a convicted cocaine dealer. (emphasis added)

"We agree with the government that evidence of Presley's prior conviction does come under Rule 404, although it falls within a subset of such evidence sometimes called 'reverse 404(b)' evidence, in which the evidence of a prior act by another is offered as exculpatory evidence by the defendant, instead of being used by a prosecutor against a defendant. . . . By its plain terms, Rule 404(b) mandates that '[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a *person* in order to show action in conformity therewith,' instead of restricting itself to evidence proving 'the character of the accused.' Rule 404(b) (emphasis added).

"Nevertheless, we recognize, as do several of our sister circuits, that such evidence when presented by the defense, requires us to reconsider our standard analysis, as the primary evil that may result from admitting such evidence against a defendant—by tainting his

character—is not present in the case of 404(b) evidence used against an absent person. . . . There is, therefore, some merit in considering the admissibility of such 404(b) evidence as depending on a straightforward balancing of the evidence’s probative value under Rule 401 against Rule 403’s countervailing considerations. . . . However, in assessing the probative value of such evidence we must also recall that the Advisory Committee Notes following Rule 401 explain that rules such as Rule 404 and those that follow it are meant to prohibit certain types of evidence that are otherwise clearly ‘relevant evidence,’ but that nevertheless create more prejudice and confusion than is justified by their probative value. In other words, we affirm that prior bad acts are generally not considered proof of any person’s likelihood to commit bad acts in the future and that such evidence should demonstrate something more than propensity.

“Lucas’s defense is that Presley committed the crime, and she did not. The defense wanted to introduce Presley’s conviction in order to demonstrate that in addition to access to the car and his strange behavior, Presley had a propensity for selling cocaine. The defense wants the jury to make the inferential leap that because Presley sold drugs before, he is likely to have done so again.”

“We therefore hold that the standard analysis of Rule 404(b) evidence should generally apply in cases where such evidence is used with respect to an absent third party, not charged with any crime. In this case, not only does the evidence not fall within the any of the exceptions, even if it did, the district court did not err in determining that any probative value of the prior bad act was outweighed by its prejudicial effect. Introducing evidence of Presley’s prior conviction would have been prejudicial to fair consideration in that it would have made it easier for the jury to lay the blame on Presley for the drug deal despite evidence presented at trial. . . . Accordingly, the district court did not abuse its discretion in excluding this evidence.”

EVIDENCE-Privileges-settlement communications

Goodyear Tire & Rubber Company v. Chiles Power Supply, Inc., 332 F.3d 976 (6th Cir., Suhrheinrich, 2003).

“Appellants Robert S. Julian and fifteen other Colorado homeowners (‘Julian’) intervened in this action and moved the district court to vacate or modify a confidentiality order. . . . The issue presented on appeal is whether statements made in furtherance of settlement are privileged and protected from third-party discovery. We affirm the decision of the district court and find that they are.”

“Defendant Chiles Power Supply, Inc. d/b/a Heatway Radiant Floors and Snowmelting (‘Heatway’) is a national manufacturer of heating and snowmelt systems. Sometime prior to 1995, Heatway purchased a significant amount of ‘Entran II’ rubber hose from Plaintiff-Appellee Goodyear Tire & Rubber Co. (‘Goodyear’). Heatway subsequently incorporated the hose into a hydronic radiant heating and snowmelt system, which it then sold to Julian and other homeowners in and around Vail, Colorado.

“In 1998, Julian filed suit in federal district court in Colorado against both Goodyear and Heatway after the ‘Entran II’ hose used in Heatway’s system failed and caused damage to Julian’s property. . . . In that action, Goodyear defends on the ground that the failure of the hose is due to negligent installation and maintenance of the system by the homeowners. Conversely, Heatway argues that the failure is due to a defect in Goodyear’s design for the hose. Significantly, Heatway co-founder Daniel Chiles gave a sworn deposition to that effect on October 29, 1997.

“Between May 1995 and June 1996, prior to the Colorado lawsuit, Heatway entered into a second contract with Goodyear to obtain Goodyear’s newest model rubber hose, presumably for use by Heatway in the same or a similar heating system. However, Heatway refused to pay the \$2,093,000 contract price after the ‘Entran II’ failures in Colorado began to surface. On January 21, 1997, Goodyear filed suit against Heatway in Ohio state court for non-payment on the second contract. Heatway removed the case on the basis of diversity jurisdiction to the United States District Court in Akron, Ohio; and counterclaimed, alleging, inter alia, breach of implied warranty of merchantability regarding the hose that had failed in Colorado. The district court granted Goodyear summary judgment on the contract, but denied summary judgment on Heatway’s counterclaims, and scheduled the case for jury trial. . . . The district court presided over settlement negotiations for the counterclaims, and admonished that all talks were to remain confidential. The negotiations ultimately proved unsuccessful. On February 4, 2000, the jury returned a verdict for Goodyear on Heatway’s counterclaims. Heatway subsequently filed for bankruptcy and did not appeal the decision.

“In March 2000, Chiles gave an interview to *Contractor*, a Cleveland, Ohio trade paper. The subsequent article quotes Chiles as saying, in regard to the Ohio litigation:

[T]he day before this trial began, Goodyear made us an offer. They said, we'll do away with this litigation, we'll give you cash, we'll indemnify you against lawsuits from homeowners and all you have to do is sign this paper and agree that the fault is with homeowners and contractors.”

“On March 14, 2000, after a hearing, the Ohio district court determined that Chiles had improperly disclosed confidential statements made during the course of negotiations, and ordered Chiles not to make any more statements about the settlement discussions. In a written order, the court noted that ‘the content of settlement discussions are always confidential’ and may never be disseminated, even after a case is closed. Moreover, to correct Chiles' misstep, the district court gave Goodyear permission to make a statement ‘in whatever form or fashion it chooses, in response to the statement of Dan Chiles published in *Contractor Magazine*.’ On May 1, 2000, *Contractor* published Goodyear's response:

Dan Chiles' statement was false. Heatway knows that where systems using Entran II as a component part had problems, those problems invariably are the result of improper system design, installation, operation or maintenance—not the result of any defect in the hose. Heatway failed to get sufficient information on system installation, operation or maintenance to installers and system users, leading directly to the limited problems that have occurred with systems in the field. Heatway's attacks on the hose are a cynical effort to misdirect installers, users and the public away from the real problems—problems that Heatway itself in large part created. In settlement negotiations, Heatway indicated it was willing to begin telling system installers and users the truth about the real cause of the problem—but only if Goodyear would make payments to Heatway. Goodyear refused to pay Heatway to tell the truth—something Heatway should have done (and should do) regardless.”

“The Colorado case . . . was by then, and is now still, pending. On May 1, 2001, having learned about Chiles' accusations, Julian filed a motion with the Colorado district court seeking to compel Chiles to testify about Goodyear's alleged offer to ‘buy’ Chiles' testimony. On May 15, 2001, without addressing whether settlement communications are always confidential, the Colorado court denied the motion to compel. The court simply held that it lacked jurisdiction to overrule another court's order.

“On June 25, 2001, pursuant to Fed. R. Civ. P. 24, Julian joined the instant Ohio case and petitioned the Ohio district court to vacate or modify its confidentiality order and to permit discovery of any statements Goodyear made during settlement talks.”

“Rule 408 of the Federal Rules of Evidence provides that ‘[e]vidence of conduct or statements made in compromise negotiations is . . . not admissible.’ Fed. R. Evid. 408. However, Rule 408 ‘does not require exclusion when the evidence is offered for another

purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.’ Julian argues that the proscriptive portions of Fed. R. Evid. 408 apply only to admissibility at trial, and that statements made in furtherance of settlement negotiations are necessarily discoverable because Rule 408 provides for their use in some aspects of trial.

“Rule 26(b)(1) of the Federal Rules of Civil Procedure provides that ‘[p]arties may obtain discovery regarding any matter, *not privileged*, that is relevant to the claim or defense of any party. . . .’ Fed. R. Civ. P. 26(b)(1) (emphasis added). Accordingly, the right to discovery is not absolute. We must therefore first address whether settlement communications are privileged.

“In *Jaffee v. Redmond*, 518 U.S. 1 (1996), the Supreme Court discussed at length the parameters of any recognizable privilege. Rule 501 of the Federal Rules of Evidence authorizes the federal courts to determine new privileges by examining ‘common law principles . . . in the light of reason and experience.’ . . . Viewed ‘in the light of reason and experience,’ we believe a settlement privilege serves a sufficiently important public interest, and therefore should be recognized.

“There exists a strong public interest in favor of secrecy of matters discussed by parties during settlement negotiations. This is true whether settlement negotiations are done under the auspices of the court or informally between the parties. The ability to negotiate and settle a case without trial fosters a more efficient, more cost-effective, and significantly less burdened judicial system. In order for settlement talks to be effective, parties must feel uninhibited in their communications. Parties are unlikely to propose the types of compromises that most effectively lead to settlement unless they are confident that their proposed solutions cannot be used on cross examination, under the ruse of ‘impeachment evidence,’ by some future third party. Parties must be able to abandon their adversarial tendencies to some degree. They must be able to make hypothetical concessions, offer creative quid pro quos, and generally make statements that would otherwise belie their litigation efforts. Without a privilege, parties would more often forego negotiations for the relative formality of trial. Then, the entire negotiation process collapses upon itself, and the judicial efficiency it fosters is lost.”

“The fact that Rule 408 provides for exceptions to inadmissibility does not disprove the concept of a settlement privilege. Julian has not presented evidence of any case where the Rule 408 exceptions have been used to allow settlement communications into evidence for any purpose. Rather, the exceptions have been used only to admit the occurrence of settlement talks or the settlement agreement itself for ‘another purpose.’”