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EVIDENCE

I. HEARSAY

In *Clark v. United States*,[1] the defendant was convicted for the murder of his former girlfriend. At trial, various hearsay statements of the deceased were admitted into evidence, detailing prior incidents of hostility and violence between her and the defendant and indicating her intent to meet the defendant at the site of her murder on the morning she was killed. The statements were all admitted under the "state-of-mind" exception to the hearsay rule. The District of Columbia Court of Appeals reversed the conviction on the ground that the "state-of-mind" exception applies only when the declarant's state of mind is at issue.[2] Here the issue was the *defendant's* motivation. Statements of the deceased that indicated *her* feelings toward the defendant were not probative of that issue.[3] Also, the deceased's presence at the scene of the crime was never at issue. Consequently, hearsay statements to the effect that she had intended to be there were irrelevant. Moreover, to the extent they intimated that the defendant would be there also, they were pure (and highly prejudicial) hearsay.[4]

In *Jackson v. United States*,[5] the defendant, on trial for murder, admitted he had been at the scene of the crime but denied he had fired the fatal shot. A detective testified during cross-examination that he had been told by an eyewitness that someone other than the defendant had shot the deceased. The eyewitness-declarant was unavailable to testify at trial. The trial court struck the detective's testimony from the record as inadmissible under any firmly rooted exception to the hearsay rule. The District of Columbia Court of Appeals also declined to admit the statement. The court appeared to follow Federal Rule of Evidence 804(b)(5), which requires a

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1. 412 A.2d 21 (D.C. 1980).
2. *Id.* at 30; *accord*, Fox v. United States, 421 A.2d 9 (D.C. 1980).
3. 412 A.2d at 28.
4. The Court thus agreed with Justice Traynor's dissent in People v. Alcalde, 24 Cal. 2d 177, 183, 148 P.2d 627, 633 (1944) ("The only purpose that could be served by admitting such declarations would be to induce the belief that the defendant went out with the deceased, took her to the scene of the crime, and there murdered her. Her declarations cannot be admitted for that purpose without setting aside the rule against hearsay.") (Traynor, J., dissenting).
5. 424 A.2d 40 (D.C. 1980).

statement to have "equivalent circumstantial guarantees of trustworthiness" to be admissible.[6] The court found no such guarantees.[7] The eyewitness's statement was made neither under oath nor in the presence of the trier of fact, and its veracity was not tested by cross-examination. It was thus distinguishable from cases where otherwise inadmissible testimony given at preliminary hearings was admitted under Rule 804(b)(5).[8] The court of appeals affirmed defendant's conviction.

The District of Columbia Court of Appeals, in *Brandt v. Uniroyal, Inc.*,[9] limited the extent to which a written report of one expert could be used to impeach the oral testimony of another expert. The plaintiff's expert testified that, in his opinion, the plaintiff's injuries had been caused by a defect in the defendant-manufacturer's tire. Defense counsel asked on cross-examination to what extent plaintiff's expert had relied on the written report of another expert who found no defect but who did not testify at trial. After stating that he had not relied on the report at all, the plaintiff's expert was asked his reaction to certain conclusions that were read verbatim from the report. The court recognized that an expert witness may be examined as to the factual basis underlying his opinion. However, here "[t]he [written] report was not used to determine the basis of [the plaintiff's expert's] opinion; the sole purpose for continuing to read from the [written] report was to offer it to the jury for the truth of the matter asserted therein."[10] Admission of this hearsay constituted reversible error[11] and the court remanded the case for a new trial.

II. IMPEACHMENT

The District of Columbia Court of Appeals held, in *Scott v. United*

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6. FED. R. EVID. 804(b)(5) provides in pertinent part:

> Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

7. The Federal Rules of Evidence are not controlling in the District of Columbia. 424 A.2d at 42.

8. *See, e.g.*, Ohio v. Roberts, 448 U.S. 56 (1980); California v. Green, 399 U.S. 149 (1970).

9. 425 A.2d 162 (D.C.1980).

10. *Id.* at 165 (citing Nemeth v. Ford Motor Co., 61 Mich. App. 359, 232 N.W.2d 404 (1975)).

11. *See* Kotteakos v. United States, 328 U.S. 750, 765 (1946). *Accord*, Fox v. United States, 421 A.2d 9, 12 (D.C. 1980); Clark v. United States, 412 A.2d 21, 30 (D.C. 1980).

States,[12] that a party may not impeach its own witness unless the court finds that the party was surprised by its witness's testimony,[13] and that the impeachment evidence is allowed only to "cancel or neutralize any damaging effect of the surprising testimony."[14]

A government witness in a rape prosecution had made statements to two different detectives before trial. The second statement tended to incriminate the defendant. In an interview with the prosecuting attorney, two days before trial, the witness denied ever having made the incriminating second statement. At trial, the witness denied having made both statements and the government was allowed to impeach his credibility by calling both detectives to testify to the two prior statements. The court reversed and remanded for a new trial. It noted that the government was surprised only by the witness's denial of his first [non-incriminating] statement and that any impeachment attempt would have to be directed to the damaging effect of the surprise. Although the witness surprisingly failed to give certain testimony, the surprise created no "affirmative damage" to the government's case.[15] Since it was pointless to impeach a witness who had not testified to anything, the only possible function the "impeachment" evidence could perform was impermissibly "to supply the anticipated testimony."[16] Because such testimony was highly prejudicial hearsay, the court found reversible error.

In *Williams v. United States*,[17] a case of first impression, the District of Columbia Court of Appeals limited the circumstances under which a showing of defendant's rehabilitation may bar the use of a prior conviction for impeachment purposes. On trial for a handgun violation, the defendant sought unsuccessfully to bar the introduction of evidence of his prior conviction for second degree murder by showing that he had been granted early parole. The defendant argued that early parole was equivalent to the "certificate of rehabilitation" required by section 14-305(b)(2)(A)(ii) of the District of Columbia Code[18] to render the evidence of his prior conviction

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12. 412 A.2d 364 (D.C. 1980).

13. *Id.* at 367. The court quoted D.C. CODE § 14-102 (1973) in pertinent part:

> When the court is satisfied that the party producing a witness has been taken by surprise by the testimony of the witness, it may allow the party to prove, for the purpose only of affecting the credibility of the witness, that the witness has made to the party or to his attorney statements substantially variant from his sworn testimony about material facts in the cause.

14. 412 A.2d at 367 (citing Byrd v. District of Columbia, 43 A.2d 46 (D.C. 1945)).

15. *Id.* at 367-68.

16. *Id.* at 368. *See* Young v. United States, 97 F.2d 200 (5th Cir. 1938).

17. 421 A.2d 19 (D.C. 1980).

18. D.C. CODE § 14-305(b)(2)(A)(ii) (1973) provides in pertinent part: "(2)(A) Evidence of a conviction of a witness is inadmissible under this section if— . . . (ii) the conviction has

inadmissible. The court ruled that the granting of early parole required only that the prisoner be "respond[ing] well to the rehabilitation"[19] and that actual accomplishment of rehabilitation would be manifested only by a discontinuance of parole supervision.[20] Thus, "a finding that the prisoner is sufficiently rehabilitated for parole is not equivalent to a finding that he has been so completely rehabilitated that the probative value of his conviction on the issue of his credibility has been diminished."[21] The court affirmed the defendant's conviction.

III. Presumptions

In *Cooper v. United States*,[22] the District of Columbia Court of Appeals outlined the narrow circumstances in which a "missing witness" instruction may be given. In an armed robbery prosecution, the defendant presented an alibi defense, claiming that he had been in Florida with several other people on the date of the crime. When defense counsel failed to produce the defendant's aunt, who allegedly had been with the defendant on his trip to Florida, the government requested and was given an instruction that the jury could presume that her testimony, if produced, would have been unfavorable to the defendant's alibi defense. The court found that the first of two prerequisites for giving the missing witness instruction was satisfied: the witness was "peculiarly available" to the defendant.[23] However, the court found the second condition unsatisfied: the defendant's aunt was not likely to "elucidate the transaction."[24] Her credibility was suspect because of her familial relationship with the defendant and her apparent drinking problem. Furthermore, her testimony—following previous testimony by other alibi witnesses—would have been merely cumulative. In light of judicial skepticism about "creat[ing] evidence from non-evidence,"[25] the jury should not have been permitted to draw negative inferences from the failure of the defendant's aunt to testify. The substantial discrediting of the defendant's alibi defense by other sources, however, precluded a finding that the missing witness instruction amounted to reversible error.[26] The court affirmed the conviction.

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been the subject of a *certificate of rehabilitation or its equivalent* and such witness has not been convicted of a subsequent criminal offense. (emphasis added)

19. 421 A.2d at 23. *See* D.C. Code § 24-201c (1973).
20. 421 A.2d at 24.
21. *Id.* at 23.
22. 415 A.2d 528 (D.C. 1980).
23. *Id.* at 533-34. *See* Hale v. United States, 361 A.2d 212 (D.C. 1976).
24. 415 A.2d at 534. *See* Brown v. United States, 414 F.2d 1165 (D.C. Cir. 1969).
25. 415 A.2d at 533. *See* Burgess v. United States, 440 F.2d 226 (D.C. Cir. 1970).
26. 415 A.2d at 535. *See* Kotteakos v. United States, 328 U.S. 750 (1946).

In *Kinard v. United States*,[27] the District of Columbia Court of Appeals joined the vast majority of jurisdictions[28] in abandoning the *falsus in uno, falsus in omnibus* (false in one thing, false in everything) instruction to the jury. When two government witnesses gave conflicting testimony as to whether they had spoken with each other about the case prior to trial, defense counsel requested the *falsus in uno* instruction. Such an instruction would have advised the jurors that they "may disregard all or part of the testimony of a witness whom they believe to have testified falsely as to a material matter."[29] The court affirmed the trial court's denial of the request and held that the instruction no longer would be appropriate in the District of Columbia. The court stated that the instruction was superfluous and confusing.[30] To the extent that the jury had been instructed already as to its general duty to determine the credibility of each witness and to weigh the testimony accordingly, the *falsus in uno* charge was mere repetition. It added only the confusing implication that some special exception was to be applied when a juror concluded that a witness had testified falsely. More importantly, the instruction was potentially prejudicial,[31] since it gave the jury the impression that the judge thought a witness had lied. This could both distract the jury from its consideration of the merits and ultimately color the jury's verdict.

IV. EXPERT TESTIMONY

In *Martin v. Washington Hospital Center*,[32] a wrongful death action, the District of Columbia Court of Appeals reversed a judgment *n.o.v.* in defendant hospital's favor on the ground that the trial court had improperly required the plaintiff to provide expert medical testimony as to proximate cause. Martin entered the hospital in a disoriented state. The hospital released him eight hours later without psychiatric evaluation. He exhibited bizarre patterns of behavior for twelve hours after his release and finally died when his automobile, traveling at high speed, went out of control and crashed into another car. The court held that the appellant, Martin's mother and the personal representative of his estate, need not supply expert testimony that such behavior manifested a mental disorder likely to

27. 416 A.2d 1232 (D.C. 1980).

28. *See, e.g.*, United States v. Taglianetti, 456 F.2d 1055 (1st Cir. 1972); United States v. Harris, 346 F.2d 182 (4th Cir. 1965); Knihal v. State, 150 Neb. 771, 36 N.W.2d 109 (1949); Rowland v. St. Mary's Bank, 93 N.H. 246, 40 A.2d 741 (1944); State v. Harris, 106 R.I. 643, 262 A.2d 374 (1970).

29. 416 A.2d at 1234.

30. *Id.* at 1234-35.

31. *Id.* at 1235 (quoting Knihal v. State, 150 Neb. 771, 36 N.W.2d 109 (1949)).

32. 423 A.2d 913 (D.C. 1980).

persist long enough to cause the plaintiff to injure himself. At trial, the appellant had established that the hospital was negligent in prematurely releasing the deceased. The court stated that the evidence, which supported the inference of causation, did not so "involve the merits and performance of scientific treatment, complex medical procedures, or the exercise of professional skill and judgment"[33] as to be beyond the ordinary knowledge and experience of the jury and require expert testimony.

V. PRIVILEGE

In *In re Estate of Wilson*,[34] the District of Columbia Court of Appeals overruled *Hutchins v. Hutchins*[35] and held that the "legal representative," for purposes of waiving the physician-patient privilege[36] in a will contest, included the decedent's heirs-at-law as well as the executor, either *eo nomine*[37] or *de jure*. At trial, the decedent's heirs-at-law sought to challenge the validity of the will by introducing medical records to show that the decedent lacked testamentary capacity at the time he made his will. The executor objected and the trial court refused to admit the records, ruling that, consistent with *Hutchins*, only a qualified executor could waive the privilege. The court of appeals reversed and remanded. First, the court recognized that, in contexts other than will contests, District of Columbia courts have held that the decedent's heirs-at-law are his legal representatives.[38] The court noted that the term "legal representative" has traditionally been given a broader construction[39] than the more restrictive

33. *Id.* at 915-16 (quoting Harris v. Cafritz Memorial Hosp., 364 A.2d 135, 137 (D.C. 1976), *cert. denied*, 430 U.S. 968 (1977)).

34. 416 A.2d 228 (D.C. 1980).

35. 48 App. D.C. 495 (D.C. Cir. 1919) (an heir is not a "legal representative" for the purpose of waiving the physician-patient privilege).

36. D.C. CODE § 14-307(a) (Supp. VII 1980) states:

> In the federal courts in the District of Columbia and District of Columbia courts a physician or surgeon or mental health professional . . . may not be permitted, without the consent of the person afflicted, or of his legal representative, to disclose any information, confidential in its nature, that he has acquired in attending a client in a professional capacity and that was necessary to enable him to act in that capacity, whether the information was obtained from the client or from his family or from the person or persons in charge of him.

37. *Contra*, McCartney v. Holmquist, 106 F.2d 855 (D.C. Cir. 1939).

38. *See, e.g.*, Thomas v. Doyle, 187 F.2d 207 (D.C. Cir. 1950) (adopted son of the decedent, who sued stepfather on the ground that stepfather, while still married to his first wife at the time he purported to marry the decedent, committed fraud on the decedent, thereby causing her to convey her property to him as joint tenant, may waive the privilege as the "legal representative"); Calhoun v. Jacobs, 141 F.2d 729 (D.C. Cir. 1944) (suit by grantor's heirs to set aside, on the ground of grantor's mental incapacity, a conveyance of real property to a stranger).

39. 416 A.2d at 231-32.

"personal representative." Furthermore, jurisdictions with even more restrictive statutes, with no provision for waiver of the privilege after the patient's death by anyone, have permitted heirs to waive the privilege.[40] Finally, the court found it illogical to restrict the waiver of the privilege in the manner of *Hutchins*. "[I]f there is to be a fair, well-informed adjudication as to decedent's testamentary capacity, the parties on *both* sides of a will contest must be allowed to waive the physician-patient privilege."[41]

VI. *Voir Dire*

In *Smith v. United States*,[42] the District of Columbia Court of Appeals held that, while the determination of a witness's competency to testify and the method of examination employed to test that competency are within the trial court's discretion, should the court choose to conduct such an examination in an adversarial context, the right to cross-examine the witness must be preserved. When the government in a murder prosecution sought to have a minor testify as an eyewitness, defense counsel requested a pretrial *voir dire* examination of the child for the purpose of testing her competency to testify. Both the court and the prosecution questioned the child, but the trial court denied defense counsel the opportunity to cross-examine her during *voir dire*. The District of Columbia Court of Appeals found this to be a deprivation of the defendant's due process right to confront the witnesses against him.[43] This constitutional infirmity could not be cured by permitting cross-examination at trial since counsel's attack on the credibility of a child would risk the hostility of the jury. The court found the constitutional error harmless, however, because the defendant would have been convicted even without the child's testimony.[44]

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40. *Id.* at 231 n.5, 235.
41. *Id.* at 235.
42. 414 A.2d 1189 (D.C. 1980).
43. *See* Springer v. United States, 388 A.2d 846 (D.C. 1978).
44. 414 A.2d at 1199.