

# **New Mexico Evidence Update: New Caselaw, Rules, and Recurring Issues**



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## **Presenter Biography:**

**George Bach** teaches constitutional law, evidence, federal jurisdiction, trial practice, and clinic at the University of New Mexico School of Law.

During and after law school, Bach worked for attorney K. Lee Peifer, litigating in civil rights, union-side labor law and employee-side employment law. In 2005, Bach became the first staff attorney at the American Civil Liberties Union of New Mexico, where he litigated a wide variety of civil rights cases in state and federal courts. In 2009, he teamed up with Matthew L. Garcia and formed the firm of Bach & Garcia. He also worked as an attorney at Garcia Ives Nowara.

A former president of the New Mexico Lesbian and Gay Lawyers Association, Bach was honored with a Santa Fe Human Rights Alliance "Treasure" Award in 2007 for his work in the LGBT community. In 2009, U.S. Rep. Martin Heinrich appointed him to the New Mexico State Advisory Committee to the U.S. Commission on Civil Rights. Bach serves as a volunteer member of the American Civil Liberties Union of New Mexico's legal panel and on the board of directors for Enlace Comunitario.

## EVIDENCE UPDATE – JUDICIAL CONCLAVE 2019<sup>1</sup>

### New Mexico Supreme Court Cases

#### **State v. Romero, 2019-NMSC-007**

At issue: Rules 11-404, 11-403, 11-901 and Fifth Amendment Rights

This case involved the shooting death of Rio Rancho Police Officer Gregg Nigel Benner at a routine traffic stop. In the months leading up to the shooting, Defendant committed multiple armed robberies with Tabitha Littles to support their drug habit. They committed a robbery of the Taco Bell in the hours before the traffic stop. Hours after the traffic stop, Defendant robbed a Shell/Giant gas station. The Defendant objected to the admission of the robberies pursuant to Rules 11-404 and 11-403.

*Admission of Other Acts: Littles' testimony about the previous robberies in the months before the shooting*

The trial court allowed testimony about the earlier robberies to give context to Ms. Littles' plea deal and to rebut impeachment by Defendant. The trial court refused to allow the State to delve into the details of every single robbery Ms. Littles admitted committing with Defendant. Instead, the trial court limited the State's inquiry to the general method the pair used to rob businesses, that the earlier robberies occurred, and that Ms. Littles was with Defendant at each occurrence. Additionally, the State's inquiry gave context to Ms. Littles' relationship with Defendant and Ms. Littles' role during earlier robberies, which were relevant to her role and physical position during the murder of Officer Benner.

Romero, 2019-NMSC-007, ¶ 28. The Supreme Court found no abuse of discretion.

*Admission of Other Acts: Testimony about the Taco Bell robbery and the Shell/Giant robbery*

The Supreme Court affirmed the admission of testimony concerning these robberies for the purpose of proving motive and identity.

The State presented evidence proving identity by showing that Defendant committed the Taco Bell and Shell/Giant robberies wearing the same clothes that Defendant was wearing at the time Officer Benner pulled him over and that Defendant used the same pistol in the Taco Bell and Shell/Giant robberies that he used to murder Officer Benner. Upon Defendant's arrest following the Shell/Giant robbery, officers found on Defendant the key to the Dodge Durango that fled the scene of Officer Benner's murder and which Defendant had used in the Taco Bell robbery, again bearing on identity. Consciousness of his guilt of the Taco Bell robbery gave Defendant a motive to kill Officer Benner and thereby avoid apprehension and a return to prison. Ms. Littles testified that "Andrew

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<sup>1</sup> Many thanks to my Research Assistant, 3L David March, for his work on this material.

always said he was never going to go back to prison. It was either going to be him or the cops.”

The probative value of evidence about the Taco Bell and Shell/Giant robberies outweighs any unfair prejudice to Defendant. The evidence was admissible as probative of both identity and motive in the murder of Officer Benner. The trial court did not abuse its discretion by admitting evidence of the Taco Bell and Shell/Giant robberies.

Romero, 2019-NMSC-007, ¶¶ 29-30

*Fifth Amendment Right: Admission of evidence of conduct by defendant*

Defendant had been Mirandized and had invoked his right to remain silent when the law enforcement officer interrogating him left him alone in a room. The Defendant made his hand into a gun gesture and pointed it at a cousin who was also arrested. Defendant objected on self-incrimination grounds to the admission of muted video showing the Defendant making the gesture. The Fifth Amendment analysis only protects evidence of Defendant’s conduct that was 1) compelled and 2) communicative. The Court held that the conduct was not compelled because the law enforcement officer had left the interrogation room, the Defendant’s conduct was not in response to any questioning, nor was the Defendant “subjected to compelling influences or psychological ploys.” Because the Court held that the conduct was not compelled, it did not consider if it was communicative.

*Authenticity: Admission of the recording of a jail telephone call*

Defendant objected to the admission of a jail telephone call, arguing that the identity of the inmate caller could not be sufficiently authenticated to allow it to fall under the hearsay objection from Rule 11-801(D)(2)(a). Under Rule 11-901(A) only a “minimal showing” is required to establish that the voice belongs to the person alleged, and there is a “low threshold for admissibility.” Identity can be established by either direct or circumstantial evidence, and the jury determines the weight to give the evidence.

Defendant argued that the State provided no date for the phone call, that there were thirteen other inmates named “Andrew” at the detention center when the call was placed, and that inmates often switch their personal identification numbers (PIN). However, the inmate in the recording self-identified as “Andrew,” used Andrew Romero’s PIN, and asked about a person named “Crystal,” which is the name of Defendant’s cousin who was arrested with him. The caller referenced a move from another detention center that was consistent with Defendant’s move. The caller made a statement about the high profile nature of the case at the same time period as Defendant’s case received a lot of media attention. Lastly, the caller asked about a foot injury that was consistent with an injury a third party received while Defendant was committing the murder.

Additionally, a detective identified the Defendant as the caller after having listened to three other calls placed with Defendant’s PIN. The Supreme Court affirmed the admissibility of the telephone recording as sufficiently authenticated.

## **State v. Candelaria, 2019-NMSC-004**

### *Competency of a witness under the influence of pain medication*

This case involved the tragic shooting death of an eight year-old girl during a violent confrontation. At the start of cross-examination, a State witness testified that he was taking hydrocodone for pain. Defense counsel questioned the witness’s competency to testify, but the trial court instructed them to address it on cross, as a full direct examination had already taken place. On cross, the witness testified that the medication caused memory loss, drowsiness, and tiredness, but that he was “okay” and remembered the incident clearly. The witness also admitted to smoking marijuana on the day of the incident in question.

“There is a general presumption that all persons are competent to be witnesses.” State v. Candelaria, 2019-NMSC-004, ¶ 43 (citation omitted). The district court must only ensure that a witness “meets a minimum standard, such that a reasonable person could put any credence in their testimony.” Id. This determination includes an inquiry into the “witness’s capacities to observe, recollect, and communicate, as well as appreciate a duty to speak the truth at the meaningful time. . . . The district court must only ensure that the witness appreciates the duty to speak the truth.” Id.

In this case, the witness did not appear to have any difficulty answering questions, and therefore clearly met the low threshold requirement for a witness. It also did not help the Defendant that he waited until the entire direct examination was complete before inquiring about the witness's competency, as it was his burden to show the witness was incompetent.

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## **New Mexico Court of Appeals Cases**

### **State v. Jackson, 2018-NMCA-066**

At issue: Rules 11-901 and 11-801

#### *Authenticity: Admission of text messages*

Defendant Sharoski Jackson was convicted of human trafficking, promoting prostitution, accepting earnings from a prostitute, contributing to a delinquency of a minor, and conspiracy. The charges arose from Defendant’s interactions with a minor, B.G., in early 2013. At trial, the State presented its theory that B.G. was engaged in commercial sexual activity at the urging and with the assistance of Defendant. The jury found Defendant guilty of all counts.

Defendant argued that text messages in an exhibit at trial were not properly authenticated and had insufficient foundation. Under Rule 11-901(B)(4), the authentication requirement may be satisfied by evidence of “appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.”

At trial, an expert witness for the State testified that he had performed a digital analysis of two cell phones, and provided a timeline that showed numerous contacts between the two phones. The State put on evidence that the messages sent between the phones included references to the Defendant and his codefendant. One witness testified that she knew she was corresponding with the Defendant on one of the numbers because she recognized his voice

during a call to that number, and because his text message answers were consistent with his in-person responses. Under 11-901(B)(5), opinion evidence identifying a person's voice through electronic transmission can be sufficient for authentication.

The State also presented evidence tying the phone numbers to the circumstances giving rise to the Defendant's charges. This included evidence that the numbers were listed in prostitution advertisements, that the email associated with one of the numbers was also listed in some of these advertisements, and that the phones associated with one of the numbers contained photographs of one of the victims.

The Defendant argued that there was evidence that the Defendant used the two phones interchangeably, so it was possible that the Defendant did not author the text messages in the exhibit. The Court of Appeals concluded that this argument went to the weight of the evidence, and not its admissibility.

The Defendant also argued that the text messages were inadmissible hearsay. The Court concluded that they were non-hearsay under Rule 11-801(D)(2)(a) (statements made by the opposing party), or Rule 11-801(D)(2)(e) (statements of a co-conspirator). Lastly, the Court concluded that the text messages in the exhibit which were not authored by either of the analyzed phones were offered as evidence of motive, and therefore were not hearsay.

The Court concluded that the State's evidence was sufficient to authenticate the exhibit, and there was not another reason for excluding the evidence, so it was properly admitted.

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**State v. Ruffin, No. A-1-CA-35424, 2018 WL 5262750 (N.M. Ct. App. Oct. 22, 2018)**

At issue: Rules 11-701 and 11-702

At approximately 7:30 p.m. on October 18, 2013, Deputy Leonard Armijo responded to a report of a two-vehicle accident involving a Ford Bronco and Toyota 4Runner. Upon arriving at the scene, Deputy Armijo observed a Ford Bronco lying on its side with a deceased individual inside. Defendant Emily A. Ruffin was standing in front of the Ford Bronco and told Deputy Armijo she was the driver of the Toyota 4Runner. She was in a hurry to pick up a friend from the airport when her phone rang and fell to the floor. When she looked at the floor, the Ford Bronco "swerved and cut in front of her, which had caused the crash." Deputy Armijo detected an odor of alcohol while talking with Defendant, prompting him to call a DWI unit to his location. Deputy Johan Jareño responded and after investigating Defendant for DWI, placed her under arrest. Defendant was charged, inter alia, with homicide by vehicle and driving while under the influence of intoxicating liquor or drugs.

Ruffin, 2018 WL 5262750, at \*1.

*Whether the Officer's conclusions could be admitted as lay testimony*

The State stated an intention to offer Deputy Armijo as an expert in "crash investigations." The district court declined to qualify the deputy as an expert and prohibited the officer from testifying as to "any conclusions" he reached regarding the circumstances of the accident. The State argued that these conclusions were lay testimony that should not have been

excluded regardless of whether the officer was qualified as an expert. In a previous case, a law enforcement officer had been allowed to offer lay testimony about the location of the debris and to offer an opinion about the point of impact through a diagram. “In this case, however, the State planned to offer Deputy Armijo’s testimony to not only his personal observations, but also to explain his conclusions regarding what those observations mean and opine as to the cause of the accident in light of his specialized training and experience” Ruffin, No. A-1-CA-35424, 2018 WL 5262750, at \*4. The Court of Appeals concluded the testimony was expert testimony.

#### *Admissibility of the non-scientific expert testimony*

The Court of Appeals concluded that some of the proposed testimony was based on the officer’s personal observations of physical evidence found at the scene, and appeared to fit directly within the scope of his specialized training. This included testimony about which parts of the two cars involved in the accident made contact, based on where the cars had matching damage, where the collision began based on where the debris was found, as well as that the “yaw and gouge marks” on the road, combined with the damage to one of the cars, suggesting that the car rolled over. Since none of these points of testimony was based on scientific principles or mathematic computations, the Court of Appeals concluded that they were not based on “scientific knowledge,” and should not have been analyzed under the *Alberico-Daubert* standard. As the district court applied the incorrect legal standard, the Court of Appeals held that excluding this testimony was an abuse of discretion. The Court did caution, however, that reliability requirements would still apply to this testimony, and that it could still end up being excluded on that basis.

When ruling on the admissibility of non-scientific expert testimony, the district court must evaluate a non-scientific expert’s personal knowledge and experience to determine whether the expert’s conclusions on a given subject may be trusted . . . The district court tests whether an expert’s skills, experience, training, or education qualify him or her in the relevant subject ... [and] uses these same factors ... to test the validity of the expert’s conclusions ... [and determine whether they] prove what they purport to prove.

Ruffin, 2018 WL 5262750, at \*6 (internal quotations and citations omitted; brackets in the original).

#### *11-403 exclusion of the non-scientific expert testimony*

Defendant also argued that it was inadmissible under Rule 11-403 because its probative value was substantially outweighed by the risk of unfair prejudice. The Court of Appeals reiterated that unfair prejudice “refers to evidence that tends to suggest decision on an improper basis.” The Court noted that the probative value of the testimony was high, because it bore directly on whether Defendant caused the accident, which was a key issue in the case. The district court expressed two concerns about the officer’s testimony: 1) that investigating officers should not testify as experts in their own cases because they “have a stake in the outcome,” and 2) that the testimony would be confusing to the jury because it lacked a scientific basis that would render it reliable.

The Court held that the first issue, namely that the officer's involvement in the case might impact his testimony, was a question of credibility for the jury to decide. As to the second issue, the Court reiterated that this was not an appropriate analysis for non-scientific expert testimony.

*Exclusion of scientific expert testimony*

The Court also concluded that some of the proposed testimony was scientific expert testimony. Whereas the Defendant's conclusion that a rollover occurred is based on his non-scientific specialized-training, his conclusions about the cause of this rollover required an application of physics principles and were therefore scientific expert testimony. According to the officer, determining how a rollover began requires analyzing the vehicles' speeds, which requires using a mathematical equation to determine the drag factor of the roadway. Because the officer failed to establish a methodology that the district court could use to test the reliability of his conclusions, this portion of his testimony was properly excluded.

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**State v. Yepez, 2018-NMCA-062, certiorari granted September 28, 2018.**

At issue: Rule 11-702

*Expert testimony and "analytical gaps"*

Defendant Anthony Blas Yepez was convicted by a jury for second-degree murder; tampering with evidence, contrary to and unlawful taking of a motor vehicle. On appeal, Defendant maintained that the district court improperly excluded expert opinion testimony related to his ability to form deliberate intent.

The district court excluded expert opinion testimony because the court concluded that it would not assist the trier of fact. The court based this on two reasons: 1) the expert testimony was unsupported by the scientific studies presented, and 2) the testimony was not relevant to the question of whether the Defendant deliberately intended to kill the victim. The Court of Appeals held that this was an abuse of discretion.

The district court had held that the scientific knowledge presented met the *Daubert-Alberico* factors, but that there was an analytical gap between it and the expert's opinion that the Defendant was "predisposed to acts of impulsive violence and is substantially more likely to engage in acts of impulsive violence than the ordinary person." In particular, the district court noted that the research it had determined to be valid and reliable did not reference impulsive violence. However, the New Mexico Supreme Court has declined to adopt *General Electric v. Joiner*, which allows a judge to "reject expert testimony where the 'analytical gap' between the underlying evidence and the expert's conclusion is too great." Instead, these credibility determinations and weighing of evidence is to be left to the trier of fact.

The Court of Appeals also held that the testimony was relevant because it affected the likelihood that the Defendant had the specific intent necessary for first-degree murder. Nonetheless, the Court found the errors to be harmless.



**State v. Flores, 2018-NMCA-075**

*Due Process: Use of a Codefendant's Guilty Plea*

Defendant Melissa Rae Flores was convicted of receiving or transferring a stolen car. Defendant's co-defendant, Scott Varetto, entered into a plea deal, agreeing to plead guilty to receiving or transferring the same car. At Flores's trial, the State admitted copies of Varetto's plea agreement. The State argued that Varetto's plea deal was evidence that Defendant knew or should have known that the car was stolen. No limiting instruction on Varetto's plea deal was given to the jury.

The Court considered precedent that a codefendant's guilty plea may not be used as substantive evidence of a defendant's guilt. This is intended to help curb the jury's temptation to find guilt by association, and ensures that the government must prove every element of an offense against the defendant. Violation of this rule is a denial of due process. New Mexico precedent suggests that the proper way for the prosecution to have used the codefendant as a witness was to elicit testimony from the codefendant that the Defendant was involved in the crime. There are no recognized exceptions to this rule, but in narrow instances, the codefendant's guilty plea may be used as non-substantive evidence, usually as evidence of the codefendant's credibility. If the plea is used in a permissible way, a limiting instruction must be given, cautioning the jury to not use the plea as proof of any of the elements of the offenses the Defendant is charged with.

In this case, the State did not use the codefendant's plea for a permissible purpose. The State used the plea agreement to substantively prove Flores knew the vehicle was stolen. The State did not contest this on appeal. The Court concluded that this was a denial of constitutional due process and denial of the right to a fair trial.

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**State v. Candelaria, No. A-1-CA-35193, 2019 WL 1435069 (N.M. Ct. App. Apr. 1, 2019)**

At issue: Rules 11-615, 11-901

This case involves two defendants from separate cases arising out of the same conduct, both of whom were found guilty of fraud in a scheme during which they wrote unauthorized checks to themselves. Both defendants, Candelaria and Chee, were housed in the Metropolitan Detention Center (MDC) at the same time. While incarcerated, Candelaria wrote a letter to Chee in which he admitted to committing the offense, and stated that he would testify that Chee was unaware of his conduct.

*Rule 11-615 Violation*

A records custodian for the MDC was excluded from testifying because she was present in the courtroom during the testimony of other witnesses, in violation of Rule 11-615.

*Letter Authentication- Rule 11-901*

Candelaria objected to the admission the inculpatory letter he wrote to Chee. Candelaria

maintained that the testifying records custodian did not have personal knowledge of the letter, had not seen the original letter, could not identify Candelaria's handwriting, and was not able to produce a mail log for the letter. The records custodian testified about which cells Candelaria and Chee were assigned to, which matched the addresses on the envelope that contained the letter. The letter also contained facts that were peculiarly known to Candelaria, and statements that the Court determined only someone in his position would make, including that his business was a franchise, that a particular third party was involved in the case, that the case involved writings, and that Candelaria loved Chee.

Rule 11-901(A) provides that evidence is authenticated if a party can “produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Under Rule 11-901(B)(4), a party can authenticate an item by providing evidence of the “appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances. The Court therefore concluded that the evidence was sufficient to permit a reasonable jury to believe that Candelaria wrote the letter. Candelaria's arguments to the contrary were held to go to the weight of the evidence, not its admissibility.

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**State v. Winn, 2019 -NMCA- 011**

At issue: Rule 11-901

*Authenticity of a presentence report in a SORNA case*

In a consideration of whether Defendant’s actual conduct, had it occurred in New Mexico, would have required sex offender registration pursuant to SORNA, the Defendant argued that the unsigned, unfiled presentence report was not sufficiently reliable nor reflective of facts the jury had to have found.

The Defendant argued that insufficient proof was presented that the presentence report was authentic and reliable. The report was inadmissible hearsay, not eligible for the public records hearsay exception because there was insufficient evidence of its reliability. The court agreed and remanded for further fact-finding.

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**Albuquerque Journal v. Bd. of Educ. of Albuquerque Pub. Sch. and Maureen Sanders, 2019-NMCA-012, certiorari granted February 19, 2019.**

At issue: Attorney-client privilege based upon common interest

In an IPRA lawsuit regarding access to materials related to the termination of APS Superintendent Winston Brooks, media outlets subpoenaed and sought to depose Brooks’ attorney, Maureen Sanders, regarding communications she had with attorneys for the School District and the Board. Sanders objected on privilege grounds as described herein.

*Whether the Open Meetings Act created a privilege for “limited personnel matters.”*

Sanders argued that the information involved confidential “limited personnel matters” under the Open Meetings Act that should be privileged. The Court of Appeals rejected the argument.

[I]nformation that is confidential is not necessarily protected by a legally recognized privilege. Critically, Sanders identifies no privilege—either adopted by our Supreme Court or recognized under the Constitution—on which to base her argument that communications regarding ‘limited personnel matters’ that occur during a closed public meeting are immune from discovery.

Albuquerque Journal v. Bd. of Educ. of Albuquerque Pub. Sch., 2019-NMCA-012, ¶ 18.

*Common interest attorney-client privilege*

Sanders also argued that the conversations were covered by the attorney-client privilege because the APS and the Board shared a common interest with her client. In order to establish the applicability of the privilege, the attorney bore the burden of proving all elements of the privilege for each communication claimed to be privileged. Privileged communications must be “between privileged persons,” which can be between a “client's lawyer and another lawyer representing another in a matter of common interest.”

To use this privilege, evidence must be presented that the parties had a contemporaneous agreement to pursue their shared identical legal interest. The Court of Appeals reiterated previous holdings that this agreement could be inferred “where two parties are clearly collaborating in advance of litigation,” but that “mere ‘indicia’ of joint strategy as of a particular point in time are insufficient to demonstrate that a common interest agreement has been formed.” Additionally, “a shared desire to see the same outcome in a legal matter is insufficient to bring a communication between two parties within [the common interest doctrine].”

The Court of Appeals stated that there was not an attempt to use any of the procedures available to prove that a privilege existed (e.g., in camera testimony). The evidence presented on appeal was merely indicia that APS shared a common goal or desire with her client at some time, rather than an identical legal interest. This is insufficient to establish a common-interest privilege.

The Court of Appeals did acknowledge “the difficult position in which Sanders has been put and her ensuing effort to zealously represent her client and meet her ethical obligations as a lawyer. Id., 2019-NMCA-012, ¶ 29.

As noted, the case is pending before the Supreme Court.

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**State v. Barela, 2019-NMCA-005, certiorari granted November 5, 2018**

At issue: Rules 11-613 and 11-403

*Admission of letters written by the victim as prior inconsistent statements*

Defendant was convicted of felony battery against a household member. Defendant argued that letters written by the victim should have been admitted for impeachment purposes as prior inconsistent statements under Rule 11-613(B). The district court allowed the Defendant to use the letters in cross-examination, but did not allow them to be admitted into evidence. The letters appear to have contained information that contradicted the victim's testimony at trial. However, the Defendant was allowed during cross-examination to quote portions of the letters verbatim and emphasize inconsistencies between the victim's trial testimony and statements made in the letters. The Court therefore held that admission of the letters would be cumulative, and that it was within the district court's discretion to refuse to admit them under Rule 11-403.

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### **Proposed Amendment to Federal Rule of Evidence 807**

The proposed amendments to Rule 807 (Residual Exception) aim to improve the operation of this hearsay exception in several respects, without narrowing or broadening its scope. First, the proposal deletes language requiring the court to identify guarantees of trustworthiness "equivalent" to those in the Rule 803 and Rule 804 hearsay exceptions – a requirement courts found difficult to apply in light of the wide-ranging and disparate nature of the various exceptions in Rules 803 and 804. The proposal instead requires the court to determine whether the statement is supported by sufficient guarantees of trustworthiness, considering the totality of the circumstances and any corroborating evidence. Second, the proposal eliminates as redundant requirements that the evidence prove a "material fact" and that admission of the evidence be in "the interests of justice" and consistent with the "purpose of the rules." Third, the proposal retains the requirements that the evidence must not be covered by a hearsay exception in Rules 803 or 804, and that the evidence must be more probative on the point for which it is offered than any other evidence the proponent can obtain through reasonable efforts. Fourth, the proposal revises the current notice provision to require that notice of an intent to use Rule 807 be given in writing before the trial or hearing and include the substance of the statement as well as the declarant's name. The proposal allows the court, for good cause, to excuse a failure to provide notice. The proposed amendments were unanimously approved by the Evidence Rules Advisory Committee and the Standing Committee.<sup>2</sup>

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<sup>2</sup> Taken from October 24, 2018 Memorandum from David G. Campbell to Scott S. Harris Re: Summary of Proposed Amendments to the Federal Rules available at [https://www.uscourts.gov/sites/default/files/scotus\\_federal\\_rules\\_package\\_2018\\_0.pdf](https://www.uscourts.gov/sites/default/files/scotus_federal_rules_package_2018_0.pdf)

**PROPOSED AMENDMENTS TO THE  
FEDERAL RULES OF EVIDENCE<sup>1</sup>**

1 **Rule 807. Residual Exception**

2 **(a) In General.** Under the following ~~circumstances~~  
3 conditions, a hearsay statement is not excluded by the  
4 rule against hearsay even if the statement is not  
5 ~~specifically covered by~~admissible under a hearsay  
6 exception in Rule 803 or 804:

- 7 **(1)** the statement ~~has equivalent circumstantialis~~  
8 supported by sufficient guarantees of  
9 trustworthiness—after considering the totality of  
10 circumstances under which it was made and  
11 evidence, if any, corroborating the statement; and  
12 ~~(2) it is offered as evidence of a material fact;~~

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<sup>1</sup> New material is underlined; matter to be omitted is lined through.

13           ~~(32)~~ it is more probative on the point for which it is  
14                           offered than any other evidence that the proponent  
15                           can obtain through reasonable efforts; ~~and~~  
16           ~~(4)~~ ~~admitting it will best serve the purposes of these~~  
17                           ~~rules and the interests of justice.~~

18   **(b) Notice.** The statement is admissible only if, ~~before the~~  
19           ~~trial or hearing,~~ the proponent gives an adverse party  
20           reasonable notice of the intent to offer the statement  
21           ~~and its particulars, including the declarant's name and~~  
22           ~~address, —including its substance and the declarant's~~  
23           ~~name—~~ so that the party has a fair opportunity to meet  
24           it. The notice must be provided in writing before the  
25           trial or hearing—or in any form during the trial or  
26           hearing if the court, for good cause,  
27           excuses a lack of earlier notice.