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THE OHIO RULES OF EVIDENCE PART V

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This is the last in a series of articles examining the Rules of Evidence as they apply in criminal cases. This article discusses some of the hearsay exceptions that are recognized by the Rules. These exceptions must be applied in light of the Confrontation Clause cases. See *Ohio v. Roberts*, 448 US 56 (1980); *State v. Tims*, 9 OS(2d) 136, 224 NE(2d) 348 (1967).

RULE 803: HEARSAY EXCEPTIONS

Rule 803 specifies twenty-two hearsay exceptions. Rule 804 specifies five hearsay exceptions. In contrast to the exceptions enumerated in Rule 804, the Rule 803 exceptions do not depend on the unavailability of the declarant. Rules 803 and 804 must be read in conjunction with Rule 801, which defines hearsay, and Rule 802, which excludes hearsay evidence in the absence of an exception. See also Rule 805 (admissibility of multiple hearsay); Rule 806 (impeachment and rehabilitation of hearsay declarants).

Firsthand Knowledge

Several of the exceptions recognized in the Rules specifically require firsthand knowledge on the part of the declarant. *E.g.*, Rule 803(5) & (6). For other exceptions, firsthand knowledge is not explicitly required. Nevertheless, firsthand knowledge is a requirement for all exceptions. This has been the traditional view. See 5 J. Wigmore, *Evidence* § 1424 (Chadbourn rev. 1974). The Advisory Committee's Note to Federal Rule 803 reads: "In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. See rule 602."

RULE 803(1): PRESENT SENSE IMPRESSIONS

Rule 803(1) recognizes a hearsay exception for

present sense impressions. The rule requires: (1) a statement describing or explaining an event or condition, (2) about which the declarant had firsthand knowledge, (3) made at the time the declarant was perceiving the event or immediately thereafter, (4) under circumstances that do not indicate a lack of trustworthiness. The present sense impression exception was not recognized under prior Ohio law, although statements that fall within this exception may have been admitted as *res gestae*.

The reliability of present sense impressions rests upon the declarant's *lack of time* to fabricate. In the leading case, *Houston Oxygen Co. v. Davis*, 139 Tex 1, 161 SW(2d) 474 (1942), the court held that the statement was "sufficiently spontaneous to save it from the suspicion of being manufactured evidence. There was no time for a calculated statement." *Id.* at 6. The Advisory Committee's Note to Federal Rule 803 states: "The underlying theory of Exception (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation." In addition, the time requirement—"substantial contemporaneity"—eliminates any problem associated with defects in the declarant's ability to remember the event.

This theory of admissibility differs from the theory which underlies the excited utterance exception recognized in Rule 803(2). The reliability of excited utterances is based upon the declarant's *lack of capacity* to fabricate. This difference in theory explains the differences between the requirements for application of the two exceptions. For example, a startling or exciting event is required for the excited utterance exception, but not for present sense impression exception.

Time Requirement

The rule requires that the statement be made "while the declarant was perceiving the event or

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condition, or immediately thereafter.” The statement must be nearly contemporaneous with the perception of the event. This requirement is more demanding than the time requirement for excited utterances. An excited utterance could be made minutes (possibly longer) after the exciting event, so long as the declarant is under the influence of the exciting event at the time the statement is made.

Subject Matter Requirement

The rule requires that the statement describe or explain an event or condition. This requirement follows from the theory underlying the exception—lack of time to fabricate. Statements beyond descriptions or explanations indicate that the declarant has had sufficient time to think about the event. In contrast, the subject matter of an excited utterance is not so circumscribed—statements “relating to a startling event” are admissible. The Advisory Committee’s Note to Federal Rule 803 states: “Permissible *subject matter* of the statement is limited under Exception (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther. In Exception (2) [excited utterances], however, the statement need only ‘relate’ to the startling event or condition, thus affording a broader scope of subject matter coverage.”

Circumstances of Lack of Trustworthiness

In contrast to Federal Rule 803(1), the Ohio rule explicitly permits the exclusion of a statement that would otherwise qualify as a present sense impression if the “circumstances indicate a lack of trustworthiness.” One of the guarantees of trustworthiness upon which the present sense impression exception is based is verification. For example, McCormick states that “the statement will usually have been made to a third party (the person who subsequently testifies to it) who, being present at the time and scene of the observation, will usually have an opportunity to observe the situation himself and thus provide a check on the accuracy of the declarant’s statement.” C. McCormick, *Evidence* 710 (2d ed. 1972). But if the witness (the third party) heard the statement but did not perceive the event, this safeguard is not present. The “lack of trustworthiness” clause was intended to protect against this possibility. The Staff Note contains the following commentary:

One of the principal elements of the circumstantial guaranty of trustworthiness of this exception is that the statement was made at a time and under circumstances in which the person to whom the statement was made would be in a position to verify the statement. The provision requiring exclusion if the circumstances do not warrant a high degree of trustworthiness would justify exclusion if, for example, the statement were made by a declarant concerning a perceived event to another by way of a C.B. radio transmission. Other circumstances other than the lack of verification may also taint the trustworthiness of this class of hearsay declaration.

Startling Event Requirement

The rule requires that the statement relate to a “startling event or condition.” This requirement follows from the theory underlying the exception—without a startling event, the declarant’s capacity to reflect and fabricate will not be suspended. In *State v. Duncan*, 53 OS(2d) 215, 373 NE(2d) 1234 (1978), the Supreme Court stated the requirement as follows: “[T]here [must be] some occurrence startling enough to produce a nervous excitement in the declarant, which was sufficient to still his reflective faculties and thereby make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs...” *Id.* (syllabus, para. 1).

The declarant may be a participant in the event—for example the victim of an assault or rape. The declarant also may be a bystander. Advisory Committee’s Note, Fed. R. Evid. 803 (“*Participation* by the declarant is not required.”). If the bystander-declarant is unidentified, admissibility of the statement requires close scrutiny. The federal drafters recognized this problem. “[W]hen declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, ... a result which would under appropriate circumstances be consistent with the rule.” Advisory Committee’s Note, Fed. R. Evid. 803. See also *New York, C. & St. L. R.R. v. Kovatch*, 120 OS 532, 166 NE 682 (1929) (unidentified bystander’s statement admitted).

Proof of the startling event may consist of extrinsic evidence of the event, including the condition of the declarant. In addition, the utterance itself may establish the existence of a startling event. See C. McCormick, *Evidence* 705 (2d ed. 1972).

Stress of Excitement Requirement

The rule requires that the statement have been made “while the declarant was under the stress of excitement caused by the event or condition.” This requirement follows from the theory underlying the exception; unless the declarant is speaking while under the influence of the event, his capacity to reflect and fabricate will not be suspended. In *State v. Duncan*, 53 OS(2d) 215, 373 NE(2d) 1234 (1978), the Supreme Court stated the requirement as follows: “[T]he statement or declaration, even if not strictly contemporaneous with the exciting cause, [must be] made before there has been time for such a nervous excitement to lose a domination over [the declarant’s] reflective faculties, so that such domination continued to remain sufficient to make his statements and declarations the unreflective and sincere expression of his actual impressions and beliefs...” *Id.* (syllabus, para. 1). Hence, statements made after a substantial time has elapsed, may be admissible so long as the declarant is under the influence of the exciting event. C. McCormick, *Evidence* 706 (2d ed. 1972). The statement also may be made in response to a question. See *State v. Duncan, supra*; *State v. Dickerson*, 51 App(2d) 255, 367 NE(2d) 927 (1977).

Subject Matter Requirement

The rule requires that the statement "relate" to a startling event. See *State v. Duncan*, 53 OS(2d) 215, 373 NE(2d) 1234 (1978) (syllabus, para. 1); *Potter v. Baker*, 162 OS 488, 124 NE(2d) 140 (1955). This requirement is simply a refinement of the "under the stress of the excitement" requirement discussed previously. Statements that do not "relate" to the startling event indicate that the declarant is no longer speaking while under the influence of the event. In *Murphy Auto Parts Co. v. Ball*, 249 F(2d) 508 (DC Cir 1957), *cert. denied*, 355 US 932 (1958), the court explained: "[A]s soon as the excited utterance goes beyond description of the exciting event and deals with past facts or with the future it may tend to take on a reflective quality... In other words, the very fact that the utterance is not descriptive of the exciting event is one of the factors which the trial court must take into account in the evaluation of whether the statement is truly a spontaneous, impulsive expression excited by the event." *Id.* at 511.

Other Requirements

The firsthand knowledge rule applies to excited utterances. See *State v. Duncan*, 53 OS(2d) 215, 373 NE(2d) 1234 (1978); *Potter v. Baker*, 162 OS 488, 124 NE(2d) 140 (1955).

Rules relating to the competency of witnesses (see Rule 601) have not been applied to excited utterances. See C. McCormick, *Evidence* 708 (2d ed. 1972). Most of the Ohio cases have involved the statements of a young child. *E.g.*, *State v. Duncan*, 53 OS(2d) 215, 373 NE(2d) 1234 (1978) (6 year old child); *State v. Lasecki*, 90 OS 10, 106 NE 660 (1914) (4 year old child).

RULE 803(3): STATEMENTS OF PRESENTLY EXISTING STATE OF PHYSICAL CONDITION OR MIND

Rule 803(3) recognizes a hearsay exception for statements of a declarant's "then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)..." The rule explicitly excludes statements "of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." Many of the prior Ohio cases treated statements falling within this exception as part of the vague *res gestae* rule.

For purposes of analysis, the rule can be divided into four categories: (1) statements of presently existing physical condition, (2) statements of presently existing state of mind offered to prove that state of mind, (3) statements of presently existing state of mind offered to prove the declarant acted in accordance with that state of mind, and (4) statements of memory or belief offered to prove the fact remembered or believed. Categories (2) and (3) are the more important ones in criminal cases.

Statements of Presently Existing State of Mind

Statements of presently existing state of mind or emotion, including statements of "intent, plan, motive, design, [or] mental feeling," are admissible under Rule 803(3). A person's state of mind is often a consequential or material fact under the substantive law; for example, most crimes require proof of the defendant's mental state (*mens rea*). The reliability of statements of presently existing state of mind rests on the spontaneity of the statement, which reduces the risk of conscious fabrication. See C. McCormick, *Evidence* 695 (2d ed. 1972).

Frequently, statements regarding the mental state of the declarant are not hearsay because they are not offered to prove the truth of the assertion contained in the statement. For example, an accused's statement, "I will kill John Doe," offered to prove intent in a homicide prosecution, is hearsay but falls within the exception of Rule 803(3). The statement, "John Doe is the most despicable person I know," offered to prove intent, is not offered to prove the truth of the assertion, and is, therefore, not hearsay. See C. McCormick, *Evidence* 694 (2d ed. 1972).

Statements of State of Mind Offered to Prove Future Conduct

Statements of presently existing state of mind are admissible under Rule 803(3) to prove that the declarant subsequently acted in accordance with that state of mind. For example, the accused's statement, "I will kill John Doe," is admissible to prove that the accused killed Doe as well as to prove his intent to kill. The leading case is *Mutual Life Ins. Co. v. Hillmon*, 145 US 285 (1892), where letters in which the declarant stated that he intended to travel from Wichita to Crooked Creek with another person (Hillmon) were offered in evidence. The U.S. Supreme Court held the letters admissible: "The letters... were competent not as narrative of facts communicated to the writer by others, nor yet as proof that he actually went away from Wichita, but as evidence that, shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which made it more probable both that he did go and that he went with Hillmon than if there had been no proof of such intention." *Id.* at 295-96.

A major problem with this rule involves statements offered to prove that a person other than the declarant also engaged in the intended conduct—for example, statements of a homicide victim that the victim intended to meet the accused on the day of the murder. The House Judiciary Committee Report attempted to limit the rule in this respect: "[T]he Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon*... so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." H.R. Rep. No. 650, 93d Cong., 1st Sess. (1973), *reprinted in*, [1974] U.S.

Code Cong. & Ad. News 7075, 7087. See also *United States v. Jenkins*, 579 F(2d) 840 (4th Cir.), *cert. denied*, 439 US 967 (1978).

RULE 803(5): RECORDED RECOLLECTION

Rule 803(5) recognizes a hearsay exception for past recollection recorded. See Annot., 35 A.L.R. Fed. 605 (1977). The rule requires that: (1) the witness have had firsthand knowledge of a matter; (2) the witness made or adopted a memorandum or record concerning the matter "when the matter was fresh in his memory"; (3) the memorandum or record reflects the witness' "knowledge correctly"; and (4) the witness has "insufficient recollection to enable him to testify fully and accurately" about the matter recorded. The exception for past recollection recorded should be distinguished from the practice of refreshing recollection, which does not involve hearsay evidence and is governed by Rule 612.

The trustworthiness of records of past recollection "is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them." Advisory Committee's Note, Fed. R. Evid. 803. The rule is consistent with prior Ohio cases. See *State v. Scott*, 31 OS(2d) 1, 285 NE(2d) 344 (1972); *Moots v. State*, 21 OS 653 (1871).

Preparation of the Record

The rule requires the record or memorandum "to have been made or adopted [by the witness] when the matter was fresh in his memory and to reflect [his] knowledge correctly." These requirements relating to the preparation of the record are designed to ensure the reliability of the matters contained in the record.

In *State v. Scott*, 31 OS(2d) 1, 285 NE(2d) 344 (1972), the Supreme Court held that the record had to have been made "at or near the time of the event." *Id.* (syllabus, para. 1). In contrast, the rule requires that the record have been prepared "when the matter was fresh in [the witness'] memory." This formulation follows Wigmore's view. See 3 J. Wigmore, Evidence § 745 (Chadbourn rev. 1970).

The rule provides that the record may be either prepared or adopted by the witness so long as the witness vouches that the record reflects his "knowledge correctly." If the witness makes a statement to a third person who prepares a record, the record is admissible if the witness verified the accuracy of the record at a time when the event was fresh in his memory. Even if the witness did not verify the record, the record may be admissible if the recorder testifies that the record contains an accurate account of the witness' statement. This situation involves what McCormick refers to as "cooperative records." C. McCormick Evidence 716 (2d ed. 1972) (*citing Rathbun v. Brancatella*, 93 N.J.L. 222, 107 A.279 (1919)).

Rule 803(5) differs from its federal counterpart in one respect. The Ohio rule requires that the accuracy of the record be established "by the testi-

mony of the witness," a requirement not explicitly stated in the federal rule. This amendment was intended to avoid the suggestion in *United States v. Payne*, 492 F(2d) 449 (4th Cir.), *cert. denied*, 419 US 876 (1974), that the accuracy of the record could be established through the testimony of a third person, even though the witness could not recall making the statement recorded.

Insufficient Recollection

The rule requires that the witness have "insufficient recollection" of the matter contained in the record to enable him to testify "fully and accurately" at trial. This requirement is consistent with *State v. Scott*, 31 OS(2d) 1, 285 NE(2d) 344 (1972), in which the Supreme Court required that the witness "lack [] a complete present recollection of the event..." *Id.* (syllabus, para. 1).

The "insufficient recollection" requirement does not relate to the accuracy of the record or memorandum. Rather, it is aimed at avoiding abuse of the exception. "[T]he absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjustors." Advisory Committee's Note, Fed. R. Evid. 803. See also C. McCormick, Evidence § 302 (2d ed. 1972).

RULE 803(6): BUSINESS RECORDS

Rule 803(6) recognizes a hearsay exception for records of regularly conducted business activities. According to the Staff Note, the rule is "in substantial conformity with RC 2317.40, the Uniform Business Records as Evidence Act..."

Rule 803(6) requires: (1) a record of an act, event, or condition; (2) made at or near the time; (3) by, or from information transmitted by, a person with knowledge; (4) if the record was kept in the course of a regularly conducted business activity; (5) if it was the regular practice of that business activity to make the record; (6) as shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10); (7) unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. Records of regularly conducted business activities include memoranda, reports, records, or "data compilation[s], in any form..." "The expression 'data compilation' is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage." Advisory Committee's Note, Fed. R. Evid. 803.

The reliability of business records "is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." Advisory Committee's Note, Fed. R. Evid. 803. See also *Weis v. Weis*, 147 OS 416, 72

NE(2d) 245 (1947).

The rule requires that the record be "kept in the course of a regularly conducted business activity." The rule defines a business as an "institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit." The term business was defined broadly in the rule to include "the records of institutions and associations like schools, churches and hospitals..." H.R. Rep. No. 1597, 93rd Cong., 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad News 7098, 7104 (Conference Report). Personal records are not admissible under this exception.

The rule also requires that the record be the product of "the regular practice of that business activity." See RC 2317.40 (record made "in the regular course of business"); *Kalna v. Fialko*, 102 App 442, 446, 125 NE(2d) 565, 567 (1955) ("piece of paper was not a part of any system of the plaintiff in recording events of his business.").

Time Requirement

The rule requires that the record have been "made at or near the time" of the act, event, or condition. RC 2317.40 contains an identical provision. The time requirement is one of the conditions that ensures the reliability of business records. McCormick advocated a flexible approach in applying this requirement: "Whether an entry made subsequent to the transaction has been made within a sufficient time to render it within the exception depends upon whether the time span between the transaction and the entry was so great as to suggest a danger of inaccuracy by lapse of memory." C. McCormick, *Evidence* 724 (2d ed. 1972). See also 5 J. Wigmore, *Evidence* § 1526 (Chadbourn rev. 1974).

Firsthand Knowledge; Double Hearsay

The rule provides that the record must have been made by a person with knowledge of the act, event, or condition or from information transmitted by a person with such knowledge. This provision does not require that the "person with knowledge" be produced or identified.

The firsthand knowledge requirement presents no problem when the person making the record had personal knowledge of the act, event, or condition. The difficult cases involve records in which the supplier of information does not make the record, but transmits the information to another person who makes the record. If both the supplier and recorder are acting in the regular course of business the record is admissible; the supplier is under a duty to transmit the information and the recorder is under a duty to make the record. The recorder need not have firsthand knowledge of the event. See C. McCormick, *Evidence* 726 (2d ed. 1972).

The situation is different if the supplier is not under a duty to transmit the information.

If...the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to the information

itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930), held that a report thus prepared was inadmissible.... The rule follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity." Advisory Committee's Note, Fed. R. Evid. 803.

If the supplier is not under a duty to transmit the information, the record may nevertheless be admissible, but only if the supplier's statement falls within another hearsay exception. This situation presents a double hearsay problem and admissibility is governed by Rule 805. For example, if the statement by the supplier is made for the purpose of medical diagnosis or treatment, the statement may qualify under Rule 803(4). If the supplier is not acting pursuant to a business duty and his statement does not fit into another exception, the statement is inadmissible. See *Schmitt v. Doehler Die Casting Co.*, 143 OS 421, 44 NE(2d) 644 (1944); *Hytha v. Schwendeman*, 40 App(2d) 478, 484, 320 NE(2d) 312, 317 (1974) ("hearsay on hearsay," in the absence of other exceptions to the general hearsay rule, is not admissible, even in view of the business records as evidence statute.").

Method of Proof

The rule provides that the foundation for the admissibility of business records may be "shown by the testimony of the custodian or other qualified witness or as provided by Rule 901(B)(10)..." The reference to Rule 901(B)(1)(10), which governs methods of authentication, does not appear in the federal rule. According to the Staff Note, "[t]his language was added to clearly permit the admission of records which qualify as self-authenticating pursuant to statute such as hospital records under RC 2317.422."

Lack of Trustworthiness

A record that satisfies the requirements of Rule 803(6) may nevertheless be excluded if "the source of information or the method or circumstances of preparation indicate lack of trustworthiness." The leading case is *Palmer v. Hoffman*, 318 US 109 (1943), in which the U.S. Supreme Court interpreted the federal business records statute as excluding an accident report prepared by an employee of the defendant-railroad company. The report was excluded not because it was untrustworthy, but rather because it was not made "in the regular course of business." According to the Court, the primary use of the report was "in litigating, not in railroading." *Id.* at 113-14. *Palmer v. Hoffman* has been criticized, see C. McCormick, *Evidence* 723 (2d ed. 1972), and the federal drafters decided to deal explicitly with the problem of unreliable records by including the "lack of trustworthiness" requirement.

RC 2317.40 contains a similar provision—admission of the record is proper "if, in the opinion of the court, the sources of information, method, and time of preparation were such as to justify [the

record's] admission." In addition, the courts have recognized that "if it should appear that such records have been made and kept solely for a self-serving purpose of the party offering them in evidence, it would be the duty of a trial court to refuse to admit them." *Weis v. Weis*, 147 OS 416, 426, 72 NE(2d) 245, 251 (1947).

RULE 803(8): PUBLIC RECORDS

Rule 803(8) recognizes a hearsay exception for public records and reports. Authentication of public records is governed by Rules 901(B)(7), (10), and 902. Under Rule 902 many public records are self-authenticating and thus admissible without any need to produce an authenticating witness. If a public record contains a statement which is itself hearsay, admissibility is governed by Rule 805 (multiple hearsay). See *a/so Westinghouse Elec. v. Dolly Madison Leasing & Furniture Corp*, 42 OS(2d) 122, 326 NE(2d) 651 (1975).

Rule 803(8) provides that records of a public office or agency setting forth "(a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law as to which there was a duty to report" are admissible. There are two limitations. In criminal cases, records containing matters observed by police officers and other law enforcement personnel are inadmissible if offered by the prosecution. Moreover, if the "sources of information or other circumstances indicate lack of trustworthiness" the record is inadmissible. Federal Rule 803(8) contains an additional subdivision which provides: "(c) in civil actions and proceedings and against the Government in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law" are admissible. This provision was not adopted. Consequently, evaluative reports are not admissible under Ohio Rule 803(8). Although subdivision (a) does not explicitly contain a firsthand knowledge requirement, that requirement is applicable.

The rule is similar to RC 2317.42, which provides: "Official reports made by officers of this state, or certified copies of the same, on a matter within the scope of their duty as defined by statute, shall, insofar as relevant, be admitted as evidence of the matters stated therein." There are several differences between the rule and statute. The statute uses the term "official reports," whereas the rule uses the phrase "[r]ecords, reports, statements, or data compilations, in any form." The term "data compilation" refers to computer-generated records. In addition, the statute covers only official reports "made by officers of this state." See *State v. Colvin*, 19 OS(2d) 86, 249 NE(2d) 784 (1969); *Masseo v. Board of Liquor Control*, 73 Abs 94, 136 NE(2d) 663 (App 1955). In contrast, the rule refers to records of "public officers and agencies." This language is intended to encompass the records of federal agencies as well as the records of agencies of other states. See Advisory Committee's Note, Fed. R. Evid. 803 ("The rule makes no distinction between federal

and nonfederal offices and agencies.") The statute also permits the use of "certified copies." Although Rule 803(8) does not address this issue, Rule 1005 permits the use of certified copies of public records.

Records of Activities of the Office or Agency

Rule 803(8)(a) provides for the admission of records setting forth the "activities of the office or agency." The Advisory Committee's Note to Federal Rule 803 contains the following examples: "Cases illustrating the admissibility of records of the office's or agency's own activities are numerous. *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 39 S. Ct. 407, 63 L.Ed. 889 (1919), Treasury records of miscellaneous receipts and disbursements; *Howard v. Perrin*, 200 U.S. 71, 26 S. Ct. 195, 50 L.Ed. 374 (1906), General Land Office records; *Ballew v. United States*, 160 U.S. 187, 16 S. Ct. 263, 40 L.Ed. 388 (1895), Pension Office records." The Ohio cases include: *State v. Walker*, 53 OS(2d) 192, 374 NE(2d) 132 (1978) (record of proper calibration of breath analysis machine admitted); *State v. Smith*, 55 App(2d) 202, 380 NE(2d) 353 (1977) (record of notice of suspension of driver's license admitted).

Matters Observed Pursuant to Duty Imposed by Law

Rule 803(8)(b) provides for the admission of records setting forth "matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, unless offered by defendant." The Advisory Committee's Note to Federal Rule 803 contains the following examples:

Cases sustaining admissibility of records of matters observed are also numerous. *United States v. Van Hook*, 284 F.2d 489 (7th Cir. 1960), remanded for resentencing, 365 U.S. 609, 81 S. Ct. 823, 5 L.Ed. 821, letter from induction officer to District Attorney, pursuant to army regulations, stating fact and circumstances of refusal to be inducted; *T'Kach v. United States*, 242 F.2d 937 (5th Cir. 1957), affidavit of White House personnel officer that search of records showed no employment of accused, charged with fraudulently representing himself as an envoy of the President; *Minnehaha County v. Kelley*, 150 F.2d 356 (8th Cir. 1945); *Weather Bureau records of rainfall*; *United States v. Meyer*, 113 F.2d 387 (7th Cir. 1940), cert. denied, 311 U.S. 706, 61 S. Ct. 174, 85 L.Ed. 459, map prepared by government engineer from information furnished by men working under his supervision.

The Ohio cases include: *Westinghouse Elec. v. Dolly Madison Leasing & Furniture Corp*, 42 OS(2d) 122, 326 NE(2d) 651 (1975) (fire department report admissible but statements of third persons contained in report inadmissible); *Carson v. Metropolitan Life Ins. Co.*, 156 OS 104, 100 NE(2d) 197 (1951) (coroner's report admissible but opinion as to suicide inadmissible).

The exclusion of police reports in criminal cases is based on the concern that admissibility of these reports would impinge upon an accused's right of confrontation. In contrast to the federal rule, Rule

803(8)(b) includes the phrase "unless offered by defendant." According to the Staff Note, "[s]uch exculpatory reports should be available to the defendant since none of the constitutional hazards of confrontation are involved in making such reports admissible on behalf of defendants." See also *United States v. Smith*, 521 F(2d) 957 (DC Cir. 1975). If a record is excluded because it involves a matter observed by police officers or other law enforcement personnel, the question remains whether the record may be admitted under the business records exception, Rule 803(6). In *United States v. Oates*, 560 F(2d) 45 (2d Cir. 1977), the court answered the question in the negative. Other courts, however, have reached the opposite result. See 4 D. Louisel & C. Mueller, *Federal Evidence* 770-76 (1980); 4 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 803(8)[04] (1979).

RULE 803(21): JUDGMENT OF PREVIOUS CONVICTION

Rule 803(21) recognizes a hearsay exception for judgments of previous criminal convictions when offered "to prove any fact essential to sustain the judgment." The rule contains an express limitation to admissibility of evidence of a previous conviction offered by the prosecution in a criminal case; judgments "against persons other than the accused" are not admissible except for the purpose of impeachment. As explained by the federal drafters, this limitation is based on constitutional concerns:

[T]he exception does not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any fact essential to sustain the judgment of conviction. A contrary position would seem clearly to violate the right of confrontation. *Kirby v. United States*, 174 U.S. 47, 19 S. Ct. 574, 43 L. Ed. 890 (1899), error to convict of possessing stolen postage stamps with the only evidence of theft being the record of conviction of the thieves. The situation is to be distinguished from cases in which conviction of another person is an element of the crime, e.g. 15 U.S.C. § 902(d), interstate shipment of firearms to a known convicted felon, and, as specifically provided, from impeachment. Advisory Committee's Note, Fed. R. Evid. 803.

This limitation does not preclude an accused from introducing judgments against third persons.

RULE 804(A): UNAVAILABILITY

Rule 804(A) contains five conditions of unavailability. A witness is unavailable where the witness (1) claims a valid privilege; (2) refuses to testify despite a court order to do so; (3) lacks a present memory of the subject matter; (4) is dead or infirm; or (5) is absent from the hearing and his testimony cannot be procured by process or other reasonable means. Rule 804(A) must be read in light of the Confrontation Clause cases. In *Barber v. Page*, 390 U.S. 719 (1968), the U.S. Supreme Court held that the unavailability requirement is satisfied only if the prosecutorial authorities have made a good-faith effort to obtain "the presence of the declar-

ant at trial. *Id.* at 725. See also *Ohio v. Roberts*, 448 U.S. 56 (1980).

By adopting a uniform rule of unavailability that applies to all the exceptions recognized in subdivision (B), the rule differs from the common law, under which each exception had developed its own conditions of unavailability. For example, the common law unavailability requirements for former testimony, dying declarations, and declarations against interest were not identical.

It is the unavailability of the declarant's testimony, rather than the unavailability of the declarant, that is determinative. Thus, if the declarant is present in court but claims a valid privilege, refuses to testify, or suffers a lack of memory, his testimony is unavailable and the hearsay statements falling within the enumerated exceptions of subdivision (B) are admissible. The burden of establishing unavailability rests on the party offering the evidence. See *State v. Smith*, 58 OS(2d) 344, 390 NE(2d) 778 (1979), *vacated on other grounds*, 100 S. Ct. 3041 (1980); *New York Central R.R. v. Stevens*, 126 OS 395, 185 NE 542 (1933).

RULE 804(B)(1): FORMER TESTIMONY

Rule 804(B)(1) recognizes a hearsay exception for former testimony. The rule provides for admissibility (1) of the testimony of a witness at another hearing or deposition; (2) if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony of the witness by direct, cross, or redirect examination; and (3) the witness is unavailable, Rule 804(A). The former testimony of a party is admissible against that party as an admission of a party-opponent. See Rule 801(D)(2)(a). Rule 804 (B)(1) supersedes RC2945.49.

Type of Testimony

The rule provides for the admissibility of testimony given "at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding." As originally adopted, Rule 804(B)(1) excluded preliminary hearing testimony from the former testimony exception. See 53 Ohio Bar 220 (1980). The exclusion of preliminary hearing testimony, Crim. R. 5(B), was based upon the Ohio Supreme Court's decision in *State v. Roberts*, 55 OS(2d) 191, 378 NE(2d) 492 (1978). The Court in *Roberts* held that admitting preliminary hearing testimony in a criminal trial violated the accused's Sixth Amendment right of confrontation. Several days before the Rules of Evidence became effective, the *Roberts* decision was reversed by the U.S. Supreme Court. *Ohio v. Roberts* 448 U.S. 56 (1980). In response, the rule was amended by deleting the clause which exempted preliminary hearing testimony. See 54 Ohio Bar 175-76 (1981). The deletion of this clause means that preliminary hearing testimony is admissible under the former testimony exception. It should be noted, however, that admitting preliminary hearing testimony in a criminal trial still raises confrontation issues.

Although the U.S. Supreme Court ruled that admitting the preliminary hearing testimony in *Ohio v. Roberts* was not error, the Court did not hold that the admission of preliminary hearing testimony will always be beyond constitutional attack. Hence the inclusion of preliminary hearing testimony within the former testimony exception changes the evidentiary, but not the constitutional, analysis.

In addition to depositions and preliminary hearing testimony, former testimony includes testimony given at a prior trial. See *Sheets v. Hodges*, 142 OS 559, 53 NE(2d) 804 (1944); *Summons v. State*, 5 OS 325 (1856). It also includes testimony given at any proceeding at which a witness testifies under oath.

Similar Motive to Examine

The rule provides that former testimony is admissible only "if the party against whom the testimony is now offered...had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." The rule does not require "identity of parties." See C. McCormick, *Evidence* § 256 (2d ed. 1972). As long as the party *against* whom the former testimony is offered had an opportunity to examine the witness at the former hearing, the rule is satisfied. It should be noted that the rule requires only that the "opportunity" to develop the testimony by direct, cross, or redirect examination have been provided at the former hearing. "Actual cross-examination, of course, is not essential, if the opportunity was afforded and waived." C. McCormick, *Evidence* 616 (2d ed. 1972). See also 5 J. Wigmore, *Evidence* § 1371 (Chadbourn rev. 1974).

Method of Proof

The rule does not specify acceptable methods of proving former testimony. RC 2945.49 contains the following provisions on the method of proof in criminal cases: "If such former testimony is contained within a bill of exceptions, or authenticated transcript of such testimony, it shall be proven by the bill of exceptions, or transcript, otherwise by other testimony."

A transcript of the former proceeding is the typical and preferable method of proof. See Rule 803(8) (hearsay exception for public records). Former testimony also may be proved by the testimony of a witness who was present at the time the testimony was given. See *Wagers v Dickey*, 17 Ohio 439 (1848). In *Summons v. State*, 5 OS 325 (1856), the Supreme Court outlined the following requirements:

It is essential to the *competency of the witness* called to give this kind of evidence, first, that he heard the deceased person testify on the former trial; and second, that he has such accurate recollection of the matter stated, that he will, on his oath, *assume* or *undertake* to narrate in substance, the matter sworn to by the deceased person, in all its material parts, or that part thereof which he may be called on to prove. *Id.* (syllabus).

See C. McCormick, *Evidence* § 260 (2d ed. 1972). The testimony of a witness should be used as a

method of proof only if a transcript is not available. The court has the authority pursuant to Rule 611(A) to require a transcript be used if one is available.

RULE 804(B)(2): DYING DECLARATIONS

Rule 804(B)(2) recognizes a hearsay exception for dying declarations. The rule requires that: (1) the statement be made while the declarant believed his death was imminent; (2) the statement concern the "cause or circumstances of what [the declarant] believed to be his impending death"; (3) the declarant be unavailable, see Rule 804(A); and (4) the statement was based on the firsthand knowledge of the declarant. See Advisory Committee's Note, Fed. R. Evid. 804 ("continuation of a requirement of firsthand knowledge is assured by Rule 602").

The rule is identical to Federal Rule 804(b)(2) and changes prior to Ohio law. In contrast to the common law, admissibility is not conditioned on the declarant's death. Any of the conditions of unavailability specified in Rule 804(A) is sufficient.

Imminent Expectation of Death

The rule provides that the statement must be "made by a declarant while believing that his death was imminent." This requirement follows from the theory underlying the exception; a declarant who does not believe that death is near may not feel compelled to speak truthfully. In *Shepard v. United States*, 290 US 96 (1933), Justice Cardozo described this requirement in the following terms:

To make out a dying declaration the declarant must have spoken without hope of recovery and in the shadow of impending death. . . .

There must be 'a settled hopeless expectation' ... that death is near at hand, and what is said must have been so spoken in the hush of its impending presence.... What is decisive is the state of mind. Even so, the state of mind must be exhibited in the evidence, and not left to conjecture. The [declarant] must have spoken with the consciousness of a swift and certain doom. *Id.* at 99-100.

See also *State v. Kindle*, 47 OS 358, 24 NE 485 (1890) (statement of declarant "made *in extremis*, while conscious of his condition and under a sense of impending dissolution").

The declarant's belief of impending death may be established by the declarant's own statements. In addition, it may be established "circumstantially by the apparent fatal quality of the wound, by the statements made to the declarant by the doctor or by others that his condition is hopeless, and by other circumstances." C. McCormick, *Evidence* 681 (2d ed. 1972). See also *State v. Kotowicz*, 55 App 497, 9 NE(2d) 1003 (1937); *Shinkman v. State*, 7 Abs 518 (App 1029).

Nature of the Statement

The rule limits the type of statements that are admissible under this exception to those "concerning the cause and circumstances of what [the

declarant] believed to be his impending death." Statements identifying the assailant who caused the injury are included, as are statements describing the events leading up to the injury. See C. McCormick, Evidence 682-83 (2d ed. 1972); 5 J. Wigmore, Evidence § 1434, at 282 (Chadbourn rev. 1974) ("facts leading up to or causing or attending the injurious act.").

RULE 804(B)(3): STATEMENTS AGAINST INTEREST

Rule 804(B)(3) recognizes a hearsay exception for statements against interest. See Annot., 34 A.L.R. Fed. 412 (1977). Such statements are admissible if (1) they are based on firsthand knowledge, (2) they are against the declarant's pecuniary or proprietary interest or would subject him to criminal or civil liability or render invalid a claim by him against another at the time made, and (3) the declarant is unavailable, see Rule 804(A). Statements of parties are admissible as admissions of party-opponents under Rule 801(D)(2).

The declaration against interest exception has been the subject of constitutional attack. In *Chambers v. Mississippi*, 410 US 284 (1973), the U.S. Supreme Court held that the exclusion of declarations against penal interest offered by a criminal defendant for the purpose of exculpation was a violation of due process. See also *Green v. Georgia*, 442 US 95 (1979). It should be noted that the declarant in *Chambers* was not available. Thus, in criminal cases the applicability of Rule 804(B)(3) is affected by constitutional considerations. See generally 4 D. Louisell & C. Mueller, Federal Evidence § 489 (1980).

Corroboration Requirement

The rule provides that a "statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement." The use of the word "accused" indicates that the corroboration requirement was intended to apply only in criminal cases. In contrast

to the Ohio rule, Federal Rule 804(b)(3) requires corroboration only when the statement is offered to exculpate the accused. The corroboration requirement was explained by the federal drafters as follows:

The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, ...but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. ...The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations.... The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication. Advisory Committee's Note, Fed. R. Evid. 804.

The Ohio rule also requires corroboration of statements inculcating the accused—for example, a statement by an accomplice that he and the accused committed a crime. The corroboration requirement was added because such statements are often self-serving and their admission raises confrontation issues. Although Federal Rule 804, as adopted, allows the introduction of statements inculcating the accused, the Advisory Committee's Note to the rule recognized that such statements may not always be reliable: "Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. ...On the other hand, the same words spoken under different circumstances, e.g. to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation."