

# Contents

**Preface** xxv

**Acknowledgments** xxix

**Art Credits** xxxi

**About the Author** xxxiii

## **PART I ■ INTRODUCTORY MATTERS AND TERMINOLOGY** 1

### **CHAPTER 1 INTRODUCTION TO EVIDENCE AND THE RULES OF EVIDENCE** 2

*Chapter Topics* 2

*Objectives* 3

- I.** Definition of Evidence 3
- II.** The Court System 5
  - A.** Federal Courts 5
  - B.** State Courts 8
- III.** Sources of Evidence Law 10
  - A.** Federal Rules of Evidence 10
  - B.** Common Law 12
  - C.** Constitutional Protections 13
  - D.** Statutory Law 14

- IV. The Actors in the Criminal Justice Process 15
  - A. Investigative Personnel 15
  - B. Laboratory Personnel 15
  - C. Coroners and Medical Examiners 16
  - D. Attorneys 16
  - E. Trial Judge 16

*Chapter Summary* 17

*Key Terms* 18

*Review Questions* 18

*Application Problems* 18

## **CHAPTER 2**

### **THE CRIMINAL JUSTICE PROCESS 22**

*Chapter Topics* 22

*Objectives* 23

*Introduction* 23

- I. The Stages of the Criminal Justice Process 24
  - A. Case Investigation 24
  - B. Charging Suspects 25
    - 1. The Grand Jury Process 25
    - 2. Informations and Preliminary Hearings 26
  - C. Arraignment 28
  - D. Bail 28
  - E. Motions Hearings 30
  - F. Evidence of Plea Negotiations 31
  - G. Trial 33
    - 1. Jury Selection 34
    - 2. Opening Statements 37
    - 3. Prosecution's Case-in-Chief 37
      - a. Direct Examination of the Witness 37
      - b. Cross-Examination of the Witness 38
    - 4. Defense's Case-in-Chief 38
    - 5. Prosecution's Rebuttal 38
    - 6. Closing Statements 38
    - 7. Reading of the Jury Instructions 38
    - 8. Jury Verdicts 39
  - H. Appeal 40
    - 1. Appeal of Right 40
    - 2. Ineffective Assistance of Counsel 41
    - 3. Habeas Corpus Petitions 42

- II. Trial Evidence 42
  - A. Witnesses 43
  - B. Exhibits 43
  - C. Judicial Notice 43
  - D. Stipulations 45
  - E. Things That Are Not Evidence 45

*Chapter Summary* 47

*Key Terms* 48

*Review Questions* 49

*Application Problems* 49

### **CHAPTER 3**

## **BASIC EVIDENTIARY TERMS: RELEVANCE, BURDEN OF PROOF, AND CIRCUMSTANTIAL EVIDENCE 52**

*Chapter Topics* 52

*Objectives* 53

*Introduction* 53

- I. Admissibility of Evidence 54
  - A. Relevancy 54
  - B. Reliability 56
  - C. Competency of Evidence 57
  - D. Exclusion of Evidence Due to Its Prejudicial Effect: Rule 403 58
- II. Burden of Proof 60
  - A. Burden of Production 60
  - B. Burden of Persuasion 61
    - 1. Reasonable Suspicion 61
    - 2. Probable Cause 62
    - 3. Preponderance of the Evidence 62
    - 4. Clear and Convincing Evidence 63
    - 5. Beyond a Reasonable Doubt 63
  - C. Defenses 65
    - 1. Right to Present Evidence in Your Own Defense 65
    - 2. Types of Defenses 66
      - a. Negating Defenses 66
      - b. Affirmative Defenses 67
    - 3. The Burden of Proof for a Defense 73
  - D. Presumptions 74
    - 1. Presumption of Innocence 75
    - 2. Presumption of Intoxication 76

- III. Direct and Circumstantial Evidence 77
  - A. Direct Evidence 77
  - B. Circumstantial Evidence 77
    - 1. Definition 77
    - 2. Sufficiency of Circumstantial Evidence 79
      - a. Reasonable Hypothesis of Innocence Test 80
      - b. The Modern Rule 80
      - c. Use of Circumstantial Evidence in Murder Cases 82

*Chapter Summary* 85

*Key Terms* 86

*Review Questions* 86

*Application Problems* 87

## **PART II ■ THE COLLECTION AND PRESERVATION OF EVIDENCE 91**

---

### **CHAPTER 4 PHYSICAL EVIDENCE 92**

*Chapter Topics* 92

*Objectives* 93

*Introduction* 93

- I. Crime Scene Searches 94
  - A. Inward or Outward Spiral Search 95
  - B. Zone Search 95
  - C. Grid Search 96
  - D. Parallel or Lane Search 97
  - E. Searching in Stages 97
  - F. Light Sources 98
  - G. Automobile Searches 99
- II. Crime Scene Documentation 100
  - A. Crime Scene Notes 100
  - B. Crime Scene Photography 101
    - 1. Photography of Bloodstains and Pattern Evidence 103
    - 2. Photography of Shoe and Tire Impressions 103
    - 3. Panoramic Crime Scene Photographs 104
  - C. Crime Scene Measurements 104
  - D. Crime Scene Sketches and Diagrams 105
- III. Evidence Collection 107
  - A. Bloodstains and Other Biological Evidence 108
  - B. Hair and Fiber Evidence 108
  - C. Firearms Evidence 109

- D. Gunshot Residue 110
- E. Drugs 110
- F. Fingerprints 111
  - 1. Development of Latent Prints Using Fingerprint Powder 111
  - 2. Development of Latent Prints Using Chemical Developers 112
  - 3. Collection of Visible and Plastic Prints 112
- G. Shoe and Tiremark Impressions 112
- IV. Chain of Custody 114
- V. Evidence Storage and Preservation 116
  - A. Preservation of Biological Evidence 116
  - B. Storage and Tracking of Evidence 117
  - C. Contamination of Evidence 118

*Chapter Summary* 120

*Key Terms* 120

*Review Questions* 120

*Application Problems* 121

## **CHAPTER 5**

### **IDENTIFICATION EVIDENCE 124**

*Chapter Topics* 124

*Objectives* 125

*Introduction* 125

- I. The Identification Process 126
  - A. Pretrial Identification Procedures 126
  - B. Admissibility of Pretrial and In-Court Identifications 127
    - 1. Suggestiveness of the Pretrial Lineup 127
    - 2. Reliability of the Identification 130
      - a. *Biggers* Factors Used to Determine Reliability 130
      - b. Criticism of the *Biggers* Reliability Factors 131
      - c. Research Findings Concerning Eyewitness Misidentification 133
      - d. State Courts' Modification of the *Biggers* Factors 135
  - C. The Use of Expert Testimony on Eyewitness Misidentification 138
  - D. Right to Counsel 139
  - E. Protocols for Conducting Unbiased Pretrial Identifications 140

*Chapter Summary* 143

*Key Terms* 143

*Review Questions* 143

*Application Problems* 144

## **CHAPTER 6**

### **CONFESSIONS 148**

*Chapter Topics* 148

*Objectives* 149

*Introduction* 149

- I.** Obtaining Confessions 150
  - A.** Physical Torture 150
    - 1.** Enhanced Interrogation Techniques 152
  - B.** Modern Interrogation Techniques 154
    - 1.** The Reid Technique 154
  - C.** Success of Interrogation 154
  - D.** False Confessions 156
    - 1.** Types of False Confessions 156
    - 2.** Causes of False Confessions 156
    - 3.** Prevention of False Confessions 159
- II.** Corroboration of Confessions 163
  - A.** *Corpus Delicti* Rule 163
  - B.** Trustworthiness Rule 164
- III.** Immunity 166
- IV.** Use of Confessions of Co-Defendants That Implicate the Defendant 168
  - A.** The *Bruton* Rule 169
  - B.** Redaction 169

*Chapter Summary* 170

*Key Terms* 171

*Review Questions* 171

*Application Problems* 171

## **PART III ■ PRETRIAL MATTERS 175**

---

### **CHAPTER 7**

#### **PRETRIAL DISCOVERY 176**

*Chapter Topics* 176

*Objectives* 177

*Introduction* 177

- I.** The Prosecution's Duty to Provide Discovery 178
  - A.** The *Brady* Rule: Duty to Preserve and Disclose Exculpatory Evidence 178

---

1.	Timing of Disclosures	179
2.	Impeachment Material	181
B.	Potentially Exculpatory Evidence	181
1.	Destruction of Evidence	181
2.	Preservation of Breath and Blood-Alcohol Samples	183
3.	Destruction of Evidence That Occurs During Testing	183
4.	Video Recording of Evidentiary Tests	184
C.	Discovery Obligations Under Rule 16	185
1.	Statements of the Defendant	185
2.	Documents, Photographs, and Tangible Objects	186
3.	Investigator's Notes	187
4.	Expert Disclosures	188
5.	Jencks Act	188
6.	Witness Lists	189
7.	Identity of Informant	189
8.	Nondiscoverable Material	190
D.	Relationship Between the Prosecution's Duty to Disclose Exculpatory Material and Its Obligations Under Rule 16	191
II.	Defendant's Discovery Obligations	193
A.	Notice of Alibi	193
B.	Reciprocal Discovery	194
III.	Sanctions for Violating Discovery Rules	194
	<i>Chapter Summary</i>	196
	<i>Key Terms</i>	197
	<i>Review Questions</i>	197
	<i>Application Problems</i>	198

## **CHAPTER 8**

### **THE EXCLUSIONARY RULE AND MOTIONS TO SUPPRESS EVIDENCE 202**

	<i>Chapter Topics</i>	202
	<i>Objectives</i>	203
	<i>Introduction</i>	203
I.	Fourth Amendment Privacy Protections	205
A.	The Warrant Requirement	205
B.	The Reasonableness Requirement	207
C.	The Exclusionary Rule	209
1.	Fruit of the Poisonous Tree	210
2.	Exceptions to the Exclusionary Rule	211
a.	Independent Source	212
b.	Inevitable Discovery	213

- c. Attenuation 214
      - d. Good Faith Exception 215
    - 3. Private Parties and Third Parties 219
    - 4. Grand Jury Proceedings and Parole Revocation Hearings 219
    - 5. Continuing Viability of the Exclusionary Rule 220
  - II. Fifth and Sixth Amendment Protections for a Defendant's Statements 221
    - A. Fifth Amendment Right to Remain Silent 221
      - 1. *Miranda* Advisements and Voluntary Waiver of the Right to Remain Silent 222
        - a. Public Safety Exception 222
        - b. Right to Counsel Under *Miranda* 224
      - 2. Due Process Concerns and Coerced Confessions 224
        - a. Physical Violence or Torture 224
        - b. Deception and Other Psychological Interrogation Methods 225
        - c. Manufacturing False Evidence 225
    - B. Sixth Amendment Right to Counsel 227
    - C. Use of Illegally Obtained Evidence for Impeachment 227
  - III. Motions to Suppress 229
- Chapter Summary* 230
- Key Terms* 231
- Review Questions* 232
- Application Problems* 232

## PART IV ■ ADMISSIBILITY OF EVIDENCE AT TRIAL 237

---

### CHAPTER 9 WITNESSES PART I: EXPERT AND LAY WITNESSES 238

- Chapter Topics* 238
- Objectives* 239
- Introduction* 239

- I. Types of Witnesses 240
  - A. Lay Witnesses 240
  - B. Expert Witnesses 243



---

- 1. Types of Experts 244
- 2. Preliminary Screening of the Admissibility of Expert Testimony 244
  - a. The Trial Judge's Gatekeeping Function 244
- 3. The Degree of Certainty to Which Experts Have to Hold Their Opinions 253
- C. Lay Opinions Versus Expert Opinions 254
- II. Subpoenas 256
  - A. General Requirements 256
  - B. Out-of-State Subpoenas 256
  - C. Subpoenas *Duces Tecum* 257
    - 1. Motion to Quash 257
  - D. Grand Jury Subpoenas 259
- Chapter Summary* 260
- Key Terms* 261
- Review Questions* 261
- Application Problems* 262

## **CHAPTER 10**

### **WITNESSES PART II: RELIABILITY OF FORENSIC EVIDENCE 264**

- Chapter Topics* 264
- Objectives* 265
- Introduction* 265

- I. The Reliability of Forensic Comparison Evidence 266
  - A. Independent Studies on the Reliability of Forensic Evidence 266
    - 1. National Academy of Sciences Report on Forensic Science 266
    - 2. Subsequent Reports on the Reliability of Forensic Evidence 268
  - B. Courts' Evaluation of the Reliability of Forensic Disciplines 270
    - 1. DNA Evidence 270
    - 2. Friction Ridge Analysis and Fingerprint Identification 271
    - 3. Firearms Identification 273
    - 4. Handwriting Analysis 275
    - 5. Hair Comparison Analysis 278
    - 6. Bitemark Identification 278
    - 7. Bloodstain Pattern Analysis 281
    - 8. Arson Investigation 283
    - 9. Admissibility of Polygraph Evidence 283

- C. Connection Between Wrongful Convictions and False or Misleading Forensic Evidence 285
- D. CSI Effect 287

*Chapter Summary* 289  
*Key Terms* 289  
*Review Questions* 290  
*Application Problems* 290

## **CHAPTER 11**

### **WITNESSES PART III: COMPETENCY AND PRIVILEGE 296**

*Chapter Topics* 296  
*Objectives* 297  
*Introduction* 297

- I. Competency of Witnesses 298
  - A. General Requirements 298
  - B. Determining Incapacity 299
  - C. Types of Incapacity 300
    - 1. Physical or Mental Infirmary 300
    - 2. Child Witnesses 301
  - D. Personal Knowledge 303
  - E. Oaths and Affirmations 304
  - F. Judges and Jurors 305
- II. Privileges 305
  - A. General Requirements 305
    - 1. Creation 306
    - 2. Assertion and Waiver of the Privilege 308
    - 3. Comments at Trial 308
  - B. Specific Privileges 309
    - 1. Privilege Against Self-Incrimination 309
    - 2. Attorney/Client 310
      - a. The Existence of an Attorney/Client Relationship 311
      - b. The Provision of Legal Advice 311
      - c. Waiver of the Privilege 312
      - d. Inadvertent Disclosure 312
      - e. Death of the Client 313
    - 3. Clergy/Communicant 315
    - 4. Family Relationships 316
      - a. Spousal Privilege 316
      - b. Parent/Child Privilege 319
      - c. Sibling Privilege 320

5. Physician/Patient 320
6. Psychotherapist/Patient 321
7. Counselor or Advocate/Crime Victim 323
8. Reporter/Source 324
9. Medical and Mental Health Records of a Crime Victim 326

*Chapter Summary* 327  
*Key Terms* 328  
*Review Questions* 328  
*Application Problems* 329

## **CHAPTER 12**

### **WITNESSES PART IV: IMPEACHMENT AND CROSS-EXAMINATION 334**

*Chapter Topics* 335  
*Objectives* 335  
*Introduction* 335

- I. Impeachment 336
  - A. Bias or Motive to Lie 337
  - B. Lack of Capacity to Perceive or Recall 338
  - C. Contradiction 338
  - D. Impeachment by Character and Conduct 341
    1. Attacking Character by Reputation or Opinion 341
    2. Attacking Character by Prior Conduct of Witness 342
    3. Attacking the Defendant's Character 343
  - E. Impeachment by Conviction 344
    1. Acts That Are Probative of Truthfulness 344
    2. Elements of the Underlying Conviction 346
    3. Juvenile Adjudications 346
  - F. Prior Inconsistent Statements 347
  - G. Extrinsic Evidence 350

*Chapter Summary* 351  
*Key Terms* 352  
*Review Questions* 352  
*Application Problems* 352

## **CHAPTER 13**

### **CHARACTER EVIDENCE 356**

*Chapter Topics* 356  
*Objectives* 357  
*Introduction* 357

- I. Character Evidence Is Generally Excluded: Rule 404(a) 359
- II. The Exceptions Under Which Character Evidence Is Admissible 360
  - A. The Defendant's Own Good Character: Rule 404(a)(2)(A) 361
  - B. Character of the Victim: Rules 404(a)(2)(B)-(C) 362
    - 1. Self-Defense 363
    - 2. Rape Shield Laws 365
      - a. Evidence of Sexual Conduct with Third Parties 366
      - b. Evidence of Prior Sexual Conduct with the Same Victim 367
      - c. Prior False Allegations of Sexual Abuse 368
      - d. Prior History of Sexual Abuse 368
      - e. Criticisms of Rape Shield Laws 370
- III. Use of Character Evidence to Prove an Independent Purpose: Rule 404(b) 371
  - A. Whether the Defendant Committed the Other Act 373
  - B. Relevance of the Other Acts 374
  - C. Independent Purpose 374
    - 1. Identity 376
    - 2. Intent and Motive 377
    - 3. Absence of Mistake 378
  - D. Balancing the Probative Value Against the Prejudicial Effect 379
  - E. Exemption of *Res Gestae* or Intrinsic Acts from Rule 404(b) 381
  - F. Admission of Prior Acts in Sexual Assault and Domestic Violence Cases 383
    - 1. Lustful Disposition Exception 383
    - 2. Heightened Relevance Laws 384
    - 3. Admission of Evidence of Prior Acts in Sexual Assault Cases in Federal Court: Rules 413 and 414 386

*Chapter Summary* 390

*Key Terms* 391

*Review Questions* 391

*Application Problems* 392

## **CHAPTER 14**

### **HEARSAY EVIDENCE 396**

*Chapter Topics* 396

*Objectives* 397

*Introduction* 397

---

<b>I.</b>	Origins of the Hearsay Rule	399
<b>II.</b>	Modern Rule	399
<b>A.</b>	Definition of Hearsay: Rule 801(a)-(c); Rule 802	399
<b>B.</b>	Exemptions from the Hearsay Rule	402
<b>1.</b>	Prior Testimony: Rule 801(d)(1)	402
<b>2.</b>	Statements of Defendant: Rule 801(d)(2)	403
<b>C.</b>	Hearsay Exceptions	404
<b>1.</b>	Availability of the Declarant Immaterial	405
<b>a.</b>	Present Sense Impression: Rule 803(1)	405
<b>b.</b>	Excited Utterance: Rule 803(2)	406
<b>c.</b>	State of Mind: Rule 803(3)	407
<b>d.</b>	Medical Diagnosis or Treatment: Rule 803(4)	408
<b>e.</b>	Records of Regularly Conducted Activities: Rule 803(6)	409
<b>f.</b>	Public Records: Rule 803(8)	410
<b>2.</b>	Unavailability of the Declarant	411
<b>a.</b>	Former Testimony: Rule 804(b)(1)	413
<b>b.</b>	Dying Declaration: Rule 804(b)(2)	414
<b>c.</b>	Statement Against Interest: Rule 804(b)(3)	414
<b>3.</b>	Residual Exception: Rule 807	415
<b>D.</b>	Impeachment of a Missing Declarant: Rule 806	417
<b>E.</b>	<i>Res Gestae</i>	417
<b>III.</b>	Testimonial Hearsay Under the Confrontation Clause	418
<b>A.</b>	<i>Crawford v. Washington</i>	418
<b>B.</b>	<i>Davis v. Washington</i>	419
<b>C.</b>	<i>Michigan v. Bryant</i>	420
<b>D.</b>	Statements Made to Persons Who Are Not Law Enforcement Officials	422
<b>1.</b>	Statements Made by Young Children	422
<b>a.</b>	Statements Made to Parents or Family Members	422
<b>b.</b>	Statements Made to Teachers	422
<b>c.</b>	Statements Made to Forensic Interviewers	422
<b>2.</b>	Statements Made to Neighbors	424
<b>3.</b>	Statements Made to a Doctor for Medical Diagnosis	424
<b>E.</b>	Forensic Lab Reports and Other Certificates of Analysis	425
<b>F.</b>	Workflow for Testimonial Hearsay	427
<b>G.</b>	Forfeiture by Wrongdoing: Rule 804(b)(6)	429
	<b>Chapter Summary</b>	<b>432</b>
	<b>Key Terms</b>	<b>433</b>
	<b>Review Questions</b>	<b>433</b>
	<b>Application Problems</b>	<b>434</b>

## **CHAPTER 15**

### **AUTHENTICATION OF EVIDENCE AND THE BEST EVIDENCE RULE 438**

*Chapter Topics* 438

*Objectives* 439

*Introduction* 439

- I. Authentication of Evidence 440
  - A. Physical Evidence 441
  - B. Documentary Evidence 441
    - 1. Hard Copies 441
    - 2. Electronically Stored Information 442
    - 3. Social Media Postings 444
  - C. Demonstrative Evidence 446
    - 1. Photographs and Video Generally 446
    - 2. Digital Photographs 448
      - a. Unaltered or Minimally Enhanced Images 448
      - b. Materially Altered Images 448
    - 3. Remote Cameras 450
    - 4. Computer Graphics and Animations 451
- II. Best Evidence Rule 452
  - A. Requirement That the Original Writing Be Produced 452
    - 1. Application of the Best Evidence Rule 453
    - 2. Definition of a Writing 454
  - B. Exceptions to the Best Evidence Rule 455
    - 1. Admission of Copies or Duplicates 455
    - 2. Admissibility of Secondary Evidence 456
    - 3. Public Records 459
    - 4. Summaries 459

*Chapter Summary* 461

*Key Terms* 462

*Review Questions* 462

*Application Problems* 463

## **CHAPTER 16**

### **TRIAL TECHNIQUES AND MOCK TRIAL TIPS 466**

*Chapter Topics* 466

*Objectives* 467

- I. Trial Practice Tips for Attorneys and Witnesses 467

- A. Opening Statements 467
- B. Direct Examination 469
- C. Cross-Examination of Witnesses 472
- D. Objections 476
- E. Closing Arguments 479
- F. Testimony Tips 479
  - 1. Preparation 479
  - 2. Estimates of Time and Distance 480
  - 3. Appearance 480
  - 4. Demeanor 480
  - 5. Scope and Style of Answers 481

*Chapter Summary* 481

*Key Terms* 482

*Review Questions* 482

*Application Problems* 482

**Appendix: Federal Rules of Evidence 485**

**Table of Cases 525**

**Glossary 527**

**Index 545**