GALVES/EVIDENCE
2012 MID-TERM EXAM ANSWER/ANALYSIS
MEANING OF NUMERICAL GRADES

On your individual score sheets distributed with your exams, you have received two numerical scores/grades written across the top of the score sheet. The Box score/grade on the left is your total "RAW" score for the exam (your actual "raw" points received). However, that raw score is NOT your grade for the Mid-Term Exam. That raw score has been ADJUSTED to a final numerical score (the box/score grade on the right) for the exam for final grading purposes. Your final letter grade for the course will correspond to the ADJUSTED numerical grade (NOT the RAW score). For example, a Raw score of 56 points, would be adjusted to a "78," so the adjusted score (the real grade) would correspond to be a "B," according to the ***OLD*** Pacific McGeorge grading scale (this score will be averaged with you final exam score and your top 5 quiz scores. Also, please see the distribution of student scores to be handed out in class).

EXAM NO. (*Your Exam # Here*)

RAW SCORE	ADJUSTED SCORE
56	**78**

There are 55 RAW points possible for Part One of the exam, and 50 RAW points possible for Part Two. Adding those possible scores together, there is a total of 105 possible RAW points for the exam. Notice that there were 10 possible RAW points (5 points for Question One and 5 points for Question Two) given for "overall clarity, persuasiveness organization, and creativity," that I took into account in the essay portions of the exam regarding more intangible factors.

FINAL RAW SCORE

EXAM SECTIONS	POSSIBLE POINTS	YOUR POINTS
ESSAY QUESTION ONE	**55**	
ESSAY QUESTION TWO	**50**	
TOTAL SCORE	**105**	

MODEL ANSWER AND EXAM ANALYSIS

The following answer/analysis is much more involved and detailed than I expected for your answers to be, given the more limited time and stressful conditions under which you had to complete the exam. Moreover, there are certain non-issues considered that you were not expected to address. This much longer analysis is NOT a model answer and you should not consider it as such. Instead, it is designed to give you important information on what issues were raised on the exam, how they should have been/might have be addressed, and how I generally graded the exam (the raw points you received for each section and possible raw points/weight of each question/subsection). It can also serve as a general study aid for the future.

Also, please review the copy of a student answer. This student exam answer is distributed to you so that you can compare how you did with how fellow a student did under actual exam conditions. Please compare this analysis that I have prepared (along with a fellow student's answer) with your own exam answer (and your corresponding score sheet) before you schedule a meeting with me in order to discuss your exam, should you wish to discuss your exam answer. Notice that on your individual score sheet, there are several sub-issues for which raw points were given that correspond exactly to the subheadings contained in this analysis.

AGAIN, PLEASE UNDERSTAND THAT THE "RAW SCORE" IS MEANINGLESS TO YOU, SO DO NOT CONCERN YOURSELF WITH IT. IT WAS JUST MY WAY OF ADDING UP POINTS. PLEASE PAY ATTENTION ONLY TO THE "ADJUSTED SCORE." THAT IS YOUR ACTUAL SCORE FOR THE MID-TERM EXAM. YOUR ADJUSTED SCORE FOR THE MID-TERM EXAM (25%), WILL BE CALCULATED ALONG WITH YOUR ADJUSTED SCORE FOR THE FINAL EXAM (55%), AND THE AVERAGE OF YOUR FIVE BEST QUIZ SCORES

(20%), IN ORDER TO DETERMINE YOUR FINAL GRADE FOR THE COURSE (100%).

Evidence 2012 Mid-Term Analysis

QUESTION ONE – *Dustin Charged, Bank Robbery; His Wife Testifies*

(1). Prosecution Asks About A Bank Robbery Committed By Dustin Two Years Ago.

I. Rule 501 Spousal and Marital Confidential Communication Privileges

Dustin and Wendy are now divorced, so the spousal privilege would be inapplicable to Wendy, who is an ex-spouse. Even if they were still married, the fact that she wants to testify would render the privilege inapplicable because it only protects those spouses who would *not* want to testify against their spouse. Next, although the marital confidential communication privilege survives a divorce (just like the attorney-client privilege survives the client no longer employing the attorney) it would be inapplicable here because the attorney's question does not ask about communications made to the spouse in the *confidence* and in the *privacy* of their marital relationship. However, if no one knew about the bank robbery except for Wendy, and the prosecution learned about Dustin's involvement in the robbery solely through Wendy, to whom Dustin had told in confidence, then the communication would be privileged.

II. Rule 611(a)/(c) Form of the Question

The question is objectionable because: (1) the question assumes facts not yet in evidence (e.g., that Dustin was desperate for money, he robbed a bank, he knows "how to do it"); (2) the question is compound (it is not just asking about one item at a time, but asks about several matters rolled into one question); and (3) the question is leading in that it improperly suggests the answer to a friendly (non-hostile) witness on direct examination (and there is no non-hostile witness exception; for example, it was not a question about an undisputed fact, or about general background, or a question where the attorney is just leading a forgetful, ill, or child witness).

III. Rule 401 Relevance

The question is relevant in that it goes to the issue of Dustin's motivation to commit the bank robbery of which he is accused because when he was desperate for money the time before, he robbed a bank, and, as Wendy points out, he again was desperate for money just before this robbery. Also, Dustin connected his need for money at the time to a possible future bank robbery by saying, "banks are where the money I need is at, you know." So his statement tends to show that Dustin had the motivation to rob a bank—his desperate need for money—and therefore his statement is relevant as it tends to make it more likely that he robbed the bank.

IV. Rule 404 & 405 Character/Rule 403 Unfair Prejudice

The defense can argue that the previous bank robbery is being used improperly by the prosecution to show that Dustin is a "bad guy," the kind of person who has robbed a bank before, and therefore he probably acted in conformity with has bad character trait of robbing a bank when he desperately needs money. Because character evidence is usually inadmissible,

unless it is first raised by defendant, which did not occur here, this character evidence should be excluded. Even if this character evidence were admissible, it would be in the wrong form—an inadmissible specific instance of conduct, and not reputation or opinion, under Rule 405(a)/(b).

The prosecution may argue that the previous bank robbery is not being used to prove that Dustin has bad character—that he has a propensity to rob banks when he desperately needs money and so he probably robbed this bank. Instead, the prosecution would argue that the previous bank robbery, and *why* he robbed the bank before, is being used only for the Rule 404(b) limited and allowable purpose of showing that Dustin had a motive (an "M" in the "MIAMI COP" pneumonic) for robbing a bank. But even if Wendy can testify about Dustin's previous bank robbery actions to show motive for this bank robbery, allowing Wendy to testify about Dustin's former bank robbery itself would go going too far. The fact that Dustin may have needed money desperately, by itself, may be allowable under Rule 404(b) for the limited purpose of showing a motive to rob the bank, but testimony about his previous act of actually committing a specific bank robbery in the past would be inadmissible because the unfair prejudice from the previous bank robbery likely would substantially outweigh the probative value of showing his motivation such that it should be excluded under Rule 403, and perhaps even Rule 404 as well.

V. Rule 801 Hearsay

Wendy is relating Dustin's out-of-court hearsay statement about needing money and that "banks are where the money is at, you know" and it would therefore be hearsay. However, his statement is not being used to prove the truth of the matter asserted by Dustin in his statement. The prosecution will argue that it is not trying to prove Dustin's express assertion that "banks is where the money [that Dustin needs] is it at…;" but instead, Dustin's statement is being used by the prosecution only to show Dustin's state of mind just before the bank was robbed—that Dustin was in desperate need of money at the time—and that Dustin himself was connecting his pressing need for money, to his observation that "banks is where the money [he needed/wanted] is at, you know." It is circumstantial evidence of what was going on in his mind when the statement was made; and therefore, it is not being used for its truth.

Even if his statement were to fit the definition of hearsay, because at least part of what Wendy said that Dustin told her was that "He needed money very badly"—and his needing money very badly is exactly what the prosecution is trying to prove—the prosecution would be using Dustin's own statement against him in order to make that showing. Therefore, Dustin's statement would be admissible against him as a Rule 801(d)(2)(A) statement of a party opponent, or possibly a Rule 803(3) then existing mental condition of Dustin's desperate need for money at the time, or a Rule 803(1) present sense impression of his situation that he was in the act of describing as he made his statement to Wendy, or, finally, a Rule 803(2) excited utterance because he was under financial stress at the time. Thus, the hearsay objection could be overcome.

(2). Prosecution Asks What Dustin Said To Wendy On The Day Of The Robbery.

I. Rule 401 Relevance

Defendant would argue that what Dustin said about being home later that evening would not be relevant to the alleged robbery, or to the case, in any way. However, the

prosecution has a strong argument that the defendant made an incriminating and very relevant statement when he revealed that he was going to be late in order to divide up some money, presumably after the bank robbery was to occur. His statement, therefore, tends to show that Dustin had the intent to commit the robbery later that day as he obviously was assuming there would be money to be split up with his accomplices later that night. Even if Dustin were dividing up money for some completely unrelated, irrelevant reason, he could simply argue that to the jury. An alternate theory does not render evidence irrelevant, as long as there is at least one possible inference that tends to show something in the case that legally or factually matters.

II. Rule 801 Hearsay

The same hearsay objections and responses as set forth above [#(1)] would apply here regarding: (1) the definition of hearsay, (2) statement of a party opponent; and (3) the various 803 exceptions. A very important exception to the hearsay rule here would be the use of Rule 803(3) as an intention of a future act (***Hillmon*** case). The fact that Dustin intended to be home late that evening because he was intending to meet some people later to divide up some money was admissible as a then existing mental condition of future intent. It is circumstantial evidence that he did in fact meet them to divide up the money, which in turn, proves circumstantially that there was to be some money—from the bank robbery—to divide up later.

III. Rule 501 Marital Communication Privilege

Defendant might now have an argument that what he said to his wife Wendy the morning of the robbery was intended to be a confidential communication (which survives a divorce) from one spouse to the other. However, Dustin was not revealing anything necessarily incriminating, or private and confidential to Wendy, at that point, as he had not informed her of the bank robbery, so perhaps his statement to her was just a very general, informational comment about which Wendy had no reason to think it was intended to be confidential.

(3). Prosecution Asks If Wendy Spoke With Anyone Else.

I. No Objectionable Question or Answer

The question is proper as a simple background question about whether Wendy ever spoke to anyone else later that evening and it is relevant to see if anyone else might have had additional admissible relevant information. The question does not ask for hearsay (yet). It admittedly is very open-ended and does not specifically refer to anything, or to anyone; however, it is proper/admissible for an attorney to establish what was, and was not, said, by either the defendant, or anyone else. Here, it was to establish that Dustin and Wendy's friend, Nancy, told Wendy something later that night and leads to the attorney's follow-up question (see below).

(4). The Prosecution Asks What Nancy, A Friend, Said To Wendy Later That Evening.

I. Rule 801 Hearsay/801(d)(2)(E) Co-Conspirator/803(2) Excited Utterance

First, the prosecution might argue that Nancy's statement that she and Dustin had "pulled off a big job" that afternoon is not hearsay because it is merely an "implied assumption," and only "express assertions" can be considered hearsay statements. So the phrase "pulled off a big job" merely *implied* that they had committed the bank robbery, but Nancy did not *expressly*

state that they had committed the bank robbery. The defense has a good counter argument, however, that the phrase "pulled off a big job" is an express assertion of the idea that they robbed the bank, but just expressed by hyperbole (like, "I can eat a horse," to assert extreme hunger).

Although the question calls for hearsay if trying to prove the truth of the matter asserted by Nancy—that Nancy was "scared because she and Dustin had just pulled off a big job," presumably referring to the bank robbery—there would be several exceptions that might apply. First, Nancy's statement might be admissible as a Rule 801(d)(2)(E) statement of a co-conspirator, as Nancy and Dustin were co-conspirators in the bank robbery. However, it appears that the statement Nancy made to Wendy was, at that point, after the conspiracy was over—because the bank robbery had been completed—so it was not *during* the conspiracy. Also, Nancy's statement to Wendy in no way was in furtherance of the bank robbery conspiracy because Nancy's statement did not help the conspiracy in any way, in fact, if anything, it could possibly harm the conspiracy by revealing the conspiracy to others, such as Wendy. Also, because no "pure bootstrapping" is allowed, there would have to be other corroborating evidence that Nancy was in the conspiracy with Dustin, in addition to her own hearsay statement.

Although the statement probably does not qualify as an admissible co-conspirator hearsay statement for the above reasons, it might qualify as a Rule 803(2) excited utterance because Nancy was scared when she talked to Wendy and the reason she was scared was because she was under stress that she and Dustin apparently had just robbed a bank earlier in the day. Nancy's statement probably would be admissible as an excited utterance, but it would mean that the judge would have to accept the underlying fact that Dustin robbed the bank as charged. Although Nancy's statement is also a statement against her interest (because she was admitting criminal guilt), that would be a Rule 804(b) exception which would require that the declarant, Nancy, be *unavailable* to testify; but it is unclear whether she is or is not available to testify.

II. Rule 401 Relevancy

The fact that Nancy was at the time "scared" may not by itself be legally or logically relevant to the case; however, it is relevant when connected to *why* she was scared. Her being scared tends to show that her statement that she and Dustin had just "pulled off a big job"—implying that they had committed the bank robbery (see below)—therefore, it is relevant.

(5). Prosecution Asks Wendy What Nancy Meant By Saying, "Pulled Off A Big Job."

I. Rule 602 Personal Knowledge/Rule 611(a) Speculation/Rule 701 Lay Opinion

The defense has several good objections here stemming from Wendy's admission that she does not know what Nancy meant by her statement—"pulled off a big job"—as Nancy did not explain to Wendy what she meant by saying that she and Dustin "had pulled off a big job" and that was why Nancy was scared. Instead, Wendy just *assumed* what Nancy must have meant by saying "pulled off a big job." The defense could argue that Wendy should not be allowed to testify about something which she does not have any personal knowledge. The defense should also make a Rule 611(a) form of the question objection because Wendy should not be able to just speculate about what Nancy must have meant. Although Wendy could relate the words Nancy used, Wendy could not elaborate on what she thought Nancy must have meant by using those words. Also, Wendy's ideas about what Nancy must have meant by her words

constitute Wendy's improper Rule 701 lay opinion about Nancy's statement. The jury can infer for itself, both from Nancy's statement, as well as the overall context, what Nancy may or may have not meant by her words—"pulled off a big job"—and why she may have been scared. For these reasons, a court would likely rule that Wendy's speculation/opinion would be inadmissible.

II. Rule 801 Hearsay

To the extent Wendy now claims to know what Nancy meant by saying "pulled off a big job"—referring to this robbery for which Dustin is charged—it would be hearsay, because Wendy would simply be relating what she has been told by others (presumably various out-of-court declarants, such as the police, detectives, prosecutors, etc.). Wendy is now claiming knowledge about what Nancy meant, but it is just based on what others have told her, which would be hearsay. Although it is not clear who, specifically, the declarants would be who stated to Wendy that Nancy's statement "pulled off a big job" actually meant to commit the charged bank robbery, it does not matter, it would still be hearsay. The identity of the declarant(s) need not be known if the witness is attempting to assert the hearsay statements of unspecified individuals. Wendy is improperly trying to relate the personal knowledge of others as her own.

(6). Prosecution Asks What Else Dustin Might Have Said To Wendy About This Robbery Case Against Him.

I. Rule 501 Marital Communication Privilege

In this instance, there now might be a valid objection based on the confidential marital communication privilege because what Dustin said to Wendy here—his discussion with the arresting officer about possibly pleading to a lesser charge against him—would probably qualify as a marital communication made in confidence. However, it would depend if Dustin ever told anyone else about that discussion with the police officer, and thus "published" it, so as to make it not in confidence, assuming it was even made to the police officer in confidence.

II. Rule 801 Hearsay

A. Dustin's Statement To The Police Officer

Although this question is asking Wendy to relate Dustin's out-of-court statement, his statement would not fit the definition of hearsay because it would not be offered to prove the truth of the matter asserted, but only to prove that Dustin seems to be "implicitly" admitting that he is guilty of the charged robbery and he therefore was just wanting the officer to consider lowering the charges against him. But even if it were hearsay because it is being used for its truth, it is also a statement *by Dustin* that the prosecution is using against him, and so it would be admissible as a Rule 801(d)(2)(A) statement of a party opponent.

B. The Police Officer's Statement Back To Dustin

What the officer said back to Dustin in response to the possible guilty plea and penalty fine—"maybe,"—would be an out-of-court statement by the officer, and because Dustin is relating it, and Wendy is relating what Dustin said to her, it would be Rule 805 "hearsay within hearsay." Unlike what Dustin said out-of-court, the police officer's statement back to Dustin would not be admissible as a statement of a party opponent as the police officer is

not a party opponent. Only the defendant and the prosecutor are the parties in a criminal action. Accordingly, although investigating police officers and criminal victims may testify for the prosecution as witnesses, they are not themselves "the prosecution," like a DA or US Attorney. Still, Dustin may have adopted the statement as his own under Rule 801(d)(1)(B).

In any event, the prosecution could argue that the police officer's statement is not an assertion of anything, and therefore it does not even fit the definition of hearsay, because the statement, "maybe," is just the equivalent of saying, "I don't know," which is not an assertion. However, if by saying, "maybe," the police officer meant to communicate to Dustin that there at least would be a good chance that Dustin's plea offer would be accepted, then it would probably be an assertion, and therefore hearsay. Still, even if the statement, "maybe," were an assertion, it is not being used for it truth, here—that there was a definite possibility that Dustin's plea offer might be accepted—and therefore it would be admissible.

However, the statement, "maybe," might be Rule 401/402 irrelevant in any event because it would not have a tendency to prove anything about the bank robbery. This is true because what the police officer said in response to Dustin's plea offer would have no legal relevance to the case (what the police officer thinks or may be asserting here is of no legal importance/significance at trial). So although it might overcome the hearsay concern, it still would appear to be irrelevant.

III. Rule 410 Plea Bargaining

Dustin has a strong argument that this entire exchange (all statements) with the police officer should be inadmissible in any case because plea bargaining discussions are excluded under Rule 410 in order to encourage parties to negotiate freely and not have what they say in plea negotiations used against them should they end up going to trial, just like Rule 408 in civil cases. There is nothing to indicate that Dustin waived his Rule 410 rights, like the defendant did in the ***Mezzanato*** case, and so the entire plea bargaining discussion here should be excluded.

The prosecution would argue, however, that although plea discussions are excluded under Rule 410, they are excluded only when those plea discussions are plea discussions *with the prosecution*—a District Attorney, or a US Attorney, who is prosecuting the case—but not with a police officer who is merely making an arrest. There is an exception if the officer has the express or at least the apparent authority to engage in plea discussions with a defendant on behalf of the prosecution, but there is nothing to indicate that is the case here. Dustin's offer may be considered a simple confession or admission of guilt by Dustin, which would not be excluded by Rule 410, but that does not appear to be the case because Dustin was trying get something in exchange for his plea offer. Although usually inadmissible, Dustin might have made a huge mistake by plea bargaining with the police officer instead talking directly to a prosecutor.

IV. Rule 411 Liability Insurance

An additional reason to exclude the conversation with the police officer (or at least some of what Dustin said in that conversation) is that Dustin reveals that he has liability insurance that would cover a possible fine he is offering to pay for the lesser charge of attempted robbery. Such statements regarding the ability to pay or not to pay, and the existence or non-

existence of liability insurance, are inadmissible. The policy behind the rule is so that juries do not consider the existence of a party's liability insurance, or ability to pay, or lack thereof, in their deliberations. Therefore, at least the portion of Dustin's statement to the police officer referring to his liability insurance covering a possible fine definitely should be excluded.

The prosecution, however, might argue that Rule 411 should be limited to civil cases, and should be inapplicable in criminal cases such as this one, because Rule 411 expressly involves "liability" insurance—which connotes *civil* type of "damages"—but does not seem to contemplate liability insurance for *criminal* "guilt." Although the rule states "liability" insurance, the defense would argue for a more expansive interpretation of "liability" to include any legal situation where one's insurance that would cover a legal loss, of any type, damages or fines, criminal or civil, due to the insured's actions, which may trigger insurance coverage, and not make such a subtle distinction between civil damages and criminal fines.

QUESTION TWO – *Manslaughter Case Against David; Death of Vic*

(1). Testimony Of Vic's Wife, Wanda, Regarding: Vic's Telephone Call With David; Vic & David's Altercation On The Military Base, And David's Alleged Sexual Assault.

I. Vic's Statement About His Telephone Call With David

A. Rule 801 Hearsay/Rule 805 Hearsay Within Hearsay

Wanda is relating Vic's out-of-court statements made to Wanda about Vic and David's telephone call. Vic related to Wanda both his own statements made to David during their telephone conversation, as well as the statements David allegedly made to Vic. Although Wanda saw that Vic got angry during that telephone conversation with David, it is not clear that she actually overheard Vic's statements as he made them. Rather, Wanda is now just repeating what Vic had told her about the telephone call after he got off the telephone with David. David would argue that all of these statements are inadmissible hearsay, and hearsay within hearsay.

The prosecution would argue that these statements are not inadmissible hearsay, and hearsay within hearsay, because the prosecution is not using any of them to prove the truth of the matter asserted by either Vic or David. Instead, they are being used only as circumstantial evidence of David's hostile treatment of Vic, and David's intent to harm Vic that eventually ended up in David killing Vic. The prosecution also could argue that the statement made by David—that he was "going to make [Vic] sorry"—had independent legal significance as a "verbal act," because it was a verbal threat. As such, all of these statements did not even fit the definition of hearsay because no one is trying to prove that David is actually "a rat," or that David was actually "going to make [Vic] sorry." A court likely would agree that these statements are not being used for their truth and so they would not even qualify as inadmissible hearsay.

B. Rule 801(d) Hearsay Exclusions/Rule 803 Exceptions

Regarding the statement that David allegedly made to Vic (that David was going to make Vic sorry), even if that statement fit the definition of hearsay, it would still be admissible as a Rule 801(d)(2)(A) statement of a party opponent because the prosecution would be using David's words against him. But that only would take care of one level of hearsay—what David said to Vic—we still need to account for the hearsay from Vic to Wanda. Unlike David's statements, Vic's statements, if used for their truth, would be hearsay and would not be party opponent statements, as Vic is a victim, not a party. But the prosecution could argue that Vic's statements identifying David on the telephone would be admissible as a Rule 801(d)(1)(C) identification of a person (but that would only cover the identification, not what was said).

Both David's and Vic's statements, if used for their truth as hearsay, might fall within some of the Rule 803 exceptions, such as Rule 803(1) present sense impressions because these were contemporaneous descriptions of what was happening at the time (or very

soon thereafter), or Rule 803(2) excited utterances to the extent the statements were made under the stress of a startling event—which might have been the verbal arguments/threats made at the time to one another and about one another. Vic's statement about what David had said to Vic about making him sorry, if used for its truth, as related now in court by Wanda, would be admissible under these hearsay exceptions.

C. Rule 901 Authentication of David's Voice

There might be a concern by the defense as to whether a proper foundation has been laid for Vic recognizing David's voice over the telephone, especially since Vic admitted that whoever was on the phone was "trying to disguise his voice." Still, it would appear that Vic had enough familiarity with David's voice that he could identify his voice on the phone even if David was attempting to disguise it (this would appear to be more of a weight issue than an admissibility issue). Along these same lines, David might argue that Vic was just "guessing," or speculating, that it was David on the telephone, and as such, Vic's hearsay statement to Wanda should be inadmissible under Rule 602 because Vic did not have Rule 602 personal knowledge, or was engaging in improper Rule 611(a) speculation, or was giving improper Rule 701 lay opinion. However, these concerns would be inapplicable to Vic because Vic is not a testifying witness on the stand, but is merely a hearsay declarant. The credibility of the declarant can always be attacked under Rule 806, but that would go to weight, not to admissibility.

II. Military Base Actions

A. Rule 801 Hearsay -- David's Gesture

Although no words were actually uttered by David, David allegedly made an obscene gesture to Vic as Vic and Wanda drove by and therefore David was intending to communicate something to Vic using "*assertive conduct"* to make this out-of-court statement. It would be hearsay, but only if trying to prove the truth of the matter asserted by David. The prosecution obviously would not be trying to prove whatever obscene assertion David was making about Vic, but only to prove circumstantially two things: (1) that David was angry and belligerent and ready to fight; and, (2) that Vic had reason to feel threatened by David's actions.

B. Rule 801(d) Hearsay Exclusions/Rule 803 Exceptions

Even if David's obscene gesture were being used for its truth, it would be admissible as a Rule 801(d)(2)(A) statement of a party opponent and it would not be hearsay within hearsay this time because Wanda directly saw/heard David's assertive conduct. The Rule 803(1) and (2) present sense impression and excited utterances exceptions might be raised but they do not appear to be applicable because David was not startled nor describing an event. The prosecution would not want to use any exclusions or exceptions anyway because the prosecution would not want to prove the truth of any negative/obscene assertion David made about Vic.

C. Rule 801 Hearsay -- Vic's Threat

The defense would not object to what Vic said to David because it would tend to show that Vic was being aggressive and was ready to fight. But Vic's statement would not be hearsay in any event because it would not be being used for its truth, but only as circumstantial evidence to show that Vic was belligerent, which would be relevant to David's

self-defense claim. However, the prosecution still might want to use what Vic said to prove that David was the one who "wanted a fight" and that Vic was just ready to defend himself. Still, the defense might argue that it was not an assertion by Vic, but only a conditional statement because Vic said, "IF" David wanted a fight, then Vic would give him one. Even if Vic's statement were an assertion being used for its truth, it still could be admissible as an excited utterance.

D. Wanda's Testimony About Fight/Actions Valid

Wanda was a direct eye witness of the actions that took place on the military base, so she could testify as to what she saw actually happen regarding the fight, the exchange of blows, the choking, the arrival of the police, and the aftermath. None of that would be "assertive conduct" (no one was doing anything in an attempt to communicate an assertion) and it clearly would be relevant information about which she has direct factual information.

III. David's Violent Sexual Assault

A. Rule 801 Hearsay

Wanda has no personal knowledge about this violent sexual assault of a young woman allegedly committed by David. Wanda admittedly read the story on the internet, from an unspecified source, and as such the story is an out-of-court statement being used for its truth and therefore it would be inadmissible hearsay. No hearsay exclusions or exceptions would apply, and, if not used for its truth, it would be irrelevant for any other purpose (see below).

B. Rule 401Relevance, Rule 403 Prejudice

David is charged with manslaughter so he would argue that a former alleged sexual assault would be irrelevant to the current charge of manslaughter. However, the prosecution would argue that violent assaults, in any form, are still violent assaults, and thus would be relevant to show that David has a violent propensity and therefore he likely would do this kind of thing again. David would argue that even if the sexual assault were relevant, it would not contain much probative value to the current manslaughter charge, although a past violent sexual assault still would be relevant to a violent manslaughter charge. However, David would argue that even if relevant, its probative value would be substantially outweighed by the danger of unfair prejudice. A judge would likely rule that the sexual assault would have some probative value, but that it would be substantially outweighed by the unfair prejudice of having the jury hear about an alleged sexual assault of a young woman. The unfair prejudice would be that the jury might be influenced by the unavoidable improper propensity character evidence (see below).

C. Rule 404 Character/Rule 405(a) Specific Instance

The defense has a very strong argument that the violent sexual assault story on the internet that Wanda had read about David should be excluded as improper character/propensity evidence under Rule 404(a). That alleged sexual assault has nothing to do with the manslaughter of Vic, except to suggest that David had a propensity to act in conformity with his violent character trait and as a result he is the kind of person would do this sort of thing. But that is exactly the kind of character evidence that is excluded under the Rule 404(a), unless the defendant is the one to "open the door" on his own character, which David has not done at

this point in the trial. Even if David had opened the door on his own character, which would allow the prosecution to put on bad character evidence about David, this story about a sexual assault would be in the wrong form because it is an improper specific instance of conduct, rather than reputation or opinion evidence, as required by Rule 405(a).

D. Rule 413-415 Inapplicable

Although character/propensity evidence is inadmissible against a defendant (unless the defendant opens the door), in a sexual assault case, prior sexual assaults are admissible to attack the character of the defendant. The defendant does not first have to open the door in sexual assault cases, and specific instances of conduct to prove character are allowed. However, David is not being charged with a sexual assault in this case, and therefore the Rule 413-415 exceptions allowing propensity evidence/specific instances in sexual assault cases are inapplicable here. It does not matter that the prior instance being used is an alleged sexual assault, because the only charge in this case is for manslaughter, and therefore this is not a sexual assault case. The sexual assault should have been considered to be inadmissible/improper character evidence about which Wanda should not have been allowed to testify.

(2). Cross-Examination Of Wanda, Her Sworn Statement That She Knew The Violent Sexual Assault Story On The Internet Was Not True.

I. Rule 401 Relevance -- Credibility

If Wanda were allowed to testify about the violent sexual assault story on the internet about Vic, as was improperly done, then the prosecution should be able to attack Wanda's credibility about that story because a witness' credibility is always relevant. It is important to see that the story itself should be inadmissible as improper hearsay and character evidence (see above); however, if it were allowed, then the defense at that point should be able to attack Wanda's credibility. The key evidence at this point is not the internet story itself, but Wanda's sworn statement that she knew the internet story was definitely not true, yet she still testified about it in open court as if it were true. It is therefore admissible because the jury should know that she previously had acknowledged in a sworn statement that she knew the story was definitely not true—it goes directly to her credibility as a witness.

II. Rule 801 Hearsay -- Sworn Statement

The document containing Wanda's sworn statement is an out-of-court statement (it was made before her present testimony in court) and it is being used by the defense to prove the truth of the matter asserted in the statement—that Wanda knew the internet story about David's alleged sexual assault definitely was not true. It does not matter that Wanda is now on the stand. Therefore, her sworn statement would fit the definition of hearsay. However, there are a couple of reasons as to why her hearsay statement might be admitted nonetheless (see below).

III. Rule 613/801(d)(1)(A) Prior Inconsistent Statement

First, the defense could argue that the sworn statement does not even fit the definition of hearsay because it is not being used for its truth, but instead is being used only to impeach Wanda under Rule 613. The jury is being shown that Wanda says different things at different times, and so her overall story, whatever it may be, is not consistent, and therefore is

unreliable. The defense would further want for the jury to believe that Wanda not only tells inconsistent stories, but that she may have just been caught in a lie in open court because her story in inconsistent. That Wanda knew that the internet story was definitely not true, is NOT what the defense is trying to prove here; instead, the defense is only trying to prove through the sworn statement that Wanda has told an inconsistent story, whatever the ultimate truth might be.

Next, the defense might try to argue that the sworn statement should be used not only to impeach Wanda under Rule 613, as a prior inconsistent statement (used to impeach), as set forth above; but also to prove the truth of the matter asserted by Wanda in that sworn statement, that she knew the internet story about David was definitely not true, under Rule 801(d)(1)(A), as a prior inconsistent statement (used for its truth). Although Wanda's sworn statement was made under oath (by definition, because it was "sworn"), and therefore satisfies that first requirement under Rule 801(d)(1)(A), it is not clear in what context this sworn statement was made. If it were made at a "trial, hearing, deposition, or other proceeding," then it would satisfy the second requirement of the rule, but we are not provided with that information. We would have to be given that information in order to make a determination. If she simply signed an affidavit in an attorney's office, for example, although it would have been made "under oath," it would not have been made at a "trial, hearing, deposition, or other proceeding," and therefore it could not be used for its truth. The third requirement of the rule, that Wanda be subject to cross-examination, is obviously satisfied as she is being cross-examined now.

(3). <u>Testimony Of David During Defense Case: (David Testifies About Fight With Vic And Vic's Violent Past, Two Other Fights).</u>

I. <u>Rule 404(a) "First Aggressor" Testimony</u>

David can be called during the defense case in order to testify about what allegedly happened between him and Vic on the military base giving his version of the events. Obviously that would be relevant admissible information. However, David's decision to testify that Vic "got out of his truck and punched [David] in the mouth," had important consequences regarding the prosecution's right to later raise character evidence about Vic, not to mention having at least an argument to raise bad character evidence against David. This issue is addressed in more detail below regarding character evidence, but it is important to see that this is a homicide case (manslaughter) and therefore, in a homicide case, if the defendant puts on evidence that the victim was the "first aggressor," that action allows the prosecution to later raise character. Even though this is a "manslaughter" case, the prosecution could invoke this exception in a "homicide" case because Vic was killed by David, and at the very least this homicide case exception argument should be raised. Although David himself did not open the door because he put on no character evidence about Vic, he "gave the keys" to the prosecution to open the door.

II. <u>Rule 801 Hearsay -- Two Other Fights</u>

Because David has no independent knowledge of the two other alleged fights that Vic had been in—the tire iron fight where Vic broke a man's arm, and a fight where Vic threatened a woman with a gun—and because David stated that he had "heard about" these two previous fights, David would be relating out-of-court statements used to prove the truth of the matters asserted by unspecified hearsay declarants, and therefore the prosecution would object because they would constitute inadmissible hearsay. That would be correct if David were using

the hearsay statements to prove that Vic got actually broke a man's arm with a tire iron and threatened a woman with a gun. However, the defense would argue that the statements by unspecified declarants from whom David had heard these stories are not being used for their truth, but only to prove that David was fearful of Vic and feared for his safety when Vic got out of his car and started to fight with David. If used by the defense for these purposes, and not their truth, then the statements would not constitute inadmissible hearsay.

III. Rule 404 Character of Victim/Rule 405 Specific Instances

The prosecution could argue that even if these stories do not constitute inadmissible hearsay, they are an attack on Vic's alleged bad character/propensity for violence. The defense would correctly argue, however, that the defense, under the mercy rule, can either raise good character/propensity evidence about the defendant, David, or, as here, bad character/propensity evidence about the victim, Vic.

Although it may be true that a criminal defendant can attack the character of the victim under Rule 404(a)(1)(A), the prosecution might argue that this otherwise admissible character evidence: (1) is not of a "pertinent" character trait of the victim, and (2) even if pertinent, is not presented in the correct form under Rule 405(a), which requires reputation or opinion evidence, instead of, as here, specific instances of conduct. Regarding the first issue, the prosecution might argue that the evidence would not be of a pertinent character trait as it involves violence with a weapon (a tire iron) and a threat of violence with a weapon (a gun), while this case involved no weapon. However, Vic's prior actions still involve the overall issue of a character trait for violence (with or without a weapon) and so it should not matter that we are dealing with a physical fist fight without a weapon (other than bare hands), instead of a fight or threat with a weapon. The trait of Vic's overall violent charater would be close enough.

Regarding the second issue, the prosecution is correct that the defendant has presented character evidence in the wrong form—specific instances of conduct—and therefore they would be inadmissible if used to show that the victim has bad character/propensity for violence. If defendant wants to open that door, he would have to put on reputation or opinion evidence about the victim.

IV. Rule 401 Relevancy/Rule 404(b) -- David's Fear (Self-Defense)

If used for their truth, these two instances would be inadmissible hearsay, and if used to prove Vic's violent character/propensity then they would be inadmissible character evidence put forth in the wrong form—specific instances of conduct. If used for neither purpose, then it might be relevant evidence but only if there would be a relevant, non-character /propensity, non-hearsay purpose for testifying about Vic's two previous acts—the tire iron fight and the threat with a gun. The defense might argue that the proper reason for relating these two incidents was only to show that David was afraid of Vic, that his fear of him was reasonable and that when Vic threatened him and was aggressive toward him, David reasonably feared for his safety. Thus, all of David's actions were justifiable self-defense. If used for these purposes, then the prior fights would be proper, admissible non-character/propensity, non-hearsay, evidence.

A. First Fight Rule 401/404(b) Relevant

For the reasons set forth above, the defense has a good argument that the first fight where Vic broke a man's arm with a tire iron is relevant to show David's reasonable state of mind on the day of the fight with Vic. It is not hearsay—it just shows David's state of mind and is not being used for its truth—and it is not being used to prove character propensity, but rather a proper admissible Rule 404(b) non-propensity act to show why Vic had reason to fear Vic and why David took reasonable steps to protect himself in self-defense.

This first fight that Vic allegedly got into and broke a man's arm with a tire iron would be relevant because David actually knew about it at the time of the fight with Vic. It would go to the relevant issue of David's reasonable fear of Vic and why David took the necessary steps he did to protect himself. David wants to show that he had ample reason to think that Vic very well was going to attack him pursuant to David's self-defense defense. A court would likely rule this first fight would be admissible for that limited purpose.

B. Second Fight Rule 402/404(b) Irrelevant

The second fight where Vic allegedly threatened a woman with a gun would be irrelevant, both logically and legally, because David was admittedly not even aware of it at the time he got into the fight with Vic. Therefore, this fight could not have been informing David's mental state in any way at the time of the fight. Because David learned about this threat only much later after the trial had started, it would not be relevant and therefore inadmissible because the only uses of the prior fight would be for inadmissible hearsay and/or character.

C. But Both Involve Weapons v. No Weapon Here

As addressed earlier, these two fights/altercations may be different enough in nature from the manslaughter charge against David in this case, because the two previous fights involved Vic using weapons, whereas in David's fight with Vic, no weapons were involved, so that the previous incidents are not similar enough to the fight in this case to be relevant. Relevancy, however, does not require exact congruence. The two fights (with weapons) are similar enough to show why David may have feared Vic, *in general*, and thus felt it necessary to protect himself. Indeed, the fact that Vic was willing to use dangerous weapons in these prior instances simply would underscore the fact that David had a reasonable fear of Vic as someone who would resort to violence, with or without a weapon, and therefore these two prior altercations would be relevant at least in this sense (but again, David was not even aware of the second fight at the time, so it could not be relevant for that purpose in any event.)

(4). Prosecutions' Rebuttal Testimony Evidence About Vic And David (Regarding Reputations/Habits Of Vic And David)

I. Rule 404(a) "First Aggressor" Testimony -- Homicide/Manslaughter Case: David Gave "Keys" to Open Door on Vic's Peaceful Character

It is true that the defense never opened the door on either his own character, or that of Vic's, by presenting either good character evidence of David (reputation or opinion) or bad character evidence of Vic (reputation or opinion). As such, the prosecution cannot be the first to put on character evidence, even on rebuttal, if David had not opened the door on character evidence. However, this is a homicide case—manslaughter still generally falls under the

"homicide" definition as we are dealing with a defendant who killed a victim, so the degree of murder does not render it a non-homicide case, at least for purposes of this exception to the mercy rule where defendant has to be the first to open the door by presenting character evidence. The defendant "gave the keys" to the prosecution to open the door on Vic's character because David put on evidence that Vic was the first aggressor. Accordingly, the prosecution putting on good character evidence of Vic's peaceful nature was properly admitted under Rule 404(a)(1)(A)(ii), and it was in the correct form under Rule 405(a), by reputation or opinion.

II. Rule 404(a) "First Aggressor" Testimony -- Was Door Also Opened On David's Bad Character, Or Limited to Vic's Character?

Although it is clear that David made it possible for the prosecution to put on good character evidence of the victim by putting on first aggressor evidence against the victim in this homicide case (see above), it is more of an open question if David *also* gave the keys to the prosecution to put on bad character evidence of David as a result of David's having put on evidence that Vic was the first aggressor. David's character should be irrelevant here, as Vic and Vic's character is the only issue; however, under Rule 404(a)(1)(A)(ii), if the defendant attacks the character of a victim, the defendant not only opens the door on the victim's character, but also has opened the door on the defendant's own character, on the same character trait that the victim was attacked.

But note that is when the defendant has attacked the victim's character directly (opened the door on character), instead of as here, under the homicide case exception (where the defendant did not put on any character evidence of the victim, but merely evidence that the victim was the first aggressor in this homicide case and thereby gave the keys to open the door to the prosecution to put on character evidence of the victim). Some courts allow this kind of exception bootstrapping to take place, while others believe this was not the intent of the rule, to heap two separate exceptions on top of one another. The idea would be that although David gave the keys to the prosecution to open the door on the character of Vic, the victim in this homicide case, David did not also give the keys to the prosecution to open the door on David's bad character. It is important to note the differing "pro-prosecution"/"pro-defense" interpretations.

III. Rule 404 Character/Rule 405(a) Specific Instances/Rule 406 Habit Of "Picking Fights With Vic"

The prosecution makes a couple of errors here. First, it tries to present improper Rule 404(a)(1)(A) character evidence of the defendant (violence towards the victim) as mere admissible Rule 406 habit evidence of the defendant, as though picking fights with a specific person is an unthinking automatic response to a repeated set of circumstances. Seeing Vic and then deciding to argue and perhaps even physically fight with him would not be a habit as contemplated by Rule 406. Instead, habit evidence under the rule involves narrow, non-volitional, specific, unthinking automatic kinds of acts, like always using a GPS system when driving or always brushing one's teeth after every meal. Character evidence, on the other hand, involves broad, volitional, non-specific kinds of behavior like being violent or peaceful, or moral or depraved, where such character traits have many possible manifestations. Accordingly, always picking fights with a certain individual speaks more to violent character of the person always picking fights with respect to a certain individual, rather than just an automatic response to a

repeated situation. It is tempting to call David's actions of always picking fights as a "habit" because it is not violence in general, but violence with respect to a certain person, but that does not turn violent a character trait, even with a particular person, into a specific habit. Also, to the extent this evidence is character and not habit evidence, it is presented in the wrong form—specific instances of conduct. The specific instances would be the times when David allegedly picked fights with Vic, instead of general reputation or opinion evidence about David, assuming character evidence would even be allowed (a "pro-prosecution" interpretation of David putting on first-aggressor evidence in a homicide case, rather than the "pro-defense" interpretation).