Evidentiary Foundation Questions For Prosecutors in 2020

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II. INTRODUCTION

A prosecutor's job at trial is to make sure all evidence proving the guilt of the defendant is admitted before the jury. Piece by piece, the prosecutor builds the case in the form of testimony and exhibits. Each crucial bit of evidence is a building block that proves the defendant's guilt. To be successful, a prosecutor must know the law of evidence. In particular, you must know the foundation questions – sometimes called predicate questions – necessary to get each important piece of evidence successfully presented to the jury.

In the beginning of your career, as a diligent prosecutor, you will study books about evidence and foundation questions, making sure all proper questions are prepared in advance. Once you've presented a certain type of evidence a few times, however, it becomes second nature. Preparing for trial becomes easier and less time-consuming. You may already be at that point in your career. If so, great! But you might not be. They call it practicing law for a reason. Even veteran trial lawyers are still practicing each time they are called out to trial.

Several good books have been published setting out foundation questions for various types of evidence. These include: E. J. Salcines, *Trial Technique Predicate Questions*, National District Attorneys Association (1977); and John C. O'Brien, Thomas Lee Stewart & Edward J. Imwinkelried, *Missouri Evidentiary Foundations, Fourth Edition*, Juris Publishing (2018). Study them when you have time.

In this outline I include the predicate foundation questions for the most common types of evidence presented by prosecutors at trial. My outline is not intended to be exhaustive but I hope it will be helpful as you prepare your cases for trial. There are valid and understandable reasons why you might lose a case at trial, but a reason you should *never* lose is that you were unable to get a crucial piece of evidence admitted because you didn't know how. A paramount goal of every prosecutor should be to be the best trial lawyer you can possibly be. It won't be long before you've mastered everything mentioned in this outline. The sooner you get there, the better.

When you know a key piece of evidence will be vital to your case, prepare a trial brief for the judge and supply it to the court before the trial. Your job is to make it as easy as possible for the judge to rule your way. You want the judge to feel confident that you have done your homework and that he or she will not be reversed for admitting that evidence.

In parts of this outline I set out applicable foundation questions, in other sections I discuss the law, and sometimes I do both. As your career progresses, my request to you is that if and when you find a case that expands, explains or changes anything in this outline, or you spot a topic I have omitted, please let me know and I'll continue updating it.

II FOUNDATION (PREDICATE) QUESTIONS

1. PHOTOGRAPHS

A. The following occurs after the witness, such as a crime scene officer, has just testified about being at the crime scene and taking photographs:

Q: Ms. Witness, I'm showing you now several photographs marked State's Exhibits 1 through 15. Are these photographs all fair and accurate representations of portions of the crime scene as it looked that day?

A: Yes.

Q: Your Honor, I offer State's Exhibits 1 through 15 into evidence. JUDGE: 1 through 15 are admitted.

Q: Ms. Witness, I'm putting State's Exhibit 1 up on the big screen now. Will you tell the jury what they are seeing?

A: That shows the body lying next to the curb . . .

B. Discussion:

When you have a group of photographs (such as crime scene photos) always show them to the witness as a group and ask if they are all fair and accurate representations. Once the witness says they are, you can admit them. Once they are admitted, you can show them to the jury. At that point, take each photo separately and have the witness explain to the jury what that photo depicts. This method saves a great deal of time and makes for a smoother delivery than taking each photo one at a time and laboriously asking if it is a fair and accurate representation over and over.

Note that the witness who lays the foundation to get a photograph into evidence does not need to be the person who took the photograph. He or she just needs to be a person who was there and who can identify it as a fair and accurate representation of what it purports to depict. *State ex rel. State Highway Commission v. Haywood*, 631 S.W.2d 928, 930 (Mo. App. S.D. 1982).

To encourage police and prosecutors to release shoplifted merchandise to stores immediately, Missouri has a statute saying that the police may photograph the merchandise along with a placard giving certain information about the merchandise (such as the date and time of the photograph, a description of the property, its retail price, the owner and address, the name of the arresting officer, and certain other information) and such photographs shall be admissible to the same extent as if the property itself were being offered. Section 490.717, RSMo.

2. SURVEILLANCE RECORDINGS

- A. There are two different ways to admit surveillance recordings into evidence. One is to use a person who was there to identify that the recording is fair and accurate in the same way you would do so with a still photograph. Note, though, that to have things go smoothly, you should have that witness watch the video with you in your office prior to trial, and have the witness initial the disc, so that when you hand it to the witness in court, the witness will be able to say that he or she has watched that recording and initialed it and that it is fair and accurate.
- B. Sometimes you do not have a live witness who saw the events depicted on the recording. In that case, the recording itself is what has been called a "silent witness." In order to admit the recording, you will need to be able to lay a foundation about how the recording was made, for example by calling an employee of the store with the surveillance cameras who has firsthand knowledge of how the equipment works.

In this example, the witness has already testified that he is the assistant manager of Robmee Convenience Store.

Q: Mr. Witness, does Robmee Convenience Store have surveillance cameras? A: Yes.

Q: Please describe these surveillance cameras for the jury?

A: We have four different cameras, showing different parts of the store.

They are constantly recording into a computer system.

Q: Is it possible to download a portion of the surveillance recording onto a disc?

A: Yes.

Q: Was that done in this case?

A: Yes. Officer Smith came to the store after the burglary and I located the part of the recording that showed the burglars in the store and I downloaded it for him.

Q: Is there a way to tell from the recording when the events were taking place?

A: Yes. The date and time appears on the screen.

Q: I'm showing you now a disc marked Exhibit 1. What is this?

A: That's the disc with the surveillance recording on it.

Q: How can you tell?

A: Those are my initials right there.

Q: Is this the disc you gave to Officer Smith on the morning after the burglary?

A: Yes.

Q: Your Honor, I offer State's Exhibit 1.

C. Discussion

The Missouri Court of Appeals recently discussed the "silent witness" approach for admitting surveillance recordings in *State v. Moyle*, 532 S.W.3d 733 (Mo. App. W.D. 2017). The court said it was a case of first impression in Missouri.

A case pointing out that the foundation for a surveillance recording can be laid by a witness who was there is *State v. McNair*, 343 S.W.3d 703 (Mo App. S. D. 2011).

Surveillance recordings in St. Louis typically come from three different sources. Businesses often have surveillance cameras. Private citizens sometimes have surveillance cameras. The police department has the RTCC ("Real Time Crime Center") system, which has surveillance cameras installed at certain places in the city.

Frequently, the date-stamp time shown on a surveillance recording will be incorrect. You should have a witness who was aware of the correct time note that the surveillance recording's time was off. Usually, the officer who collected it will have noticed that fact when the recording was obtained.

3. CAR VIDEO RECORDINGS

The video recordings made by police car cameras are subject to admission in either or both of the ways described above. First, the officer who was involved in the activity (such as a highspeed chase or the interview with the suspect sitting in the patrol car) may identify it as a fair and accurate recording from personal knowledge. On the other hand, if that particular officer is not a witness, the custodian of the records of the patrol car videos may lay the foundation to establish the camera in the patrol car as a "silent witness" under *State v. Moyle*, 532 S.W.3d 733 (Mo. App. W.D. 2017).

Bear in mind that if you plan to use a police car recording, you must request it as soon as possible because the recordings are not kept indefinitely.

4. AUDIO RECORDINGS

A. You may be presenting an audio recording in a number of situations. Perhaps you are prosecuting a drug sale, and the undercover officer buying the drugs was wearing a body wire. Or maybe your child molestation victim was making a tape-recorded phone call to her molester to try to get him to make admissions over the phone. *See State v. Barrett*, 41 S.W.3d 561 (Mo. App. S.D. 2001). Or perhaps your informant was wearing a wire when talking to a co-conspirator. Or it could be a recorded confession made by the defendant to

a law enforcement officer after his arrest. In any event, the foundation questions are simple: (1) show that the witness was a party to the conversation; and that (2) the conversation was recorded; (3) the recording device worked properly; and (4) the disc in court contains the recording and it is fair and accurate.

Q: Mr. Witness, you just told the jury about your conversation with the defendant where he was trying to hire you to kill his wife. Was that conversation recorded?

- A: Yes.
- Q: How?
- A: I had a small tape recorder in my pocket.
- Q: Did you record the entire conversation?
- A: Yes.
- Q: How?

A: I turned on the tape recorder before I met with him and after the meeting was over, I met with Officer Smith and he turned it off and took the tape.

Q: I'm showing you now State's Exhibit 1. Would you identify that for the record, please?

- A: That's the recording.
- Q: Have you listened to it since that day?
- A: Yes. Those are my initials on it. I put those on it the day I listened to it.
- Q: Is it a fair and accurate recording of the conversation you had with this defendant that day?
- A: Yes.
- Q: Your Honor, I officer State's Exhibit 1.
- B. Discussion

The seven-prong test for admissibility of a tape recording was originally set out in *State v. Spica*, 389 S.W.2d 35 (Mo. 1964), and was restated in *State v. Wahby*, 775 S.W.2d 147 (Mo banc 1989) and *State v. Simpson*, 779 S.W.2d 274 (Mo. App. S.D. 1989). The foundation requirements include: (1) a showing that the recording device was capable of taking testimony; (2) a showing that the operator of the device was competent; (3) establishment of the authenticity and correctness of the recording; (4) a showing that changes, additions, or deletions have not been made; (5) a showing of the manner of the preservation of the recording; (6) identification of the speakers; and (7) a showing that the testimony elicited was voluntarily made without any kind of inducement.

The fact there are some inaudible parts on the tape recording will not make it inadmissible. *State v. Spica*, 389 S.W.2d 35, 48; *State v. Luton*, 795 S.W.2d 468, 478 (Mo. App. E.D. 1990); *State v. Dunivant*, 674 S.W.2d 685, 687 (Mo. App. E.D. 1984).

A recording of the defendant selling drugs or conspiring to commit murder or some other crime will often include references to other crimes he has committed. *State v. Sweeney*, 701 S.W.2d 420 (Mo. banc 1985); *State v. Engleman*, 653 S.W.2d 198 (Mo. 1983); *State v. Spica*, 389 S.W.2d 35 (Mo. 1965); *State v. Luton*, 795 S.W.2d 468 (Mo. App. E.D. 1990); *State v. Brown*, 584 S.W.2d 413 (Mo. App. E.D. 1979). Although the general rule is that evidence of other crimes is not admissible, Missouri has a well-recognized exception that a tape recording of a conversation of the defendant mentioning that he committed other crimes is admissible if the reference to the other crimes is relevant to show the defendant's intent. *Id.* If the references to the other crimes are not considered relevant and can be deleted without destroying the meaning of the conversation, the portions of the tape referring to the other crimes may be deleted. *State v. Brown*, 584 S.W.2d 413, 415 (Mo. App. E.D. 1979).

Keep in mind that if you are going to need to make an edited version of the recording, you should do so far in advance of the trial and should discuss the edit during the pretrial conference. The editing should not wait until the last minute. Advance preparation is crucial.

5. TRANSCRIPTS OF RECORDINGS

A. It is permissible for the trial court to provide the jury with a transcript of a recorded conversation for them to refer to as they listen to the tape. *State v. Wahby*, 75
S.W.2d 147, 154 (Mo. banc 1989); *State v. Ianniello*, 671 S.W.2d 298, 301 (Mo. App. W.D. 1984). The foundation is laid by showing that a party to the conversation has compared the transcript to the recording and that it is as accurate as the witness can make it. This applies to both audio recordings and video recordings.

Q: Detective Smith, you just testified that you interviewed the defendant at the police station. Was that interview recorded?

A: Yes.

- Q: I'm showing you now State's Exhibit 1. Please identify it for the jury.
- A: That's the recording of my interview with the defendant.
- Q: Have you listened to this recording?

A: Yes.

Q: Is it a fair and accurate recording of your conversation with the defendant?

A: It is.

- Q: I'm showing you now State's Exhibit 2. Please identify it for the jury.
- A: That's a transcript of my interview with the defendant.
- Q: Have you compared that transcript to the recording itself?
- A: Yes.

Q: Is that transcript a fair and accurate transcript of the conversation on the recording?

- A: Yes.
- Q: Is it as accurate as you could make it?
- A: Yes.
- Q: Your Honor, I offer State's Exhibits 1 and 2.
- JUDGE: Admitted.

Q: Your Honor, I request permission to play State's Exhibit 1 for the jury and to pass to each juror a copy of the transcript to read along with as the recording is played.

JUDGE (READING MAI-CR 4TH 410.19): State's Exhibit 1, the audio recording of the alleged conversation between Detective Smith and the defendant has been admitted into evidence and will now be played for you. A transcript of the audio recording is being provided to you to read as you listen to the recording. This transcript is not evidence and is being provided to you to assist you in following the audio recording. You are instructed, however, that the audio recording, and not the transcript, is the evidence. Should there be any discrepancies between the audio recording and the transcript, you are to be guided by what you hear on the audio recording.

[Transcript is passed out and the recording is played.]

B. It is a good idea to prepare jury instruction 410.19 for the judge in advance and discuss it during the pretrial conference. Many judges are not aware of this instruction. When discussed in advance during the pretrial conference, this process goes smoothly at trial.

I have often prepared the first draft of a transcript myself. Sometimes I have an intern do it. After the first draft is done, I ask the witness to listen to the recording and compare it to the transcript and make any changes so that the final version of the transcript is as perfect as can be. I have the witness initial and date the transcript when that process is done, so he or she can properly identify it when on the witness stand.

6. CHAIN OF CUSTODY

A. Don't forget to think in advance about the chain of custody for each piece of evidence you plan to admit at trial if that item was something that required testing at the crime lab. This needs to be done in advance of trial because you will want to make sure you have endorsed the witnesses you will need. For example, in a drug case, where drugs were found in the defendant's car, in order to make a perfect chain of custody you would need the officer who found the drugs and the officer who received them from the first officer and subsequently took them to the crime lab. You should have the officer who delivered it to the lab talk about handing it to the clerk at the lab, or about putting it into the locked

evidence locker. Have the officer explain how the evidence locker works. You might also decide to call the clerk at the lab to talk about getting the drugs out of the locker and doing the processing of the package and getting it to the chemist for analysis. The clerk can also testify about how the evidence is safeguarded at the lab. On the stand, the chemist will look at the packaging and identify the bag as the one containing the white powder that the chemist tested. Along the way, have each witness testify that he or she did not alter the item in any way from the time it came into that witness' possession until he/she passed it along to the next person. That is a perfect chain of custody.

Missouri law does not require a perfect chain of custody, though. If the defense objects that you left someone out of the chain of custody and that the evidence should therefore not be admitted, be prepared to argue that your chain of custody only needs to be reasonably reliable, not perfect. Missouri follows the reasonable assurance standard. The State is only required to provide reasonable assurance that the original item was not exchanged, contaminated, or tampered with. A hand-to-hand accounting is not required, the evidence need not be continually watched, and the State need not exclude every possibility the evidence might have been disturbed. *State v. Clay*, 817 S.W. 2d 565 (Mo. App. E.D. 1991); *State v. Sammons*, 93 S.W.3d 808 (Mo. App. E.D. 2002); *State v. Grisby*, 811 S.W.2d 488 (Mo. App. E.D. 1991) (when seizing officer took evidence to lab, chemist testified about procedure for labeling, testing and safekeeping, and both testified they recognized the exhibit, the chain was sufficient for admission).

If the chain of custody is not perfect, bear in mind that even though the evidence got admitted, the defense might still have ammunition for closing argument to attack the weight of the evidence. It is best not to allow the defense lawyer any wiggle room to attack your chain of custody in closing argument, so put on a perfect chain most of the time.

Remember that when an item is identified positively at trial (such as a gun with a serial number or stolen television on which the officer put his initials) a chain of custody is not required because the item can be specifically identified.

7. CHEMIST IN DRUG CASE

A: Questions

- Q: Please state your name for the Court?
- Q: What is your occupation?
- A: I am a drug chemist with the St. Louis Metropolitan Police Department Crime Laboratory.
- Q: How long have you worked at the crime lab?

- Q: Is the laboratory accredited?
- Q: By whom?
- Q: What does it mean to be accredited?
- Q: What are your duties on a typical day at the crime lab?

A: My job is to analyze, compare, and identify physical evidence in drug chemistry. To prepare official laboratory reports, and present my findings in a court of law.

- Q: What experience and training to you have to analyze drugs?
- Q: Do you continue to receive training on a regular basis?
- Q: During the course of your employment, have you analyzed substances to determine whether the substance contains a controlled substance?
- Q: How many times?
- Q: Have you testified as an expert witness in courts of Missouri before?
- Q: Approximately how many times?
- Q: I'm showing you now State's Exhibit 1. Do you recognize this item?
- Q: How do you recognize it? [Seal with initials and date, lab #, etc.]
- Q: How did it come into your possession?

Q: Has it been continuously under the care, custody and control of your laboratory?

- A: Yes, except when obtained by the circuit attorney's office.
- Q: Remove the contents of the evidence bag. Do you recognize this? How?
- Q: Is it in the same condition now as when it was first received?

A: Yes, except for what was done during analysis. (E.G. Added zip lock bags, opened knotted plastic bags, removed an item and small amount of sample for analysis, etc. Will not specifically go into this unless asked.)

- Q: Did you analyze State's Exhibit 1 to see if it was (marijuana) (cocaine) (etc.)?
- Q: What test did you do?

A: Preliminary tests, confirmatory test. [The chemist will not go into specifics unless you ask for the specifics. Don't want to bore or confuse the jury!]

- Q: Are the tests you did accepted in the scientific community?
- Q: Based upon your testing, what were your conclusions as to State's Exhibit 1?
- A: The substance contained (cocaine) (etc.).
- Q: What was the weight?
- Q: How did you reach your conclusion?
- A: Tests...
- Q: Is (substance) a controlled substance?
- A: Yes, it is.
- Q: What does controlled substance mean?

A: A controlled substance is any substance that can affect behavior and is regulated by law with regard to possession and use.

Discussion:

I don't generally offer the lab report itself. Some prosecutors do. If you decide to

do so, ask if the chemist prepared a report, have the chemist identify the report, have the chemist testify that it is fair and accurate, and offer it into evidence.

If the defense is making a big deal out of chain of custody, you might want to spend more time on the chain of custody questions as explained elsewhere in this outline.

8. LAY OPINION AS TO INTOXICATION

A. QUESTIONS:

- Q: Did you see the defendant when he got out of the car?
- Q: Did you notice anything unusual about his actions?
- Q: Describe his speech?
- Q: Describe his appearance?
- Q: Did you notice any odors?
- Q: Describe the odor?
- Q: Have you been around intoxicated people in your lifetime?
- Q: How often?

Q: Do you have an opinion as to whether the defendant was intoxicated when he got out of the car?

- Q: What is that opinion?
- B: Discussion

In Missouri, a lay person who has been around drunks in the past can give an opinion that the person was intoxicated. Remember, though, that this may not be true in cases where you are trying to prove intoxication by drugs. Compare *State v. Friend*, 943 S.W. 2d 800 (Mo. App. W.D. 1997) (conviction reversed because the bizarre behavior of the defendant who drove on the wrong side of the road and spoke of being pursued by Mexicans out to kill him was abnormal but not necessarily caused by drug intoxication) with *State v. Owen*, 869 S.W.2d 310 (Mo. App. S.D. 1994) (DWI conviction affirmed based upon a lay opinion by a trooper that the defendant's driving ability was impaired by reason of the effects of alcohol or drugs because of his eyes and the odor and the way he was acting).

9. DRUG RECOGNITION EXPERTS

A Drug Recognition Expert (DRE) is a police officer who has been specifically trained to personally examine a person and give an opinion as to whether that person is under the influence of a drug. A DRE can also generally tell which category of drug is affecting the person, such as whether it is a depressant, stimulant or hallucinogen. When corroborated by a blood or urine test confirming

the presence of a drug in that person's system, courts across the country have uniformly held that this evidence supports a conviction for driving under the influence of drugs. See H. Morley Swingle, "Drug Recognition Experts in Missouri," 66 J. Mo. Bar 250 (2010).

A DRE will have been certified by the International Association of Chiefs of Police and completed standardized training. The DRE must be recertified every two years. *Id.*

After establishing the DRE's training and experience, the prosecutor should show that the DRE followed the protocol developed by the National Highway and Safety Administration. The 12-step process includes: (1) a breath test for alcohol; (2) the DRE's interview of the arresting officer; (3) a preliminary examination of the suspect and a taking of the pulse; (4) an eye examination, including, among other things, a horizontal gaze nystagmus test; (5) a motor skills evaluation through field sobriety tests; (6) testing of blood pressure, temperature and a second pulse reading; (7) pupil measurement and ingestion examination; (8) muscle rigidity examination; (9) an inspection for injection sites and a third pulse reading; (10) interrogation about drug use; (11) documentation of the drug use; (12) the drawing of blood and/or urine for toxicology tests to corroborate the DRE's opinion. *Id.*

Some courts have said that DRE testimony is not expert testimony but is admissible as the lay testimony of an informed person as to whether a person is under the influence of drugs. *Williams v. State*, 710 So. 2d 24 (Fla. Dist. Ct. App. 1998), n. 14. Others have held it to be expert testimony admissible under the *Frye* test. *State v. Baity*, 991 P.2d 1151 (Wash. 2000). Still others call it expert testimony admissible under the *Daubert* test. *State v. Sampson*, 6 P.3d 543 (Or. Ct. App. 2000).

10. BUSINESS RECORDS

- A. Questions:
 - Q: Please state your name?
 - Q: What is your occupation?
 - Q: What is your position at the business?
 - Q: Are you one of the custodians of records of the business?
 - Q: I show you now State's Exhibit 1. Please tell the jury what State's Exhibit 1 is?
 - Q: Are the records in State's Exhibit 1 kept in the normal course of business?
 - Q: Are the entries in State's Exhibit 1 made at or near the time the events occurred?
 - Q: Your Honor, I offer State's Exhibit 1.

B. Discussion

The Missouri business records statutes are Section 490.680 and 490.692, RSMo. Note that pursuant to 490.692, if you give the other side seven days advance notice, you may prove up business records with an affidavit from the custodian, rather than having the custodian come to court in person. Be aware that even though the affidavit procedure may get the records admitted, you may still need a witness to explain what the information means.

- 11. 911 CALLS
 - A. QUESTIONS
 - Q: State your name for the jury?
 - Q: What is your occupation?

Q: Do part of your duties include being the custodian of records of the 911 calls made in connection with an incident?

- Q: How does the department go about recording the calls?
- Q: Are they recorded at the time they occur?
- Q: Are they kept in the normal course of business?
- Q: How are they stored?

Q: Did you make a search to locate all of the 911 calls pertaining to this incident at (time) and (place)?

- Q: What did you do with the calls once you located them?
- Q: I show you now State's Exhibit 1. Please identify it for the record.
- Q: Your Honor, I offer State's Exhibit 1.
- B. Discussion

All 911 calls are not automatically admissible into evidence simply because they are business records. Some calls may contain inadmissible hearsay.

Many, if not all, 911 calls will come in as excited utterances made by someone who is calling 911 seeking help. *State v. Edwards*, 31 S.W.3d 73 (Mo. App. W.D. 2000).

Occasionally, a dispatcher will end up in a long conversation with the caller and during the course of the call the caller calms down and the conversation turns into an interrogation about what happened rather than merely a request for help. In that case, the questioning and the answers have become testimonial, and therefore inadmissible under the Confrontation Clause if the witness is not available to be cross-examined.

The most instructive case on this point is Davis v. Washington, 547 U.S. 813

(2006). In *Davs*, a domestic violence victim (who later became unavailable for trial) frantically called 911 seeking help. The first part of the call was admissible, including the part where she identified her attacker, because she was not identifying him for the purpose of prosecution, but rather for the purpose of seeking help and trying to get him picked up so she would no longer be in danger. The later part of the conversation, where she calmed down and went into greater detail as to what happened, was not admissible.

A 911 call can also be admitted under the present-sense-impression exception to the rule against hearsay. In *State v. Gyunasher*, 592 S.W.3d 836 (Mo. App. E.D. 2020), a young boy called 911 and told the dispatcher that his father was beating his mother and she was bleeding from the mouth. He said, "Please hurry!" He sounded panicked and scared. The court held the call admissible both as an excited utterance and as a present sense impression, which applies when: (1) the statement is made simultaneously or almost simultaneously with an occurrence; (2) the statement describes the occurrence; and (3) the declarant perceives the occurrence with his or her own senses.

12. FINGERPRINTS

When presenting fingerprint evidence, you are having the expert testify that she compared the latent prints lifted at the scene to known prints made by the defendant, and that they were made by the same person; or that it does not belong to the defendant, or is inconclusive, or of no value. Thus, you need to admit the known prints, the latent prints and the opinion testimony of the expert.

The known prints will typically come from fingerprint cards taken at the time of arrest or a card on file. When preparing for trial, you should locate the person who fingerprinted the defendant and make sure that person is endorsed as a witness. You need to check with the expert to find out where she got her known prints and make sure you can connect them to the defendant. Even if you cannot locate the person who took the prints, the fingerprint card itself can come in as a business record if you lay a sufficient business record foundation for it. *State v. Williams*, 797 S.W.2d 734 (Mo. App. W.D. 1990).

The latent prints will come from an evidence technician (or the expert herself) who lifted them from the piece of evidence (such as the trigger of the gun).

Once the fingerprint examiner is on the stand, the questioning goes:

- Q: Please state your name.
- Q: Are you employed?
- Q: By whom?
- Q: Is the laboratory accredited?

- Q: What does it mean to be accredited?
- Q: What is your specific role at the crime lab?
- Q: Describe the nature of your work.
- Q: Does your job include processing and/or comparing fingerprints?
- Q: How much of your work week is spent doing fingerprint work?
- Q: How long have you been involved in fingerprint comparison work?
- Q: What experience and training do you have in fingerprint comparison?
- Q: What steps, if any, do you take to stay current in the field?

Q: Have you testified in court in the past as an expert in the field of fingerprint comparison?

- Q: How many times?
- Q: How many comparisons have you conducted in your career?
- Q: What is a fingerprint?
- Q: Please explain to the jury how the science of fingerprints can be used to tell whether a particular person left a particular fingerprint.
- Q: Explain to the jury what a "latent" fingerprint is.
- Q: Explain to the jury what a "known" fingerprint is.
- Q: Does a fingerprint have different distinguishing characteristics?
- Q: Explain.
- Q: How is it possible for a person to leave fingerprints?
- Q: Does a person always leave fingerprints?
- Q: What factors determine whether a person will leave a fingerprint?
- Q: What types of surfaces are good or bad for leaving fingerprints?
- Q: What is a lift?
- Q: How do you go about comparing a latent fingerprint to a known fingerprint?
- Q: Are fingerprints unique and specific to each individual?
- Q: Could two different people have the same fingerprints?
- Q: Based upon your experience and training and study and your years of experience have you ever seen two people with the same fingerprint?

Q: I show you now State's Exhibit 1 (Latent Print) and ask you if you have had occasion to examine it? When? Where?

Q: I show you now State's Exhibit 2 (Rolled Ink Impression of Defendant) and ask if you have had occasion to examine it? When? Where?

Q: Did you arrive at a conclusion as to whether the same person made these fingerprints?

Q: Please state your conclusion.

Q: What factors led to your conclusion?

Q: Based upon your expertise in the field of fingerprint analysis, are the points of comparison conclusive as to the identity of the person who made the latent print?

Q: Based upon you experience and training, to a reasonable degree of scientific certainty, did the defendant whose known fingerprint is State's Exhibit 2 make the latent fingerprint on State's Exhibit 1?

Discussion:

Often you will simply use the testimony and exhibits described in the example above. Sometimes, however, especially if this evidence is a key part of your case, you might want to amplify it by having the expert help you prepare additional demonstrative exhibits for trial, such as blown up photographs of the latent and known prints, side-by-side, with the points of comparison shown with red circles or other markings. You may decide to use a mug shot that was taken of the defendant at the same time his fingerprints were taken in the old case, to further drive home the point that the known prints came from this guy.

13. PATHOLOGIST: AUTOPSY RESULTS

A. Questions:

- Q: Name
- Q: Occupation
- Q: What do your duties as a Medical Examiner include?
- Q: Educational Background
- Q: Work Experience
- Q: What is Pathology?
- Q: What is Forensic Pathology?
- Q: Are you licensed to practice medicine?
- Q: Are you Board Certified in Forensic Pathology?
- Q What does Board Certification mean?
- Q: Do you belong to any specialized medical or scientific groups or associations?
- Q: How long have you worked at the Medical Examiner's Office?
- Q: Does part of your job include doing autopsies to determine the cause and manner of death?
- Q: Approximately how many autopsies have you performed or assisted with?
- Q: What is an autopsy?
- Q: Did you perform an autopsy on [name of victim]?
- Q: When and where?
- Q: Describe what procedure you followed in doing the autopsy?
- Q: As to the external examination, what was the height and weight of the body of [victim]?
 - Q: What injuries, if any, did you notice on the exterior of the body?
 - Q: Did you do an internal examination of the body?
 - Q: What were the results of your internal examination?
 - [Gunshot wound case.]
- Q: Is it possible to determine whether a particular gunshot wound is an entrance wound or an exit wound?
 - Q: How can you tell?
 - Q: How many entrance wounds did you find on the body of [name of victim]?

Q: As to each gunshot wound, I'd like you to tell the jury the path of the bullet through the body. Let's start with the wound to the chest?

Q: [Repeat for each gunshot wound.]

Q: Doctor, I now show you a group of photographs marked State's Exhibits 10 through 18. Please look at them as a group and tell me if they are fair and accurate representations of things observed during the autopsy?

Q: Your Honor, I offer State's Exhibits 10 through 18.

Q: As to State's Exhibit 10. I'm putting it up on the big screen now. Please tell the jury what we are seeing?

[Repeat for each photo.]

Q: [Consider using a diagram of the wounds if it would be helpful to the jury.]

[If the distance of the gun to the victim might be important, add these questions.]

Q: As a medical examiner, can you tell the jury anything about the distance the gun was from the victim at the time any of these gunshots occurred?

[The doctor can talk about the fact that a contact wound, where the end of the barrel is pressed against the victim's skin. The doctor can also talk about powder and stippling around the wound (or on the victim's clothing) showing that the end of the barrel of the gun was within two feet of the body of the victim at the time the shot was fired. Lack of either shows that the end of the barrel of the gun was two feet or more away.]

Q: As a part of the autopsy, were toxicology tests done on the body of [name of victim]?

Q: What were the results of the toxicology testing?

Q: Based upon your experience and training, do you have an opinion, to a reasonable degree of medical certainty, as to the cause of death of [name of victim]?

Q: What is that opinion?

B. Discussion

The main thing you are calling the pathologist for is the cause of death. I like to save that question for the end, usually. Meet with the pathologist in advance and have the doctor help you decide which photographs will be most useful when explaining the injuries and cause of death to the jury. Consider having the Medical Examiner make a diagram if it would drive home a point in a particular case. The medical examiner can also discuss distance from the of the end of the gun barrel to the entrance wound as well as angles of the travel of the bullet through the body and what that means in regard to the position of the gun that was being fired to the body of the victim. The defense might object that the medical examiner is not a firearms expert, but case law supports allowing a medical examiner to give these opinions. *State v. Isom*, 660 S.W.2d 739 (Mo. App. E.D. 1983). As with lab reports, I never offer the autopsy report itself into evidence.

14. DEATH CERTIFICATE OR BIRTH CERTIFICATE

A. Questions:

Q: Your Honor, I offer into evidence State's Exhibit 14, the death certificate of [name of victim].

B. Discussion

Section 193.255.2, RSMo provides that a certified copy of a Missouri vital record (including a birth certificate or death certificate) "shall be prima facie evidence of the facts stated therein." *State v. Fakes*, 51 S.W.3d 24 (Mo. App. W.D. 2001). I will sometimes, but not always, include a death certificate in a homicide case as part of the evidence. In rural jurisdictions the Coroner can testify as to what it is and how it got filled out. In the City, the Medical Examiner will have a copy in his or her file but does not typically include it as part of the autopsy report. You may order a certified copy from the Missouri Department of Health. It is sometimes useful to use a birth certificate in a child sex case where the age of the victim is an element we are required to prove beyond a reasonable doubt.

- 15. DNA
 - A. Questions

BACKGROUND/INTRODUCTION:

- Q: Please state your name for the Court?
- Q: What is your educational background?
- Q: Where are you employed?
- Q: What is your occupation?
- Q: How long have you worked at the crime lab?
- Q: Is your laboratory accredited?
- Q: By whom?
- Q: What does it mean to be accredited?
- Q: What are your duties at the crime lab?

Q: What experience and training to you have in regard to forensic DNA analysis?

- Q: Do you continue to receive training on a regular basis?
- Q: Do you belong to any professional organizations?
- Q: What percentage of your work week is spent working with DNA?

Q: Do you have a ballpark idea of the number of times you have performed DNA analysis?

Q: Is DNA testing accepted as reliable in the scientific community?

Q: Have you testified as an expert witness in courts of Missouri before in regard to DNA testing?

Q: Approximately how many times?

DNA:

Q: What is DNA?

[DNA is basically the chemical blueprint for your body. You get half from your mom and half from your dad. Everyone's DNA is unique except for identical twins.]

Q: Where is DNA found in the human body?

[DNA is found in all nucleated cells. Skin, hair, blood, saliva, seminal fluid.] Q: Please tell the jury how the science of DNA can help determine whether or not a person [touched something] [had sexual activity with another person]. [We compare evidence from a crime scene or evidence obtained on the victim of a crime with a known individual to see whether or not that person could be the source of the DNA.]

Q: How do you develop a DNA profile?

Q: How do you make a comparison?

Q: What is a reference standard and why is it important?

Q: How do you know that it is reliable?

TESTING:

Q: How does one go about comparing DNA left at a scene or on an item to a known sample?

Q: How does one go about taking a known sample of a person's DNA?

Q: Describe for us how a buccal swab is taken?

Q: I'm showing you now State's Exhibit 10. What is it? [The buccal swab supplied to the crime lab by Officer Smith purporting to have been taken from this defendant.]

Q: Were you able to develop a profile of the person who gave this buccal swab?

Q: I am now showing you State's Exhibit 12. What is it? [That is the swab taken from the trigger of the gun marked as Exhibit 20.]

Q: Did you do DNA analysis on State's Exhibit 12?

Q: What was the result?

Q: What does that mean?

Q: Did you calculate the statistics on the DNA profile found on State's Exhibit 12?

Q: How does that profile compare to the known sample taken from this defendant and marked as Exhibit 10? [No differences.]

Q: So how uncommon is this profile? [E.G. Only 1 in 400 quadrillion people would have that profile.]

Q: Approximately how many people are currently on the planet? [About 7 billion.]

Q: Would you take a moment to write out on this pad the number 400 quadrillion, using the proper amount of zeros?

Q: Now would you write out 7 billion?

Q: What is the significance of these statistics?

Q: Does a person always leave a measurable amount of DNA on something when he touches it? [No. In fact, more often than not a measurable amount of DNA is NOT left.]

Q: Why not?

Q: What factors determine whether or not a person leaves DNA on something?

B. Discussion

The detail into which you go with the DNA testimony can depend upon how important the testimony is to your case. Most jurors these days understand the concept of DNA and are prepared to trust it so you can usually have your expert run through the foundation and get right to the statistics. The expert might bore the jury with detailed a detailed discussion of DNA markers and other scientific jargon, so you might save that boring part for the defense lawyer to play with. I find it much more jury-friendly to skip the boring parts and hurry to the part where the expert writes out the statistic and I then ask about the number of people on the planet. It sets up your closing argument: "The expert told you that only 1 in 400 quadrillion people would be expected to have that profile of the DNA on the trigger. The defendant does. And there are only 7 billion people on the planet. Science proves that the defendant's finger was on that trigger."

Note that often we will be calling the DNA expert solely to explain an absence of DNA -- that just because nobody's DNA was found on an item does not mean that the defendant did not touch it. Same thing with fingerprints.

16. FIREARMS (QUALIFYING EXPERT)

Qualification questions for Firearms Expert

- Q: Please state your name?
- Q: What is your occupation?
- Q: How long have you worked at the crime lab?
- Q: Is your lab accredited?
- Q: By whom?
- Q: What does it mean to be accredited?
- Q: What is your educational background?
- Q: What experience and training to you have in the area of Firearms?
- Q: What percentage of your work week is spent doing Firearms work?

- Q: Do you belong to any associations or societies pertaining to firearms analysis?
- Q: Have you testified in court before as a firearms expert?
- Q: Approximately how many times?

17. FIREARMS (GUN WORKS, I.E. READILY CAPABLE OF LETHAL USE)

Questions for Firearms Expert as to Gun Working

Q: Do part of your duties at the crime lab include testing a particular gun to see if it is in proper working order?

Q: How do you go about doing that?

Q: I'm showing you now State's Exhibit 1. Did you test this gun to see if it was in proper working order?

- Q: How do you know that is a gun you tested? [My mark is right here, etc.]
- Q: How did the gun come to be in your possession?
- Q: When did you test it?
- Q: Tell the jury the results of your testing?
- Q: Did this gun work?
- Q: Was it readily capable of lethal use?

18. FIREARMS (BULLET MATCHING TO GUN)

Questions for Firearms Expert as to bullet matching to gun

Q: Do part of your duties in the Firearms Section of the crime lab include testing a particular gun to see whether it fired a particular bullet?

Q: How is it possible to tell whether a particular gun fired a particular bullet? [We can tell from the striations on the bullet, which are made by the lands and grooves inside the barrel.]

Q: Can you always tell whether a bullet was fired from a particular gun?

Q: What factors determine whether you will be able to determine whether a bullet was fired from a particular gun?

Q: What sort of testing do you do when determining whether a particular bullet was fired from a particular gun?

Q: Is that testing accepted as reliable in the scientific community?

Q: I'm showing you now State's Exhibit 1. Please identify it for the record? [That is the gun I tested.]

Q: How do you know that is the gun you tested?

- Q: How did it come into your possession?
- Q: When did you test it?

Q: I'm showing you now State's Exhibit 2. Please identify it for the record? [That's the bullet recovered at autopsy and submitted to the lab.]

- Q: How do you know that is a bullet you tested?
- Q: How did it come into your possession?
- Q: When did you test it?

Q: Did you do an analysis as to whether the gun marked State's Exhibit 1 fired the bullet marked State's Exhibit 2?

Q: How did you go about doing that analysis?

[I test fired the gun and compared the striations on the bullet I got from test firing to the striations on the bullet collected by the evidence technician.]

- Q: What are striations?
- Q: What are lands and grooves inside a gun barrel?
- Q: How are lands and grooves made?
- Q: Are lands and grooves distinctive to a particular gun?
- Q: What are subclass categories?
- Q: What can subclass categories tell us here?
- Q: What are individual characteristics?
- Q: Are the individual characteristics unique to a particular gun?
- Q: I'm showing you now State's Exhibit 3. What is it?

[That the bullet I test fired from the gun marked State's Exhibit 1.]

Q: What is your conclusion, to a reasonable degree of scientific certainty, as to whether the gun marked State's Exhibit 1 fired the bullet marked State's Exhibit 2?

Q: What factors led you to that conclusion?

19. FIREARMS (SHELL CASINGS MATCHING TO GUN)

Questions for Firearms Expert as to ejected shell casings matching to gun Q: Do part of your duties in the Firearms Section of the crime lab include testing a particular gun to see whether it fired a particular shell casing?

Q: First of all, what is the difference between a revolver and a semiautomatic gun?

Q: How is it that a semiautomatic gun ejects shell casings as shots are being fired? [Note: In a particular case you might want to use a diagram of a bullet and a training video of a shell casing being ejected from a gun.]

Q: Where do spent shell casings typically come out of the gun?

Q: How far do they typically go?

Q: Do they bounce?

[Like a football, rather than a basketball.]

Q: How is it possible to tell whether a particular gun fired a particular ejected shell casing?

[We can tell from firing pin and breech face impressions on the shell casing.]

Q: Can you always tell whether a shell casing was ejected from a particular gun?

Q: What factors determine whether you will be able to determine whether a shell casing was fired from a particular gun?

Q: What sort of testing do you do when determining whether a particular shell casing was fired from a particular gun?

[I will test fire the gun and compare the ejected shell casing from my test fire to the shell casing submitted to the lab by the officer who collected it.]

Q: Is that testing accepted as reliable in the scientific community?

Q: I'm showing you now State's Exhibit 1. Please identify it for the record?

[That is the gun I tested.]

- Q: How do you know that is the gun you tested?
- Q: How did it come into your possession?
- Q: When did you test it?

Q: I'm showing you now State's Exhibit 2. Please identify it for the record? [That's the shell casing recovered at the scene of the crime and submitted to the lab.]

Q: How do you know that is a shell casing you tested?

Q: How did it come into your possession?

Q: When did you test it?

Q: Did you do an analysis as to whether the gun marked State's Exhibit 1 ejected the shell casing marked State's Exhibit 2?

Q: How did you go about doing that analysis?

[Did the test firing and comparison of the breech face impressions and firing pin impressions on each of the shell casings.]

Q: I'm showing you State's Exhibit 3. What is it?

[That's the shell casing from my test firing of State's Exhibit 1.]

Q: What is your conclusion, to a reasonable degree of scientific certainty, as to whether the gun marked State's Exhibit 1 ejected the shell casing marked State's Exhibit 2?

Q: What factors led you to that conclusion?

20. FIREARMS (SHELL CASINGS EJECTED FROM SAME GUN)

Discussion:

This would be similar to the questioning used when matching a shell casing to a gun except that it is matching it to another ejected shell casing.

21. FIREARMS (BULLETS FIRED FROM SAME GUN)

Discussion:

This would be similar to the questioning used when matching a bullet to a gun except that it is matching it to another bullet.

22. FIREARMS (DISTANCE DETERMINATION)

Discussion:

The Firearms Expert, like the medical examiner, can talk about the fact that when a gun is fired, power and stippling (tiny burnt pieces) come out of the end of the barrel of the gun. They are lightweight, so they don't go far, typically not more

than three feet. Thus, if no powder or stippling was near the wound, the barrel of the gun was more than two feet away at the time the shot was fired. When you have a wound (or clothing) that has stippling and powder on it, the examiner, if asked, can do further testing for distance determination. This will not typically be done without a specific request from the prosecutor so be alert to ask for it if you think it could be helpful to your case.

If a shotgun was used, the expert will be able to be more definitive as to the distance. This is because the shotgun fires multiple projectiles at once. As they travel, they spread apart into a wider pattern. The Firearms Examiner will test fire the shotgun from several distances until he finds a range that made a similar pattern to the circumference of the pattern left on the victim's body. Thus, if the shotgun is recovered, the expert will be able to give a pretty precise opinion as to the distance from which it was fired at the victim.

At the present time, the St. Louis Crime Lab does not do distance testing. If it is requested, they will have the Missouri Highway Patrol Crime Lab perform it.

23. FIREARMS – VISUAL AIDS

Discussion:

Dave Menendez, the head of the Firearms section at the St. Louis Metropolitan Police Department Crime Laboratory, suggests that prosecutors should give more thought to using more visual aids during testimony from a firearms examiner. These can include things like: (1) a diagram of a bullet; (2) a plastic replica of the inside of a gun barrel showing lands and grooves; (3) an illustrated cartoon video showing what happens inside a semi-automatic gun as a bullet is being fired and a cartridge is being ejected; (4) actual side-by-side photographs taken under the microscope at the lab showing how the striations on the one bullet match to the other; (5) photos showing guns being fired to see how stippling comes out and immediately drops, or how gunshot residue occurs; (6) distance determination targets showing the presence of stippling and powder from the gun being fired at various distances for comparison to the stippling and powder around the wound on the victim's body. These are exhibits you will need to develop in advance and supply to the defense via discovery.

24. FIREARMS (GUNSHOT RESIDUE)

- Q: Please state your occupation for the jury?
- Q: What educational background do you have?
- Q: How long have you worked at the crime lab?
- Q: What specific training to you have in regard to gunshot residue testing?
- Q: How often do you do gunshot residue testing?

Q: Do you keep up on new developments in the field of gunshot residue testing?

Q: How do you keep up to date?

Q: When we talk about gunshot residue, what are we talking about?

Q: I'm showing you now a photograph marked State's Exhibit 1. What is this?

[That's a photograph showing a cloud of smoke coming out around the hand of a person firing a gun.]

Q: Is State's Exhibit 1 fair and accurate to help the jury understand how gunshot residue comes out of a gun?

Q: Your Honor, I offer State's Exhibit 1.

Q: We're showing State's Exhibit 1 to the jury now. Tell them what they are seeing? [Cloud of smoke near the hand of the shooter.]

Q: What chemicals are in gunshot residue?

Q: Is it common or uncommon for all three of these chemicals to be found in one place?

Q: Would you tell the jury how the science of gunshot residue works?

Q: Is the science of gunshot residue accepted in the scientific community?

Q: How does an officer go about testing a person's hands to see whether gunshot residue is on the hands?

Q: Are there any rules about how soon this checking of the hands must take place? [We require it to be done within six hours or we won't test it.]

Q: Why do you have the rule that the collection from the hands must be done within six hours? [Because gunshot is so fragile it rubs off quickly.]\

Q: Just because a person does not have gunshot residue on his hands, does that mean he did not fire a gun? [No, because it rubs off so easily.]

Q: Can you also test clothing of a suspect to see whether gunshot residue is on that clothing?

Q: How do you go about testing clothing for gunshot residue?

Q: I'm showing you now State's Exhibit 1. Please tell the jury what it is?

[Gunshot residue kit collected by the officer and sent to the lab.]

Q: Did you test State's Exhibit 1?

Q: How do you know you tested State's Exhibit 1?

Q: How did State's Exhibit 1 come into your possession?

Q: What specific tests did you perform on State's Exhibit 1?

Q: Based upon your testing, to a scientific degree of certainty, did you form any opinions as to whether State's Exhibit 1 contained gunshot residue?

Q: What is that opinion?

Q: What factors led you to that opinion?

Q: When you say that gunshot residue was found in State's Exhibit 1, what does that mean as to whether the defendant fired a gun or handled a recently-fired gun r was in the proximity of a gun being fired?

Discussion:

The questions used when laying the foundation for the expert's opinion that

gunshot residue was on the hands of the suspect can be modified slightly to ask whether gunshot residue was found on the suspect's clothing.

At the present time, the local crime lab in St. Louis does not do gunshot residue testing. Instead, they send the samples to the Missouri Highway Patrol Crime Lab for testing and testifying.

25. DIAGRAM OR MAP

Crime Scene Diagram Questions to Officer who was at the scene:

Q: Officer Smith, did you prepare a diagram of the crime scene?

- Q: When?
- Q: How did you go about preparing it?

Q: I'm showing you now State's Exhibit 1. What is it? [That's the diagram I prepared.]

Q: Does State's Exhibit 1 fairly and accurately portray where various items were located at the crime scene?

Q: Your Honor, I offer State's Exhibit 1.

Q: Officer Smith, I'm putting State's Exhibit 1 up on the big screen. Would you explain to the jury what we are seeing here?

Q: Your Honor, may the witness move closer to the diagram so he can point out to the jury where each item was located? [Have officer point out significant things shown on the diagram.]

Q: Thank you, Officer Smith. You may resume your seat on the witness stand.

26. PHOTOCOPY (VERSUS BEST EVIDENCE RULE)

Discussion:

The "best evidence rule" requires the lawyer to offer into evidence the original of a writing, rather than a copy (i.e. secondary evidence), when the contents of that writing are at issue. In Missouri, the best evidence rule applies not just to writings, but also to photographs, x-rays, videotapes and motion pictures. *K.B.C. v. Juvenile Officer*, 273 S.W.3d 76 (Mo. App. W.D. 2008). Thus, the prosecutor should be prepared to offer the original of items such as advice of rights waiver forms, lineup viewing forms, written confessions, etc. Many lawyers will not bother making a best evidence objection, but the safer practice is not to give them the opportunity to do so.

The best evidence rule does not exclude evidence based upon personal knowledge, even if documents or other writings would provide the same information. *State v. Galazin*, 58 S.W.3d 500 (Mo banc 2001); *State v. Teague*, 64 S.W.3d 917 (Mo. App. S.D. 2002).

"The proponent can usually defeat a best evidence rule objection. The proponent can do so because . . . the judge can overrule the objection on the following grounds: The article involved is not a 'writing'; the writing's terms are not 'in issue,' the writing's terms are only collaterally 'in issue'; the evidence offered is an 'original'; the evidence offered is a duplicate; or there is an adequate cause for the nonproduction of the originals and the proponent is offering an admissible type of secondary evidence." John C. O'Brien, Thomas Lee Steward, Edward J. Imwinkelried, *Missouri Evidentiary Foundations, Fourth Edition* (2018), Chap. 8.

Whereas under Federal Rule of Evidence 1001(e), a photocopy is considered admissible in spite of a best evidence objection, Missouri still follows the common law approach that a photocopy is not admissible upon a best evidence objection unless the copy was made as a duplicate original from the same impression as the original. *Ousley v. Casada*, 985 S.W.2d 757 (Mo. banc 1999) (photocopy of document as secondary evidence is admissible only upon foundation showing that: (1) the original is unavailable; (2) the unavailability is not the fault of the proponent; and (3) the secondary evidence is trustworthy).

Certain statutes specifically provide that photocopies are equally admissible as originals. Examples include: Section 302.312 (Department of Revenue files and Department of Health records); Section 490.680 (business records).

27. PRIOR INCONSISTENT STATEMENT

Discussion:

A prosecutor uses prior inconsistent statements in two different situations. One is where a witness called by the defense says something different from what the witness said in a prior statement and you are going to cross-examine that witness with the prior inconsistent statement. The other is where your own witness has become uncooperative or forgetful and you must impeach your own witness with the prior inconsistent statement and offer it as substantive evidence under Section 491.074, RSMo.

When cross-examining a witness with a prior inconsistent statement, you are required to remind the witness about the time and place of the prior statement and then ask whether the witness made that statement. The prior statement might be a verbal statement, a written statement, a recorded statement or prior sworn testimony (such as at a deposition). The questioning with an unsworn prior statement would go like this:

Q: Mr. Smith, do you recall talking with [person who took statement] on [time, date and place]?

Q: The answers/statements you gave to [person] were all true, were they not?

Q: Do you recall in your statement [either oral or in writing or recorded] that [person] asked you the following question? OR: Do you recall telling [person] the following words [State what the witness wrote or said.]?

Q: [If the witness claims not to recall, conclude by saying: So you don't recall saying [repeat again what the person said. You will later put on the person to whom the statement was made to show that it was, in fact, made.]

Q: [If the witness admits making the prior statement.] Mr. Smith, isn't your response today different than what it was on [time, date and place]?

Q: You would admit that when you gave that prior statement and said [repeat it again] the events were closer in time than they are now?

Q: [Some lawyers suggest asking the next question, but you might not want to, since it gives the witness a chance to repeat the lie.] Which statement is true? The one you are giving the jury today or the one you gave on [previous date]?

If the prior statement was under oath, the questioning might go like this:

Q: Do you recall giving sworn testimony at a deposition at the Public Defender's Office on March 1 of this year? [Or similar question by which the witness is reminded of the taking of the deposition.]

- Q: The defense lawyer, Ms. Blake, was present, correct?
- Q: You were sworn to tell the truth?
- Q: A court reporter was present?
- Q: You were asked questions and gave sworn answers?
- Q: You told the truth during your answers to the questions?
- Q: Isn't it true you were asked [specify what was asked]?
- Q: Isn't it true your answer was [specify what witness said]?

A prosecutor may use a prior inconsistent statement for substantive evidence of guilt. For example, if a witness says she was a witness to a murder but at trial she says she does not remember anything from the night of the murder, you may offer her prior inconsistent statement into evidence. You may either get it in through her, or you may simply stop after asking if she gave the prior statement and then call the officer to whom she gave the statement. It usually flows more smoothly to prove the prior statement using the officer since the witness is probably hostile to you (or at least uncooperative) at that point.

The questioning of the witness, after she has just said either that she doesn't remember what happened or has just given some completely different story, would go like this:

Q: Ms. Smith, do you remember talking to Detective Funk at the police station right after this shooting happened on the night of April 21, 2018? [If the interview was recorded, you might be prepared with a still photo of the interview, and if she says she doesn't remember you can say, "Isn't this a photograph of you being

interviewed by Detective Funk that night?" Likewise, if the prior statement was in writing, show it to the witness.]

- Q: Do you recall Detective Funk asking you [specific question]?
- Q: Do you recall telling Detective Funk [specific statement]?

NOTE: Some lawyers like to play the excerpt of the recorded statement at that point while the witness is on the stand. That's one way to do it. I prefer to later put the officer on the stand and play the recording at that time. It seems to go smoother that way.

Any prior inconsistent statements of the prosecutors' witnesses are admissible under Section 491.074, RSMo, which states that prior inconsistent statements <u>shall</u> <u>be</u> admissible as substantive evidence. The statute reads as follows:

491.074. Prior inconsistent statement may be admissible in criminal cases as substantive evidence. – Notwithstanding any other provisions of law to the contrary, a prior inconsistent statement of any witness testifying in the trial of a criminal offense shall be received as substantive evidence, and the party offering the prior inconsistent statement may argue the truth of such statement.

The constitutionality of this statute has been upheld by the Missouri Supreme Court. *State v. Blankenship*, 830 S.W.2d 1 (Mo. 1992); *State v. Bowman*, 741 S.W.2d 10 (Mo. Banc 1987), *cert. denied* 488 U.S. 829 (1988). Both cases hold that the statute does not violate the confrontation clause of the Constitution.

FOUNDATION REQUIREMENTS

The party offering the prior inconsistent statement must show only that the prior statement was made and that it is inconsistent with the trial testimony. The declarant should be asked, when she is on the stand, if she made the statement and if it is true. Bowman, 741 S.W.2d at 14; State v. State v. McClanahan, 202 S.W.3d 64 (Mo. App. S.D. 2006); State v. Chandler, 860 S.W.2d 823 (Mo. App. E.D. 1993). It is no longer necessary for the party to elicit the prior inconsistent statement to show surprise or hostility. Blankenship, 830 S.W.2d at 9; Bowman, 741 S.W.2d at 13. It is not necessary for the declarant to admit the truth of the statement or even that she made the prior statement as long as the fact she made the prior statement is established by other evidence. State v. Belk, 759 S.W.2d 257 (Mo. App. E.D. 1988); Blankenship, at 12 ("[E]ven though a witness denied making the prior statement, a videotaped prior statement is sufficiently reliable to justify its admission."). Whether an inconsistency exists between trial testimony and statements made prior to trial "is to be determined by the whole impression and effect of what has been said and done." Blankenship, 830 S.W.2d at 9. These prior inconsistent statements are admissible even when the declarant disaffirms the statements under oath. State v. Garner, 14 S.W.3d 67 (Mo. App. E.D. 1999).

A witness testifying that she does not remember an event is considered inconsistent with a prior statement wherein she did remember the event. Blankenship, at 10-11; State v. Lyons, 951 S.W.2d 584, 594 (Mo. banc 1997); see also State v. Sykes, 480 S.W.3d 461 (Mo. App. S.D. 2016). Likewise, a witness testifying that she does not remember giving the prior statement is inconsistent with the prior statement. State v. Belk, 759 S.W.2d 257, 259 (Mo. App. E.D. 1988) ("We also do not believe it is necessary for the declarant, himself, to admit he made the statements if from his testimony and other evidence the fact that such statements are made is established. Here Wallace did not state that he did not make the statements, he said only that he could not recall making them and if he did he lied."); State v. Archuleta, 955 S.W.2d 12 (Mo. App. W.D. 1997) ("Ms. Calcote testified on direct that she did not recall the events of October 2, 1996, including her statements to Officer Keisling. Her lack of memory of the events of October 2, 1996, established the requisite foundation for the admission of her prior inconsistent statements to Officer Keisling."); State v. Matchett, 69 S.W.3d 493 (Mo. App. S.D. 2001) ("The State asked B.Z. if she could remember what statements she made to Dep. Olmstead and Nurse Hancik. B.Z. stated that she could not. A proper foundation was laid to introduce the testimony of Dep. Olmstead and Nurse Hancik regarding the statements B.Z. made to them."). As the Missouri Supreme Court stated in May of 2009: "If a witness claims not to remember if a prior statement was or was not made, a proper foundation has been laid to admit the prior inconsistent statement." State v. Reed, 282 S.W.3d 835, 838 (Mo. banc 2009).

28. TELEPHONE RECORDS

Discussion:

Telephone records will typically come in as business records, using a typical business records affidavit under Section 490.680.

Telephone records are often used to show calls made between particular phone numbers. The prosecutor must be prepared to show what phone number checks to a specific person. A witness may testify to his own phone number. The defendant may have confessed to his phone number during his questioning or booking. The defendant's phone may have been on him at the time of his arrest and a forensic search of it may have revealed that it is his phone. Upon a specific request to the phone company, the phone company can provide information as to the person to whom the phone number is listed for billing purposes.

Telephone records are also useful in this day and age to show cell tower location information in regard to a defendant's location (rather, the location of his cell phone at a particular time). For more information about cell tower location

information, see the applicable section below.

29. TEXT MESSAGES

Discussion:

The foundation for authentication for a text message may be laid in different ways. One way is for a screen shot to be taken of the text message. The victim can take the stand and testify that he received a particular text message, and can identify a screenshot that he (or an officer) took of that particular message, and can thus identify it by personal knowledge.

EXAMPLE:

- Q: I'm handing you what has been marked as Exhibit 52. What is it?
- A: It is a picture of a text message.
- Q: Do you recognize it?
- A: Yes.
- Q: How?
- A: It is a screen shot from my phone, which I took and gave to the detective.
- Q: When did you take this screen shot?
- A: It was the same day my baby went to the hospital.
- Q: I'm going to ask you a few questions about how this photo came to be.

A: Okay.

Q: First, you said that it was a picture of a text message. What is a text message?

A: It's a way of communicating with someone on the phone without talking out loud. You type a message and hit send and the person gets the message on their phone.

Q: How long have you been familiar with text messaging?

- A: Since I got my first phone about ten years ago.
- Q: Have you ever text messaged with the Defendant?
- A: Lots of times.

Q: When you texted him, how did you know it was the defendant you were texting?

- A: Because his phone number is in my contact list and that's what I use.
- Q: What is a contact list?
- A: It is my phone book, kept in my cell phone.
- Q: You have the defendant's number in there?
- A: Yes.
- Q: How did you get his number?
- A: He gave it to me.

Q: You mentioned that you have texted with him before. Describe how you would create a text to him? Step by step.

A: It depends. The first time, I would have to go into my text message

application and type in either his name or his phone number into the recipient field. Then I would type the body of the message and hit send. If I'd previously established a text message then I would just need to open up the last conversation we had and type in a message and hit send. The phone keeps the previous conversations.

Q: You mentioned the phrase "taking a screenshot." What does that mean?

A: Depending on the type of phone, you can hit a button and take a photo of whatever is on your screen.

Q: Okay. So now I want to talk to you about this particular message. Did you get a text message from the defendant about a crying baby?

A: Yes.

Q: How did you know it was from the defendant?

A: My phone popped up a text message from "Mikey Boy" which is what I call Mike.

Q: You have previously received messages from "Mikey Boy?"

A: Yes.

Q: Did you have any reason to believe this particular message was from someone other than the Defendant?

A: No, especially because of the content of the message.

Q: Why do you say that?

A: Because I knew that on that day he was home alone with his son.

Q: When that message came in, what did you do?

A: I replied to it.

Q: Then what?

A: Mike replied back.

Q: What made you take a screen shot photo of it?

A: I had heard that the baby was in the hospital and something inside me just said to take it.

Q: Did you follow the same steps that you described before for taking the screen shot?

A: Yes.

Q: Do you consider that to be a reliable method of capturing what is on the screen?

A: Yes.

Q: So with respect to State's Exhibit 52, does that photo fairly and accurately depict the test message conversation between you and the defendant that day? A: Yes.

Q: Your Honor, I offer State's Exhibit 52 into evidence.

DEFENSE LAWYER: I object! Relevance! Lack of authentication! Hearsay! JUDGE: Your response?

PROSECUTOR: Your Honor, the Defendant is charged with causing the death of his son by shaking him, causing brain injuries which caused his death. The State's theory is that the Defendant was home alone with the child and when the child wouldn't stop crying the defendant lost his temper and shook him. The text

message from the Defendant to his friend tends to prove that the child was crying and that the Defendant became frustrated by it. As for authentication, the witness has first-hand knowledge of this photo and its contents, and he described with specificity how this photo came to be. It is not hearsay because it is an admission of a party-opponent.

NOTE: This example comes from a handout prepared by Sasha Rutizer, Senior Attorney with the National District Attorney's Association.

NOTE: You can also confirm the identity of the person to whom the phone number checks through a subpoena for that information from the applicable phone company. It is also possible that the defendant's phone was on him when he was arrested and that the phone number can be obtained from the phone itself by a search of the phone.

MISSOURI LAW: *State v. Harris*, 358 S.W.3d 172, 175 (Mo. App. E.D. 2011). "The proponent of text messages must present some proof that the messages were actually authored by the person who allegedly sent them. This should not be an unduly burdensome requirement and can be satisfied by circumstantial evidence. Proof could be in the form of an admission by the author that he actually sent them, or simply an admission by the author that the number from which the message was received is his number and that he has control of that phone. Such proof could even be established by the person receiving the message testifying that he regularly receives text messages from the author from this number, or something distinctive about the text message indicating the author wrote it, such as a personalized signature. Once the evidence is admitted, it is still the province of the jury to determine its weight." *See also State v. Hein*, 553 S.W.3d 893 (Mo. App. E.D. 2018).

30. INSTANT MESSAGE/E-MAIL

"With the explosion of electronic mail delivery systems, such as e-mail, text-messaging, Google chat and instant messaging, many people are now able to conduct as much business with their smart phone siting at a café as they did dictating letters (or, God forbid, making a phone call!) at the office. For many, e-mails and text messaging are as much a part of everyday life as making a phone call. Most jurors and courts will be intimately familiar with this technology, and accept its use as the way that business, personal and otherwise, is conducted." Thomas Lee Stewart, John C. O'Brien, Edward J. Imwinkelried, *Missouri Evidentiary Foundations, Fourth Edition* (2018), page 131.

E-mails can be faked, so a judge might insist on a foundation being laid to authenticate an e-mail message. The discussion in *State v. Harris*, 358 S.W.3d 172, 175 (Mo. App. E.D. 2011) above, relating to authenticating text messages,

also applies to e-mails.

The following is another example from Sasha Rutizer, Senior Attorney with the National District Attorney's Association.

EXAMPLE. Your detective has been hanging out in a chatroom called "Teachum Yung." This room if for the purchasing of children for sexual acts by adult men. The detective is posing as the mother of an 8-year-old girl who is offering the child in exchange for money. Your detective (acting as the mother) is contacted by the username Daddyof4. who is interested in meeting Mom and her 8-year-old daughter, Tina. They talk for a while on instant message and then the detective suggests they move to e-mail for specifics as to when and where to meet. An e-mail is received into an account created by the detective. The sender was Patsfan4@yahoo.com. The content of the e-mail is "okay, tell me how you want to do this." The detective replies, "Union Station, this Saturday, 7 p.m. at the Amtrak. Wear a Hawaiian shirt and bring a slushi for Tina. \$1K." The detective receives a one-word reply: "Confirmed." The defendant shows up at the Amtrak station wearing a Hawaiian shirt and carrying a slushi. He is found to have \$1,200 in cash on him. At trial the defense is mistaken identity.

Admitting the E-Mail:

Keeping in mind the general rule of Federal Rule of Evidence 901 ["To satisfy the requirements 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... For a telephone conversation, evidence that a call was made to the number assigned at the time to: (A) a particular person, if circumstances, including self-identification, show the person answering was the one called."] we need to provide the judge with as much confirmatory information as possible. This is best done in limine, to avoid surprises. There are a number of ways an e-mail can be authenticated. The easiest is to use either "The Reply Doctrine" or "Action Consistent With Message Doctrine."

NOTE: "The Reply Letter Doctrine" is explained in *Missouri Evidentiary Foundations, Fourth Edition* (2018), Section 4.03[4]: "The courts assume that the mails are reliable. Given that assumption, the courts have developed the so-called reply letter doctrine. Suppose the witness sent a letter to a certain person. In the due course of mail, the witness receives a letter. The letter purports to be signed by the person to whom the witness sent the first letter, and the second letter refers to or at least purports to respond to the first letter. The courts generally hold that this fact pattern creates a sufficient circumstantial inference that the second letter is authentic."

NOTE: The "Subsequent Action Consistent with the Message Doctrine" is

explained in *Missouri Evidentiary Foundations, Fourth Edition* (2018), Section 4.04[5][b]: "Suppose that after the receipt of the electronic message, the purported sender takes action consistent with the content of the message. In a business context, the action might be the delivery of merchandise mentioned in the message. That conduct could provide circumstantial authentication of the source of the message. The common law recognized this method of authentication in the past, and the method is still valid in the e-mail setting."

NOTE: "Content" is another way to authenticate and thereby lay the foundation for an e-mail. As explained in *Missouri Evidentiary Foundations, Fourth Edition* (2018), Section 4.03[5][b]: "The proponent can authenticate a writing by showing that only the purported author was likely to know the information reflected in the message. That technique also extends to e-mail. There are at least three fact situations in which that technique would come into play. First, the substantive content of the message might be information only the sender was familiar with. Second, if the recipient used the reply feature to respond, the new message will include the sender's original message. Third, if the sender dispatched that message to only one person, its inclusion in the new message indicates that the new message originated with the original recipient."

EXAMPLE CONTINUED:

- Q: Detective, what job were you performing on November 10, 2013?
- A: I was undercover posing online as a mother willing to sell her child for sex.
- Q: How did you do that?

A: I went into a chat room, that based on my experience and training was known to draw men who were interested in purchasing children for sex.

Q: Can you tell us what a chatroom is?

A: A chatroom is web based technology that allows multiple users to communicate in real-time by typing. This is called "chatting." There are a number of Providers who host these types of rooms, and they often break down into categories of interest.

Q: What is the name of the chatroom you were on that day?

- A: Teahum Yung.
- Q: Did there come a time when you were contacted by another user?
- A: Yes.
- Q: When?

A: Within seconds of my joining the chatroom. I was Private Messaged by the User Name Daddyof4.

Q: What did Daddyof4 say?

DEFENSE: Objection! Calls for hearsay!

PROSECUTOR: Your Honor, it is non-hearsay as an admission by a party-opponent.

JUDGE: Counsel, you haven't linked the defendant to this User Name.

PROSECUTOR: Your Honor, we are using the Reply Letter Doctrine as well as Other Actions Consistent with the Message to authenticate the e-mail and link it to the Defendant.

JUDGE: I'll reserve my ruling until I hear more.

A: Daddyof4 aid he would e-mail m to go over the meetup details. Within moments I received an e-mail from <u>Patsfan4@yahoo.com</u> with the body of the e-mail stating, "Okay, tell me how you want to do this." I replied to that e-mail by stating "Union Station, this Saturday, 7 p.m. at the Amtrak. Wear a Hawaiian shirt and bring a slushi for Tina. \$1K." Within seconds I received a reply which said "Confirmed."

Q: What does 1K mean?

A: It means the cost would be one thousand dollars.

Q: When you received the final reply from <u>Patsfan4@yahoo.com</u> were the previous e-mails still a part of that message?

A: Yes, they were part of the "e-mail string" so they were contained in the final message.

Q: I'm handing you what has previously been marked as State's Exhibit 71 for I.D. What is it?

A: It is a printout of the e-mail string.

Q: How do you recognize it?

A: It contains my undercover e-mail address as well as <u>Patsfan4@yahoo.com</u> and the content of the e-mails is the same I just told you about.

Q: Is this document a fair and accurate depiction of your e-mail exchange with <u>Patsfan4@yahoo.com</u>?

A: Yes.

Q: Let's move to the meetup, then. Tell us about that.

A: We set up eight undercover officers throughout the Amtrak terminal in Union Station and waited for someone to show up wearing a Hawaiian shirt holding a slushi.

Q: Why did you choose those two articles?

A: We figured it being November in Washington, D.C., the chances of someone other than our target wearing a Hawaiian shirt and holding an icy slushy would be minimal.

Q: Did someone appear fitting that description?

A: Yes, at 6:58 p.m. a man appeared wearing a blue Hawaiian shirt and holding a slushi drink.

Q: What did you do?

A: We made contact and detained that person, and asked if we could search the little gym bag he was carrying.

Q: What did that person say?

- A: He said we could.
- Q: What did you find?
- A: We found \$1,200 in the bag as well as duct tape and a lighter.
- Q: Did you identify this man?

A: Yes, we opened his wallet and pulled out a driver's license. The picture was identical to the man in custody and stated his name was Joseph Smith.

Q: Your Honor, at this time I offer State's Exhibit 71 into evidence.

DEFENSE: Objection! Lack of authentication.

PROSECUTOR: Your Honor, we have established a litany of unique facts which support that the sender of the e-mail was the Defendant. Starting from the instant message content, which was immediately followed up with the e-mail string detailing where to show up, what time, what to be wearing, and what to have with him. Defendant showed up in the precise outfit, at the precise time, holding the precise slushi. The State has met its burden in authenticating these documents, and any argument to the contrary by the defense should go to the weight, not admissibility.

JUDGE: I agree. The objection is overruled and State's Exhibit 71 is admitted.

VERSION #2:

DEFENSE: Objection! Hearsay!

PROSECUTOR: Your Honor, it is not hearsay since it is an admission by a party-opponent.

JUDGE: Counsel, you haven't linked the defendant to this User Name. Objection sustained.

PROSECUTOR: Detective, you told us that you were private messaged by the User Name Daddyof4. What is a User Name?

A: It is a handle, so to speak. A user created a unique name that appears whenever he types in the chatroom. A nickname.

Q: Tell us what it means to be private messaged?

A? A chatroom is designed for a group of people to talk to each other, en masse. You can also directly connect with one person in the room for a more private conversation. That way, the entire group is not aware of what you are talking about.

Q: How many times have you used a chatroom or private message in your career?

- A: Hundreds if not thousands.
- Q: Have you been able to identify who the User Name Daddyof 4 belongs to?
- A: Yes, we have.
- Q: How?

A: What started off as a chatroom and then private message chat turned into an e-mail conversation. Once I was approached by Daddyof4 to purchase sex from my fictitious 8-year-old daughter and we discussed a few details, Daddyof4 suggested we move to e-mail for the final specifics.

Q: What happened?

A: I got an e-mail from <u>Patsfan4@yahoo.com</u> regarding the same content I was private messaging Daddyof4 with. At this point we believed we had probable cause to get the identifying information for <u>Patsfan4@yahoo.com</u> from Yahoo. Q: What happened next?

A: We sent a preservation letter to Yahoo, which basically commands them to maintain specific records for 90 days until we get a warrant.

Q: Then what?

A: During the interim, we applied for a search warrant requesting the subscriber information for <u>Patsfan4@yahoo.com</u>

Q: Did you get the warrant?

A: Yes.

Q: Then what happened?

A: We sent the warrant to Yahoo. They complied with it by sending us the subscriber information for <u>Patsfanr@yahoo.com</u>. This information included the name associated with the account, the payment method, as well as the billing address.

Q: What did you learn from this information?

A: We learned that <u>Patsfan4@yahoo.com</u> was registered to the Defendant, Joseph Smith.

Q: What did you do with that information?

A: Nothing at that time because we had the meetup set for the next day. We planned to execute the search warrant for his home and computers after the meetup. Q: I want to skip the meetup for a few moments so we can tie up a few loose ends.

Did there come a time when you executed the search warrant?

A: Yes.

Q: What happened?

A: Based upon subscriber information obtained from Yahoo, we went to the

Defendant's address and executed the search warrant and seized two computers.

Q: What did you do with the computers?

A: I conducted a forensic analysis on them and we located the e-mails sent from me to Daddyof4 in the computer found in this Defendant's home.

PROSECUTOR: Your Honor, I again offer State's Exhibit 71.

DEFENSE: Same objection. Hearsay.

PROSECUTOR: Admission by a party opponent. We've now linked it to this Defendant.

JUDGE: Objection overruled. State's Exhibit 71 is admitted.

31. SOCIAL MEDIA (FACEBOOK; MYSPACE; INSTAGRAM; TWITTER)

This is another example is from Sasha Rutizer, Senior Attorney with the National District Attorney's Association.

EXAMPLE:

You are prosecuting a case of sexual assault on a minor. The defense is that the young teen victim is lying for attention, that she has a crush on the older Defendant, but that he rebuffed her. The cross of the victim was effective. The Defendant's girlfriend has testified as an alibi witness that he was with her at a party at the time

the victim says they had sex. You talk with the victim during a break and she tells you there is a Facebook post from the Defendant right before he picked her up at her house. You go to your office, she logs into her Facebook account and scrolls to that night. Indeed, she was right. You print off the screen shot and go back into court. Your cross-examination of the Defendant's girlfriend gets her to commit to her testimony that the Defendant was with her in New York City at the time of the crime, and not with the victim in Washington, D.C. The defense rests, and you call the victim back to the stand in rebuttal.

- Q: Erica, do you use Facebook?
- A: Yes.
- Q: Do you think you can explain to us what Facebook is?

A: It's basically a way to stay in touch with friends online. You sign up for an account, give them some personal information and set up a user name. Most of the time it's your first and last name. Then you set up your profile, which tells people about you (where you live, what schools you went to, things you like, etc.). You can have a profile picture and a cover photo. Once you've set up your profile, your page is called your "wall." Think of it as a blank wall, where your friends can add things to your wall. You have to request somebody to be your "friend." Or if they request you, then you have to accept their friend request. Facebook friends can add comments to your wall: links to websites, videos, games, things like that. You can add things to other people's wall, or your own wall, which is called a "status update." For instance, I could update my status to show "in court testifying." Once I do that, I can tag people I'm with in my post. So I could tag you (if we were Facebook friends). I can also add where I am (like @local courthouse). Once I post, Facebook will independently (using GPS) include what city/town I posted from and the time and date. The time will only stay on for that day, then it will just say the date after that.

- Q: Erica, are you Facebook friends with the Defendant?
- A: Yes.
- Q: How did that happen?

A: We started chatting on World of Warcraft and then it progressed to using Facebook. He sent me a friend request, and I accepted it.

- Q: Since you were Facebook friends you could see what was on his wall?
- A: Yes.
- Q: And you could each post things on each other's wall?
- A: Yes.
- Q: What is his Facebook user name?
- A: His first and last name, David Adams.

Q: How did you know it was this Defendant you were friends with, and not someone pretending to be him?

A: We spent months talking via Facebook and he sent me pictures of him. Plus his profile picture is of him.

Q: As you sit here, do you have any reason to doubt that he person you were

talking to on Facebook with the name David Adams is the same person in court today?

A: No.

Q: You told us earlier that on the night you two had sex, the Defendant picked you up from your house and right before you had sex?

A: Yes, that's right.

Q: The defendant's girlfriend testified a few moments ago that the defendant was with her in New York City that night and therefore could not have been in D.C. with you.

A: That's not true. He posted a Facebook status right before he picked me up that night.

Q: I'm handing you State's Exhibit 26. What is it?

A: That's a printout of David's Facebook page that I just did for you in your office.

Q: How did you access it?

A: I signed on to my Facebook page in your office, clicked on David's page, and then scrolled down until I got to the posts he made that night.

Q: Do you believe Facebook is reliable when it comes to your location at the time of your post?

A: I do. In fact, I'm surprised how accurate it is sometimes.

Q: Your Honor, I offer State's Exhibit 26.

DEFENSE: Objection! Lack of authentication!

PROSECUTOR: Your Honor, the State has presented unique identifying characteristics that link the Defendant to this particular Facebook page, including photos of himself and prior communications with Erica. We have provided ample evidence to support that this page is what it purports to be.

JUDGE: I agree, and the defense opened the door to this with the alibi testimony. State's Exhibit 26 is admitted.

SOME CASE LAW ON SOCIAL MEDIA AS EVIDENCE:

Parker v. State, 85 A.3d 682 (Del. 2014). Appellant argued that social media evidence should be scrutinized more heavily than other types of evidence because of the ease of fabrication. The Delaware Supreme Court disagreed and adopted the *Tienda v. Texas* approach and rejected the *Griffin v. Maryland* approach. "We conclude that social media evidence should be subjected to the same authentication requirements as any other evidence... We are mindful of the concern that social media evidence for fully the existing Rules of Evidence provide an appropriate framework for determining admissibility."

Simmons v. Kentucky, 2013 WL 674721 (2013). "The burden . . . to authenticate a writing is slight and requires only a prima facie showing." Ordway v. Commonwealth, 352 S.W.3d 584 (Ky. 2011). The court takes a "content plus circumstances" approach to authentication (consistent with this outline). The

judge serves as gatekeeper, but it is up to the jury to determine how much if any value to place on the evidence.

Tienda v. Texas, 358 S.W.3d 633 (Tex. Crim. App. 2012). "Evidence may be authenticated in a number of ways, including by direct testimony from a witness with personal knowledge, by comparison with other authenticated evidence, or by circumstantial evidence." The court details methods of authentication, giving particular attention to a unique characteristics approach. "Printouts of e-mails, internet chat room dialogues, and cellular phone text messages have all been admitted into evidence when found to be sufficiently linked to the purported author so as to justify submission to the jury for its ultimate determination of authenticity. Such prima facie authentication has taken various forms. In some cases, the purported sender actually admitted to authorship, either in whole or in part, or was seen composing it. In others, the business records of an internet service provider or a cell phone company have shown that the message originated with the purported sender's personal computer or cell phone under circumstances in which it is reasonable to believe that only the purported sender would have had access to the computer or cell phone. Sometimes the communication has contained information that only the purported sender would be expected to know. Sometimes the purported sender has responded to an exchange of electronic communications in such a way as to indicate circumstantially that he was in fact the author of the particular communication, the authentication of which is in issue. And sometimes other circumstances, peculiar to the facts of the particular case, have sufficed to establish at least a prima facie showing of authentication."

But see Griffin v. Maryland, 419 Md. 343, 19 A.3d 415 (2011). Here the prosecution was seeking to impeach the defendant's girlfriend by using a printout purportedly from her Myspace page. Instead of confronting the witness with the printout and asking her to authenticate it, the prosecution used a law enforcement officer for authentication. He testified he printed out the page and that it had her photo and birthday on the Myspace profile to the "snitches get stiches" comment could be attributed to her. The Court of Appeals reversed due to lack of proper authentication. The court said the proper ways to authenticate a social media post like this included: asking the witness who has firsthand knowledge; examining the Internet history and/or drive of the purported poster; or obtaining testimony directly from the social media website (in this case Myspace).

32. CELL TOWER LOCATION RESULTS

Phone company records can also be used to establish the location of a person's phone (and thereby most likely that person) at any given time. This can be hugely helpful in a criminal prosecution. In a homicide case, for instance, the victim's phone might be lying next to his dead body. Phone records can show the phone number of the last person he spoke to. A search warrant for that person's phone

records might show that that person was in the vicinity where the murder took place at the time of the murder.

Once the records are obtained, a witness will need to explain to the jury how a cell phone constantly sends out signals that bounce off the closest cell tower. The phone company keeps a record of this information, so a person's movements may be tracked by looking at which towers the signals are using. A signal is sent every time a person makes or receives a call, or text, or sometimes just because the phone is doing it on its own.

The Crime & Intelligence Analysist at the St. Louis Police Department who makes the maps charting the location of the towers and the calls bouncing off them is Lindsay H. Maier. She does not consider herself an expert, but because of her experience and training, she probably qualifies as one. Her office phone number is 314-444-5945.

State v. Blurton, 484 S.W.3d 758 (Mo. banc 2016) held that it does not take an expert witness to show that a particular phone has traveled a particular route based upon the phone records of the towers being used for each call. In *Blurton*, the phone records showed that the defendant had traveled from the vicinity of his home in Garnett, Kansas, to the vicinity of the home of the murder victims in Cole Camp, Missouri. The state called a "criminal intelligence analyst" for the Missouri Highway Patrol. His background was that he routinely performed telephone toll analysis on cell phone calls, and had been doing so since 2004. He went to cell analyst training school, where he was instructed how to analyze telephone records. He testified that in this case, he first obtained an Excel spreadsheet of the defendant's cell phone records from the telephone company, then sorted those records to show only those calls made to and from defendant's phone around the time of the murders. The record of each call provided the exact geographic location of the cell tower to which the defendant's call phone was connected at the beginning and end of the call. Using the information, the witness mapped out the location of each tower using a consumer mapping program. In doing so, he created a map that showed the times of the calls and their respective cell phone towers.

At trial, the defense in *Blurton* objected that the analyst was not properly qualified as an expert witness since he "had no training besides attending this one program." The trial court concluded, and the Missouri Supreme Court agreed, that it did not take an expert witness to plot the location of the cell towers the calls had used. The court stated: "Although there may have been sufficient evidence in the record before the trial court to support a finding that the witness was an expert qualified in the field of telephone toll analysis, it was not necessary for the trial court to make such a finding. Missouri courts have held that 'reading the coordinates of cell sites from phone records and plotting them on a map is not a scientific procedure or technique' because cell phone records are factual records and no specific skill is required to plot these records. . . Such evidence can be introduced by a lay witness so long as the lay witness confines the testimony to the facts contained in the cell phone records."

Blurton noted that another case, State v. Patton, 419 S.W.3d 125, 130 (Mo. App. E.D. 2013) held that when the witness goes further in her testimony, and talks specifically about how close the phone would have been to a particular tower, an expert witness is required. "An expert is required because such an identification requires broad inferences due to a call phone's ability to connect to a cell tower as far away as thirty miles or as close as thirty feet depending upon myriad factors such as geography, weather, or the cell phone itself. Accordingly, to identify the specific location of the defendant based on cell phone tower connections, an expert witness must make "an expansive range of inferences" that requires "the aid of specialized experience or knowledge in the field of cellular communications." 484 S.W.3d at 771. For example, in *Patton*, a lay witness testified that at the time of the crime the defendant's cell phone was connected to a cell tower near the crime scene. The defendant claimed he was at his cousin's house four miles away. The lay witness drew the inference that the cell phone records proved the defendant was near the crime scene and not near his cousin's house. The appellate court held the trial court erred in not requiring an expert to present this evidence since it required technical inferences outside a lay person's common knowledge. The same result was reached in State v. Ford, 454 S.W.3d 407 (Mo. App. E.D. 2015).

The expert witness at the FBI's St. Louis office who can testify with precision as to the location of the cell phone at the time of a call is Special Agent Bastian Freund. He is trained as an expert witness in this field.

Thus, if a map showing which towers the calls bounced off of at particular times is all you need, you are one hundred percent safe using Lindsay H. Maier as your witness. She may even qualify as an expert to give an opinion as to how close to the tower the phone would have been. To be completely safe going that far, though, you should contact Bastian Freund to become an expert witness in your case.

The *Patton* court cited a law journal article as authoritative in this area: Aaron Blank, "The Limitations and Admissibility of Using Historical Cellular Site Data to Track the Location of a Cellular Phone," 18 *Rich. J. L. & Tech.* 3 (2011).

33. BREATH TEST RESULTS

Judicial Notice of Scientific Principles – The breathalyzer machine is considered a reliable device for measuring intoxication. *State v. Becker*, 429 S.W.2d 290 (Mo. App. K.C. 1968).

Chemical tests must be performed according to methods approved by the Division of Health. 577.020 & 577.026. The regulations governing the administration of breath tests are set out at 19 C.S.R. 20-30.011 to 20-30.060. Since 1988, the regulations have required the breath analyzer to undergo a maintenance test "at intervals not to exceed 35 days." Until 1988, if State showed that breath test was administered in accordance with Dept. of Health regulations by a person with Type III permit, a prima facia case for introduction of the test into evidence was made; Type II operator was not needed regarding the maintenance of the machine, and would be needed only if some evidence was offered that the machine was malfunctioning. Under current law, though, the foundation requirements include evidence that a maintenance check was done within 35 days of the test - if no objection by the defense, the prosecutor does not need to put on evidence of the maintenance test, but if the defense does object, the prosecutor needs to put on evidence of the maintenance check before the results of the test are admissible. Sellenriek v. Director of Revenue, 826 S.W.2d 338 (Mo. banc 1992).

Breathalyzer maintenance records are admissible as business records. *Thomas v. Director of Revenue*, 875 S.W.2d 582 (Mo. App. W.D. 1994). An officer who did not do the maintenance test and who is not custodian of the records cannot lay a sufficient foundation for their admission. *Schmitz v. Director of Revenue*, 889 S.W.2d 883 (Mo. App. S.D. 1994).

It doesn't matter if more than 35 days elapsed at some point in the past history of the machine, as long as a maintenance check had been done within 35 days of the present test. *Sellenriek, supra; McClimans v. Director of Revenue*, 826 S.W.2d 422 (Mo. App. E.D. 1992).

The foundation requirement for admission of a breathalyzer test result includes that "an approved standard simulator solution was used to verify and calibrate" the machine. The material used for verification and calibration must be certified by the manufacturer and this certification must accompany the maintenance report. *Divine v. Director of Revenue*, 961 C.S.R. 87 (Mo. App. E.D. 1997); *Van Wagner v. Director of Revenue*, 954 S.W.2d 647 (Mo. App. W.D. 1997). The certificate of the manufacturer qualifies as a business record. *Overman v. Director of Revenue*, 975 S.W.2d 183 (Mo. App. E.D. 1998). But, the proof has to show that the certificate is from the manufacturer of the solution, not some other company. *McDonough v. Director of Revenue*, 977 S.W.2d 278 (Mo. App. E.D. 1998). It is sufficient to show by business record affidavit from the law enforcement agency that the "certificate of analysis was supplied with the simulator solution." *Trumble v. Director of Revenue*, 985 S.W.2d 815 (Mo. App. E.D. 1998).

The Breathalyzer test results are generally accepted as reliable and admissible if the test was administered by a law enforcement officer possessing a valid Division of

Health permit who performs the test in accordance with the methods approved by the Division of Health. 577.020 & 577.037.4.

DISCOVERY - Section 577.020.6 requires full information concerning the test be supplied to the person tested upon request. *State v. Clark*, 723 S.W.2d 17 (Mo. App. E.D. 1986).

OVERRIDE BUTTON: The sample obtained when the officer hits the "sample control override" button was admissible when an officer with a Type II permit, familiar with the function of the sample control override button, testified that you can hit the override button when the sample is too small to trigger the machine, but the reading will be a lower reading than would be expected from a full and complete sample. *Bradford v. Director of Revenue*, 2 S.W.3d 611 (Mo. App. E.D. 2002).

34. BLOOD TOXICOLOGY RESULTS

The questions for the chemist who analyzed the blood are not complicated:

- Q: Name?
- Q: What is your occupation?
- Q: What is your educational background?
- Q: What experience and training to you have as a toxicologist?
- Q: Are you a member of any societies or organizations dealing with toxicology?

Q: Have you performed tests on blood samples to determine alcohol concentration?

- Q: How many times?
- Q: I'm showing you now State's Exhibit 1. Please identify this exhibit?
- Q: Do your markings appear anywhere on it?
- Q: Did you test State's Exhibit 1 to determine the alcohol level in the blood?
- Q: How did State's Exhibit 1 come into your possession?
- Q: Describe what you did to test State's Exhibit 1 for the presence of alcohol?
- Q: Is that sort of testing accepted as reliable in the scientific community?
- Q: What were your findings as to any alcohol being in State's Exhibit 1?

Q: Is there a recognized correlation between the alcoholic content of blood and intoxication?

Q: From your training and experience, to a reasonable degree of scientific certainty, what would be the condition of a person whose blood showed that level [e.g. .25 percent alcohol] of alcohol concentration in his or her blood?

Several foundation questions must be asked of the officer who collected the blood, and it may be necessary to call the medical personnel, too.

577.029 - Blood may be withdrawn by medical personnel (physician, nurse, trained medical technician) at request of law enforcement officer, unless in good faith medical judgment the procedure would endanger the life or health of defendant; a "previously unused and sterile needle and sterile vessel shall be utilized and the procedure shall otherwise be in strict accord with accepted medical practices. A nonalcoholic antiseptic shall be used for cleansing the skin prior to venipuncture."

577.026 - Chemical tests of blood shall be performed according to methods and devices approved by the Dept. of Health.

Search warrants may be obtained for sample of defendant's blood even after defendant has refused a breath test. *State v. Willis*, 97 S.W.3d 548 (Mo. App. W.D. 2003); *State v. Trice*, 747 S.W.2d 243 (Mo. App. W.D. 1988); *State v. Stottlemeyer*, 752 S.W.2d 840 (Mo. App. W.D. 1988). Nationwide, a split of authority exists whether a search warrant may be sought after the suspect has refused a test under the implied consent law, but Missouri allows a search warrant even after a refusal. *State v. Smith*, 134 S.W.3d 35 (Mo. App. E.D. 2004).

A search warrant may be obtained for results of blood tests taken for medical purposes since the doctor-patient privilege does not apply due to 577.037 (which says that in DWI cases blood alcohol tests are admissible in spite of the doctor-patient privilege under 491.060). *State v. Waring*, 779 S.W.2d 736 (Mo. App. S.D. 1989); *State v. Todd*, 935 S.W.2d 55 (Mo. E.D. 1996).

A hospital blood test may also come in under the business records statute, but must be interpreted by expert. State v. Todd, 935 S.W.2d 55 (Mo. App. E.D, 1996). Defendant was convicted of two counts of involuntary manslaughter in connection with a DWI-fatality. Defendant had been taken to the hospital immediately after the crash. His blood was drawn for testing by the hospital. The test showed blood alcohol level of .11 which was introduced via a business record affidavit accompanying a lab report. The medical examiner, a doctor, testified as an expert witness as to the meaning of a .11 blood alcohol reading. Defendant claims the blood test results were not admissible since the implied consent procedures set out in 577.020 to 577.041 were not followed. HELD: "The requirements and protection provided by the implied consent law do not apply to all blood tests offered as evidence but only to those offered pursuant to Chapter 577." This was not a prosecution under Chapter 577 (DWI), but under 565 (Offenses Against the Person). Thus, the lab test result from the hospital was admissible as a business record. See also State v. Moore, 128 S.W.3d 115 (Mo. App. E.D. 2003) (blood drawn at hospital for medical purposes not barred by doctor-patient privilege, 491.060(5), in manslaughter trial).

State v. Faust, 709 S.W.2d 121 (Mo. App. E.D. 1986). Lab report of blood alcohol was admitted at trial for DWI even though chemist could not be there as a business

record, when all requirements of business record met. This would no longer be allowed under *State v. March*, 216 S.W.3d 663 (Mo. banc 2007) (admitting lab report of chemist violates Confrontation Clause of Sixth Amendment).

State v. Setter, 763 S.W.2d 228 (Mo. App. W.D. 1988). Foundation requirements for drawing and admitting blood test results are clear and easy to meet under 577.029. "Previously unused and sterile needle & sterile vessel shall be utilized" requires strict and literal compliance, and prosecution required to lay that foundation or reversible error. Dept. of Health has enacted 19 C.S.R. 20-30.070 (1988) which provides that blood samples must be taken in accordance with 577.029.

State v. Hanners, 774 S.W.2d 568 (Mo. App. E.D. 1989). Nurse originally used an alcoholic antiseptic but then realized mistake and wiped off the spot and used a nonalcoholic antiseptic. This violated the foundation requirements that a "nonalcoholic antiseptic for cleansing prior to venipuncture." Reversed.

Moore v. Director of Revenue, 811 S.W.2d 848 (Mo. App. S.D. 1991). Packaging on unopened needle and vacuum tube labeling them as "sterile" and label on antiseptic solution saying it contained "no alcohol" were exception to hearsay rule because of probability of trustworthiness. Results of blood test were properly admitted. This should still be good law even under Confrontation Clause analysis.

State v. Parker, 817 S.W.2d 920 (Mo. App. S.D. 1991). Vacuum tube from MSHP stock and needle from hospital, neither of which were in packages marked sterile, did not meet the *Moore* test and no other evidence of sterility on record. (MSHP testimony that tube was "straight from the factory" and phlebotomist's testimony that needle was in an unopened package <u>not</u> enough.)

Nesbitt v. Director of Revenue, 982 S.W.2d 783 (Mo. App. E.D. 1998). State did not call the medical technician to lay the foundation for the .10 blood sample; rather, the trooper merely testified that this was a hospital phlebotomist who had drawn blood for him many times. HELD: Trooper's testimony was not sufficient evidence that this person was a licensed physician, registered nurse or trained medical technician. Driver's license suspension reversed.

State v. Kummer, 741 S.W.2d 285 (Mo. App. E.D. 1987). Dept. of Health has now adopted regulations dealing with taking blood (19 C.S.R. 20-30.070) and blood tests are admissible if regulations followed, even if blood testing occurred prior to the passage of these regulations. NOTE: *State v. Peters*, 729 S.W.2d 243 (Mo. App. S.D. 1987) is distinguished, because in *Peters*, the Dept. of Health had not yet enacted its regulations so the blood sample was not admissible.

19 C.S.R. 20-30.070 (1988) says (1) blood samples are to be taken in accordance

with 577.029; (2) blood sample shall be collected in a clean, dry container that has an air-tight inert stopper, but if whole blood or plasma is required, an anticoagulant may be used that is appropriate for the test method being employed; (3) a sufficient volume of blood shall be collected for duplicate testing; (4) approved tests include chromatographic tests, spectrophometric or colormetric measurement of the conversion of alcohol to acetaldehyde by alcohol-dehydrogenase, or quantitative determination of reduction of dichromate in acid solution by ethanol.

36. URINE TESTS

Urine tests – 19 C.S.R. 20-30.070 states that urine sample shall be collected in a clean, dry container that has an air-tight, inert stopper; "Urine specimens shall be refrigerated immediately after collection or a preservative may be used that is appropriate for the test method being employed;" and a sufficient amount shall be taken to allow for duplicate testing. NOTE: *State v. Regalado*, 806 S.W.2d 86 (Mo. App. W.D. 1991) (Defendant was in wreck, unconscious at hospital. Trooper had urine sample drawn and he put it in his patrol car, but had to report to another accident, and did not get sample into refrigerator for two hours. HELD: This was not in compliance with regulation's word "immediately" absent proof that the two-hour delay did not result in the urine sample's "substantial decomposition.")

37. HORIZONTAL GAZE NYSTAGMUS TEST

State v. Hill, 865 S.W.2d 702 (Mo. App. W.D. 1993). Missouri accepts the Horizontal Gaze Nystagmus test as being sufficiently reliable to be admissible as evidence of intoxication. In Missouri, the officer who gives the test must have had a minimum of 8 hours training on how to administer and interpret the HGN test. It is improper for the officer to testify that in his experience he would expect this person's BAC to be a specific level based on the HGN test. *State v. Rose*, 86 S.W.3d 90 (Mo. App. W.D. 2002). But an officer with experience and training about the HGN test may give an opinion about the effect of things like multiple sclerosis on the results of the HGN test. *State v. Bradley*, 57 S.W.3d 335 (Mo. App. S.D. 2001). An experienced officer may give an expert opinion that blindness in one eye would not affect the HGN test. *State v. Poole*, 216 S.W.3d 271 (Mo. App. S.D. 2007).

38. RADAR RESULTS

EXAMPLE #1 -- From *Missouri Evidentiary Foundations, Fourth Edition* (2018). This is a speeding case, where the officer has already testified that he arrived at the scene and set up his equipment, a General Electric radar gun:

- Q: What equipment were you using?
- A: A General Electric radar gun.
- Q: What training, if any, have you had in using a radar gun?

A: I spent two weeks studying the radar gun and how to use it at the Police Academy.

- Q: How many times have you used a radar gun?
- A: Hundreds of times.
- Q: How long have you used one?
- A: I've been assigned to Traffic for three years, and I use the gun almost daily.
- Q: What did you do after you arrived at the scene?
- A: I checked to ensure that the radar gun was in working order?
- Q: What condition was it in?
- A: Good, operational condition.
- Q: How did you know that?
- A: I used a tuning fork test.
- Q: What is the tuning fork test?

A: The manufacturer supplies you with several tuning forks. I have thirty, forty-five, and sixty-mile-per-hour forks. I test these forks for accuracy each month by striking the tuning forks and holding them up to the microphone of a digital frequency counter. The day before I clocked the defendant's car, I tested my forks. The checked out as being accurate for the speeds for which they were calibrated. When you reach the scene of your traffic detail, you set the forks off, and the radar gun is supposed to register those speeds.

Q: How did you conduct the test on this occasion?

A: I used all three forks, and the machine checked out all three times. It registered the right speed. I also checked the radar gun through its internal calibration check and found that it was functioning properly.

- Q: What did you do then?
- A: I let the machine warm up and then aimed the transmitter down the road.
- Q: What happened after you aimed the transmitter?
- A: I saw the defendant's car approaching.
- Q: Who is the defendant?
- A: He's the fellow sitting at the table over there.
- Q: How long did you have to observe the defendant at the scene?

A: About three minutes. I saw him as he passed by, and then later, after we stopped him, I talked to him for several minutes.

Q: Your Honor, please let the record show that the witness has identified the defendant.

JUDGE: It will so reflect.

Q: What did you do when you saw the defendant's car approaching?

A: I checked to ensure that my radar speed gun was on, and then I clocked his car.

- Q: What does "clocked" mean?
- A: It means that I measured his speed.
- Q: What was the clocking?

A: The radar gun flashed a signal that his car was going 60 miles an hour.

DISCUSSION:

Missouri case law requires a showing that the tuning forks themselves have been tested for accuracy. *State v. Shoemake*, 798 S.W.2d 191 (Mo. App. E.D. 1990); *State v. Moore*, 700 S.W.2d 880 (Mo. App. E.D. 1985); *City of Kansas City v. Tennill*, 630 S.W.2d 173 (Mo. App. W.D. 1982). A more recent case concerning the foundation for radar gun results is *State v. Parshall*, 454 S.W.3d 928 (Mo. App. W.D. 2015) (no abuse of discretion to admit radar device results where the device – a Stalker DSR 2x radar gun unit – was tested by an "internal test" and found to be functioning properly at the site of the violation and reasonably close in time; the court rejected defendant's argument that Missouri case law required the officer to conduct a tuning fork test at the site). *Missouri Evidentiary Foundations, Fourth Edition* (2018), Section 4.11[3][a].

EXAMPLE #2: This example is from the Missouri Highway Patrol, and involves a trooper whose car is equipped with a speed control device.

- Q: On [Date.] did you come into contact with a [Make, model, color of car.]
- Q: What drew your attention to this car?
- Q: Where did you come into contact with the car?
- Q: Is your car equipped with a speed control device?
- Q: What model?
- Q: Are you licensed or certified to use this device?
- Q: What training do you have in using this speed control device?
- Q: Did the speed control device, to the best of your ability and experience, appear to be operating normally that day?

Q: Was there a car in such a position that would have interfered with your radar reading?

- Q: Where were you when your radar was activated?
- Q: Stationary or moving?
- Q: Prior to the activation of your radar, was it tested for proper operation? In both the stationary and moving modes?

Q: How is this done? Please explain?

[Internal circuitry and tuning forks.]

Q: Are the tuning forks calibrated in some manner?

Q: When was the last time these tuning forks were tested for correct calibration before you used this device to determine the defendant's speed?

- Q: What was the result of the tuning fork test?
- Q: Did you test your radar unit on [Date.]?
- Q: What was the result?
- Q: Did you test it again at any time on that day? What were the results?
- Q: Did you measure the speed of the car?

- Q: What speed did your unit indicate the car to be traveling?
- Q: Did you stop the car?
- Q: Do you see the driver in the courtroom?

39. ADMITTING CONFESSION (AND POSSIBLY REDACTING)

After preliminary questions of the officer, we eventually get to the confession:

- Q: Did you have an occasion to interview this defendant?
- Q: When and where?
- Q: Who was present?
- Q: Did you take steps to advise the defendant of his Miranda warnings?
- Q: How did you go about doing that?

Q: [If the officer used a form add this.] I show you now State's Exhibit 42, is this the Miranda form you used?

- Q: Did the defendant sign it? Where?
- Q: Did you sign it as a witness? Where?
- Q: Your Honor, I offer State's Exhibit 42.

JUDGE: Received.

Q: Would you read the Miranda warnings for the jury just the way you read them for this defendant?

Q: Did he waive those rights and agree to talk to you?

Q: Tell the jury what he told you?

[NOTE: If the defendant gave a written statement, once the officer describes verbally what the defendant said, ask: Q: Did the defendant reduce what he told you to writing? Q: I'm showing you now State's Exhibit 43, please identify it? Q: Did the defendant sign this document in your presence? Q: Your Honor, I offer State's Exhibit 43. Q: Please point out to the jury which portions the defendant wrote in his own hand and which parts you or anyone else wrote.] [NOTE: If the interview was video recorded, it is a nice touch to make a still photo from the recording and show it to the witness and say: Q: I'm showing you State's Exhibit 44. What is this? A: That's a photograph of my interview with this defendant. Q: Is it a fair and accurate representation of that interview taking place? A: Yes. Offer it.]

[NOTE: Next show the witness the disc containing the recorded confession.]

Q: I'm showing you now State's Exhibit 45. Tell the jury what this is.

A: It is the recorded statement I took from the defendant.

Q: How do you know?

A: That's my handwriting on the disc, my initials. I put them on it when I listened to it. [Make sure the witness has done this, perhaps in your office!] Q: Is the recording a fair and accurate recording of your interview with the defendant? A: It is.

Q: Your Honor, I offer State's Exhibit 45.

Q: Your Honor, I request permission to play State's Exhibit 45 for the jury.

[NOTE: Basically, the same questions would be asked for an audio-recorded interview.]

As you prepare for trial, keep in mind that you may need to make a redacted (edited) version of the confession that takes out references to other crimes. A recording of the defendant being interviewed by the investigator will often include references to other crimes he has committed. *State v. Sweeney*, 701 S.W.2d 420 (Mo. banc 1985); *State v. Engleman*, 653 S.W.2d 198 (Mo. 1983); *State v. Spica*, 389 S.W.2d 35 (Mo. 1965); *State v. Luton*, 795 S.W.2d 468 (Mo. App. E.D. 1990); *State v. Brown*, 584 S.W.2d 413 (Mo. App. E.D. 1979). Although the general rule is that evidence of other crimes is not admissible, Missouri has a well-recognized exception that a tape recording of a conversation of the defendant mentioning that he committed other crimes is admissible if the reference to the other crimes is relevant to show the defendant's intent. *Id.* If the references to the other crimes may be deleted. *State v. Brown*, 584 S.W.2d 413, 415 (Mo. App. E.D. 1979).

40. PROVING PRIOR CONVICTIONS OF A PRIOR OFFENDER

The standard way to prove a prior conviction is to present the court with a certified copy of that conviction. (It is good practice to include the charging document and the formal judgment of conviction, as well as the docket sheet.) When the prior conviction comes from a Missouri court, the documents merely need to be certified by the court clerk. Section 490.130, RSMo. On the other hand, when the conviction comes from another state or a federal court, it is necessary to have the conviction "certified and exemplified," which involves the use of a certification form in which the clerk certifies that the copy of the conviction is correct, the judge certifies that the clerk is really the clerk, and the clerk certifies that the judge is really the judge. *State v. Monroe*, 18 S.W.3d 455 (Mo. App. S.D. 2000); Section 490.130, RSMo.

A recent Missouri appellate case of first impression held that when a state like Missouri has electronic records, such as Casenet, those records may be used to prove a prior conviction. *State v. Ralph*, 521 S.W.3d 673, 678-79 (Mo. App. E.D. 2017). In *Ralph*, the defendant did not stipulate to his prior convictions so the prosecutor called the court clerk, who testified that records in the Missouri Justice Information System (JIS) – which is a computerized statewide automated record-keeping system established by the supreme court – showed that Ralph had prior convictions in Case Numbers 1322-CR01218 and 0822-CR03740. The State did not introduce physical copies of the files but asked the trial court to take judicial notice of its own files. On appeal, the court held that under Section 490.130 the "records of proceedings of any court of this state contained within any statewide

court automated record-keeping system established by the supreme court shall be received as evidence of the acts or proceedings in any court of this state without further certification of the clerk, provided that the location from which such records are obtained is disclosed to the opposing party."

Be aware of *State v. Pylypczuk*, 527 S.W.3d 96 (Mo. App. E.D. 2017), where the Court held that in a DWI case it was improper to admit a record taken from the Missouri Uniform Law Enforcement Driving While Intoxicated Tracking System (DWITX) without authenticating it in some way -- by oral testimony, or business record affidavit, or certification by an officer under 302.312.2, RSMo.

If you charged a person as a prior offender, persistent offender, or persistent misdemeanor offender, remember that you must have the judge make the finding that the person is such a prior offender at a hearing outside the presence of the jury "prior to the submission to the jury." Section 558.021.2, RSMo. The finding is best made during the pretrial conference because it will take punishment away from the jury, and may thus affect the questions asked during voir dire, since punishment will no longer be something the jury will be asked to consider.

41. CROSS-EXAMINATION WITH PRIOR CONVICTION

In criminal cases in Missouri, a prior conviction and or a suspended imposition of sentence may be used to impeach a witness. The statute reads:

Section 491.050 RSMo. "Any person who has been convicted of a crime is, notwithstanding, a competent witness; however, any prior criminal conviction may be proved to affect his credibility in a civil or criminal case and, further, any prior pleas of guilty, pleas of nolo contendere, and findings of guilty may be proved to affect his credibility in a criminal case. Such proof may be either by the record or by his own cross-examination, upon which he must answer any question relevant to that inquiry, and the party cross-examining shall not be concluded by his answer."

You are allowed to elicit four things about each prior conviction: (1) the date; (2) the court; (3) the crime; and (4) the sentence. *State v. McClanahan*, 954 S.W.2d 476 (Mo. App. W.D. 1997). It can be reversible error to go too far into the underlying facts of the conviction. *State v. Gaines*, 668 S.W.2d 612 (Mo. App. E.D. 1984).

Be aware that a municipal court conviction is not considered a criminal conviction for the purposes of cross-examination. *State v. Albanese*, 920 S.W.2d 917 (Mo. App. W.D. 1996).

Unlike some jurisdictions, in Missouri even very old prior convictions may be used

to impeach. State v. Givens, 851 S.W.2d 754 (Mo. App. E.D. 1993).

42. CROSS-EXAMINATION WITH PRIOR BAD ACT SHOWING UNTRUTHFULNESS

A witness may be impeached by the use of a prior bad act that shows his untruthfulness. In *Mitchell v. Kardesch*, 313 S.W.3d 667 (Mo. banc 2010), a doctor (civil defendant) in a malpractice case lied at his deposition by denying he'd ever lost his medical license. The trial court erred by not allowing the plaintiff to cross-examine him about the lie. HELD: In Missouri, on cross-examination, a witness may be asked questions about prior lies that tend to "test his accuracy, veracity or credibility." Furthermore, if he denies the lie, extrinsic proof will be allowed.

43. ADMITTING HEARSAY OF UNAVAILABLE WITNESS UNDER FORFEITURE BY WRONGDOING DOCTRINE

The Sixth Amendment of the United States Constitution provides that in all criminal prosecutions, the accused will "be confronted with the witnesses against him." The testimonial statements of witnesses who do not appear at trial are generally not admissible unless the declarant was unavailable and the defendant had a prior opportunity for cross examination. Crawford v. Washington, 541 U.S. 36, 53-54 (2004). The constitutional right of confrontation is abrogated, however, by conduct designed to prevent the witness from testifying. Giles v. California, 554 U.S. 353, 366 (2008). "[T]he rule of forfeiture by wrongdoing... extinguishes confrontation claims on essentially equitable grounds." Crawford, 541 U.S. at 62 (citing Reynolds v. United States, 98 US 145, 158-159 (1878)). "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong." Reynolds, 98 U.S. at 159. Hearsay objections are forfeited, and otherwise inadmissible statements of the unavailable witness may be admitted against a party who has been engaged in or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness. United States v. Cherry, 217 F.3d 811 (10th Cir. 2000) (holding that Fed.R.Evid. 804(b)(6) codified the "long-standing doctrine of waiver by misconduct"). A defendant also forfeits confrontation rights "when he uses an intermediary" for the purpose of making a witness absent. Giles, 554 U.S. at 360. A co-conspirator has waived confrontation and hearsay objections when another member of the conspiracy wrongfully procures the unavailability of a witness as a foreseeable or natural consequence of the conspiracy. Cherry, 217 Fd. 3d at 815-21.

The doctrine of forfeiture by wrongdoing applies equally to witnesses unavailable through intimidation or death since "a witness's absence can be procured by intimidation and harassment no less effectively than by secreting away or murdering the witness." *State v. Ivey*, 427 S.W.3d 854, 863 (Mo. App. W. D. 2014). The Missouri Supreme Court only requires the State to provide "ample" evidence that the defendant

made a witness unavailable before forfeiting that right. *State v. McLaughlin*, 265 S.W.3d 257, fn. 10 (Mo. banc 2008). A majority of federal circuit courts, including the Eighth Circuit, make it clear that the standard of proof to use in establishing the defendant's involvement in causing the unavailability of a witness is preponderance of the evidence. *United States v. Emery*, 186 F.3d 921 (8th Cir. 1999); *United States v. Scott*, 284 F.3d 758, 762 (7th Cir. 2002); *United States v. Houlihan*, 92 F.3d 1271, 1280 (1st Cir. 1996). Thus, the prosecutor should show by a preponderance of the evidence that the witness is unavailable due to the wrongdoing of the defendant, or his acquiescence in the wrongdoing.

A pretrial hearing on the admission of testimonial hearsay evidence due to a forfeiture by wrongdoing is not required. *Emery*, 186 F.3d at 926. Rather, the evidence can be admitted "at trial in the presence of the jury contingent to proof by a preponderance of the evidence" that the defendant engaged in or acquiesced in wrongdoing designed to make the witness unavailable. *Id*. Since a case involving coercion or threats to a witness may produce a witness who refuses to testify at trial, direct testimony about the threats is not required; rather, circumstantial evidence can support a finding of coercion. *Scott*, 284 F.3d at 764. Even though a pretrial hearing is not necessarily required, if the evidence is vital to your case, it would be advisable to file a trial brief and take up the matter prior to trial.

44. JAIL CALLS

Jail calls come in as business records through the custodian of the records.

The custodian of the records can lay an adequate foundation for the identity of the inmate making the call by explaining in detail how the system works. Such a foundation was laid in *State v. Washington*, 512 S.W.3d 118 (Mo. App. E.D. 2017). The court observed: "The State produced evidence that to make a telephone call from jail, all inmates must first enter their inmate number plus the last four digits of the social security number. The telephone calls are recorded and saved under this identifying information. The St. Louis Justice Center employs a voice-recognition system to detect telephone calls where more than one inmate is speaking. This identification system is sufficient to establish the speaker-identity element for creating a proper foundation to admit a recorded conversation. Evidence of fraud within the system, such as inmates making telephone calls using other inmate's numbers, is relevant to the evidentiary weight of the recorded conversations, not their admissibility."

45. DEPARTMENT OF REVENUE RECORDS

302.321. "1. Copies of all papers, documents, and records lawfully deposited or filed in the offices of the department of revenue . . . and copies of any records, properly certified by the appropriate custodian or that director, shall be admissible as evidence

in all courts of this state . . .

2. A computer terminal printout of an individual driving record through the Missouri uniform law enforcement system from the department of revenue database, certified by an officer of the local law enforcement agency, shall be admissible in evidence in all courts of this state."

Discussion:

Department of Revenue records are useful in a number of ways: (1) to show the name and address of the owner of a vehicle; (2) to get a copy of a person's driver's license to show photograph, signature and address; (3) to show a person's driving record.

46. PHOTO LINEUPS, PHYSICAL LINEUPS & SHOW-UPS

Discussion:

The defense will often file a motion to suppress the identification made by a witness. The motion will usually be taken up outside the presence of the jury. The questions you ask during the pretrial hearing will generally be identical to ones later asked in front of the jury once the motion to suppress is denied.

The identification being challenged may be a physical lineup, a photo array or a "show-up" (confronting a witness with a suspect shortly after the crime). Allowing the victim to identify the suspect in a one-man show-up at or near the scene of the crime or arrest is an approved identification procedure. *State v. Clark*, 809 S.W.2d 139 (Mo. App. E.D. 1991). *See also State v. Nelson*, 334 S.W.3d 189 (Mo. App. W.D. 2011) (a "show up" including only the defendant within a half hour of the crime did not taint the identification).

The foundation for the admission of a photo lineup or a physical lineup is essentially the same. To be admissible, you must satisfy a two-part test: (1) the court must determine whether the pretrial identification was suggestive; and (2) if it was suggestive, the court must evaluate the impact of the suggestive procedure on the reliability of the identification made. *State v. Williams*, 717 S.W.2d 561, 564 (Mo. App. E.D. 1986). *See also State v. Vinson*, 800 S.W.2d 44, 446 (Mo. banc 1990). Whether the identification procedure unduly suggestive is determined by the totality of the circumstances. *State v. Carter*, 572 S.W.2d 430, 436 (Mo. banc 1978). The defense has the burden of proof that the identification procedure was unnecessarily and impermissibly suggestive. Only then will the court go to the second prong of the test – whether the impact of the suggestive procedure was so severe that the identification made was unreliable under the totality of the circumstances. *Neil v. Biggers*, 409 U.S. 188 (1972).

EXAMPLE: Sometimes the officer who prepares the photo lineup is the same officer

who shows it to the witness. Often, however, the investigators will have one officer who knows the identity of the suspect prepare the lineup, and a "blind administrator" who does not know which photograph is actually the suspect will show the photo lineup to the witness. This example involves a blind administrator.

PART I: OFFICER WHO PREPARED PHOTO LINEUP

Q: Detective, did you prepare a photo lineup to be shown to Felicity Jones to see if she could pick this defendant out of the photo lineup?

Q: How did you go about preparing the photo lineup? [Warn the officer in advance NOT to say he used the defendant's mugshot on file at the department because that implies a prior criminal history. Instead, the witness should say that he located a photograph of the defendant and placed it into a photo array of people who looked somewhat similar to the defendant. Sometimes generating the "filler photos" is done by computer, these days.]

Q: Did you take any steps to try to make the "filler" photos look similar to the appearance of the defendant? How so?

Q: I'm showing you now State's Exhibit 22. Please identify it for the record. [That's the photo lineup I prepared, along with the Photo Lineup Acknowledgement Form.]

Q: Is one of these photos a photograph of this defendant?

Q: Which one?

Q: Once you prepared this photo lineup, did you show it to Felicity Jones? [No.]

Q: Why not?

[I used a "blind administrator."]

Q: What do you mean by blind administrator?

Q: Who did you use as the blind administrator?

PART II: OFFICER WHO SHOWED LINEUP TO WITNESS

Q: Did you show a photo lineup to a witness named Felicity Jones?

Q: When and where did that take place?

Q: Who all was present?

Q: Where did you get the lineup you showed to Felicity Jones?

Q: Did you know at the time which photo was of the suspect?

Q: Describe the procedure you followed in showing the lineup?

[Sometimes the photos are shown all at once; more often, they are shown one at a time.]

Q: Was Felicity Jones able to make an identification of this defendant?

Q: What specifically did she say?

Q: Did she indicate her level of certainty? What did she say?

Q: Did you have her make in markings or fill out any forms?

Q: I'm showing you now State's Exhibit 22. Please identify it?

[This is the photo lineup and acknowledgement form I showed to Felicity Jones.]

Q: Does your handwriting appear on this Exhibit as a witness?

Q: Your Honor, I offer State's Exhibit 22 into evidence.

Q: In looking at State's Exhibit 22, which parts are your handwriting and which parts are the handwriting of Felicity Jones?

PART III - THE IDENTIFICATION WITNESS HERSELF

Q: At some point, did the police officers show you a photo lineup to see if you could recognize the man who robbed you?

Q: When and where did that take place?

- Q: Who all was present?
- Q: Describe how the officer went about showing you that lineup?

Q: Were you able to recognize the man who robbed you?

Q: How certain were you that you were correct?

Q: I'm showing you now State's Exhibit 22. Is this the photo lineup you were shown?

Q: In looking at State's Exhibit 22, does your handwriting appear on it in places?

Q: Your Honor, I offer State's Exhibit 22 into evidence.

Q: Would you point out for the jury which parts of State's 22 are your handwriting? [Go through each part of the Photo Lineup Acknowledgement Form.]

Q: Who checked the box saying "I am certain" I made the right identification?

- Q: Are you still certain today?
- Q: Which photo did you pick out?

Q: Did you mark it in some way?

Q: Please point out to the jury the marks you made.

[NOTE: When you are preparing your direct examination of an eyewitness, go through the factors listed in Missouri's eye-witness jury instruction and make sure you ask questions to put the applicable facts into the record that will allow you to argue them in closing argument. These include: (1) The witness's eyesight; (2) the lighting conditions at the time the witness viewed the person; (3) the visibility at the time the witness viewed the person; (4) the distance between the witness and the person in question; (5) the angle from which the witness viewed the person; (6) the weather conditions; (7) whether the witness was familiar with the person; (8) any intoxication, fatigue, illness, injury or other impairment of the witness at the time the witness viewed the person; (9) Whether the witness and the person were of different races; (10) whether the witness was affected by any stress or other distraction or event, such as the presence of a weapon, at the time the witness viewed the person; (11) the length of time the witness viewed the person; (12) the passage of time between the witness's exposure to the person and the identification made; (13) the witness's level of certainty; (14) the method by which the witness identified the defendant, including whether it was a live or photographic lineup; (15) any description provided by the witness after the event and before identifying the defendant; (16) whether the witness's identification was consistent with any earlier identification made by the witness; and (17) any other factor that may bear on the reliability of the witness's identification of the defendant. See

MAI-CR 4th 410.02.]

Discussion:

You will probably put your eyewitness on the stand before you call the officer or officers who will testify about the photo lineup. If so, the photo lineup will already be in evidence by the time they testify.

In the past, Missouri courts held it inadmissible hearsay for the officer showing the photo lineup to testify to what the witness said when looking at the lineup. That line of cases was overruled by the Missouri Supreme Court in *State v. Harris*, 711 S.W.2d 881 (Mo. banc 1986). Thus, as long as your identification witness will be testifying, too, so you don't have a Confrontation Clause problem due to her not being available as a witness, you may have the officer who showed the lineup testify about what the witness said when making the identification of the defendant.

Since it is permissible for the officer to testify as to what the witness said when making the identification, it logically follows that if we have a video recording of the actual showing of the photo lineup, we should be allowed to play it for the jury. Have your officer who showed the lineup lay the foundation for the recording in the same way you would for any recording as described in other sections of this outline. It is also effective to take a still shot from the video recording. When the witness who made the identification is on the stand, you can have her look at the photograph and testify that it is a photo of her making the identification.

This example is for a photo lineup, but the questions for a physical lineup or a show-up would be similar.

47. EXPERT TESTIMONY IN GENERAL.

Until August 28, 2017, criminal cases in Missouri followed the "*Frye* test" (*Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) when determining the admissibility of scientific expert testimony in criminal cases. The *Frye* test looked at whether the expert's opinion was "generally accepted" in the scientific community. For expert testimony regarding a non-scientific matter (such as behavior of molested children, street level drug sales, gambling activity), the test was whether the testimony would assist the jury because the subject was an area outside the jurors' experience or knowledge.

Missouri's 2017 statute controlling expert testimony in criminal cases reads:

2. In all actions except those to which subsection 1 of this section applies:

(1) A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) The testimony is based on sufficient facts or data;

(c) The testimony is the product of reliable principles and methods; and

(d) The expert has reliably applied the principles and methods to the facts of the case;

(2) An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect;

(3) (a) An opinion is not objectionable just because it embraces an ultimate issue.

(b) In a criminal case, an expert witness shall not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone;

(4) Unless the court orders otherwise, an expert may state an opinion and give the reasons for it without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

In *State ex rel. Gardner v. Wright*, 562 S.W.3d 311 (Mo. App. E.D. 2018), the Court held that the new statute did not change the fact that a social worker's experience and training in dealing with sexually abused children would qualify her as an expert to testify about common behaviors of those children in general. The testimony is admissible because it assists the jury in understanding the behavior of sexually abused children. Thus, the trial court erred by granting a pretrial motion precluding the expert from discussing delayed reporting being a common occurrence and the typical reasons therefor.

A prosecutor should be prepared to use this statute to address challenges to all types of expert testimony, from fingerprints, to firearms ballistics testing, to DNA, to drug-sniffing dogs, to drug recognition expert testimony.

48. STIPULATIONS.

When a certain matter is uncontested it is often a good idea to prepare a written stipulation about that evidence in order to cut down the number of witnesses and shorten the trial. When this is done, the attention of the jury can be focused on the truly contested issues in the case. Sometimes, however, you will decide not to offer stipulations because you want the jury to hear your foundation for that specific piece of proof so the jury will understand how reliable it is. Things that lend themselves to stipulations include: (1) drug test results; (2) 911 call foundation; (3) fingerprint results (especially when none were found); (4) DNA analysis results (especially when no match was found); (5) medical records; or (6) business records.

The best way for presenting a stipulation is to prepare a written version that will be signed by both the prosecutor and the defense lawyer. You may want to include a signature line for the defendant, as well.

Be aware that sneaky lawyers have been known to stipulate to a lab report that an item was a drug, and then argue that the prosecutor never established a chain of custody to show that the item collected from the defendant was the same drug analyzed in that lab report. Be sure to draft the stipulation in a way that will prevent such a stunt.

About the Author

Morley Swingle is an Assistant Prosecuting Attorney for Boone County, Missouri. He previously worked in in the Violent Crime Unit of the St. Louis Circuit Attorney's Office, and as an Assistant United States Attorney for the Eastern District of Missouri, and as the elected Prosecuting Attorney for Cape Girardeau County. He has tried 177 jury trials and has taken over 100 homicide cases to plea or trial. He has taught continuing legal education seminars throughout the country and has published numerous articles in law journals. He has written several books, both fiction and nonfiction, and is a member of Mystery Writers of America. He serves on the Missouri Supreme Court's Criminal Jury Instruction Committee.